

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001834-MR

MELISSA LEE

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 07-CI-02419

v.

SHANE LEE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, TAYLOR, AND L. THOMPSON, JUDGES.

TAYLOR, JUDGE: Melissa Lee, *pro se*, brings this appeal from a November 22, 2016, Order of the Hardin Circuit Court, Family Court Division, awarding Shane Lee sole custody of the parties' child and denying Melissa's request for an award of maintenance. We affirm.

Melissa and Shane were married on May 1, 1993. The parties had a son, N.L., born in 2002. The couple and their son moved to Kentucky in August

2005. Shane retired from military service and subsequently became employed as a defense contractor. Melissa had been previously employed as a teacher but upon the birth of the parties' son did not return to work.

In September of 2007, Melissa took N.L. to Louisiana purportedly to visit her mother. After the two arrived in Louisiana, Shane learned that Melissa had no intention of returning to Kentucky with N.L., and she refused to permit Shane to visit the child. As a result, Shane initiated legal proceedings on November 26, 2007, by filing a petition for legal separation in the Hardin Circuit Court, Family Division.

The focus of the legal proceedings quickly became Melissa's accusation that Shane had sexually abused N.L. and Shane's allegation that Melissa was mentally ill.¹ By Agreed Order entered March 28, 2008, both parties agreed to submit to a mental health assessment. Then, by order entered May 15, 2008, the petition for legal separation was converted to an action for dissolution of marriage.

On December 17, 2008, a temporary order was entered granting the parties "split custody" of N.L. with each parent "acting as sole custodian while the

¹ Spanning a period of several years, Melissa Lee reported incidents of sexual abuse by Shane Lee upon N.L. Several agencies investigated the allegations including the Criminal Investigations Division of the United States Army, the Vine Grove Police, and the Cabinet for Health and Family Services. All the claims were determined to be unfounded.

child is in their home.”² Pursuant to the temporary order, N.L. alternated between the parties’ respective homes on a weekly basis. The parties subsequently reconciled, and the dissolution action was dismissed without prejudice by order entered October 7, 2009.

Over the next several years, there was no activity of record in the dissolution action. Then, on June 24, 2015, Melissa told Shane that she and N.L. were going out to run an errand. Instead, Melissa took N.L. and drove for two days through seven different states. Shane had no idea where Melissa had taken N.L. and could not contact Melissa as she refused to have a cell phone. Shane contacted Melissa’s mother in Louisiana, but she denied any knowledge of Melissa’s location or of her plans. Shane contacted local police and reported that Melissa and N.L. were missing. A few days later, Melissa and N.L. surfaced at the home of Melissa’s mother in Louisiana.

On July 1, 2015, Shane filed a motion to be awarded emergency custody of N.L. and a motion to restore the dissolution action to the family court’s active docket. In the attached affidavit, Shane alleged that two different psychologists had previously diagnosed Melissa as suffering from a “Delusional Disorder” described as “a chronic personality disorder characterized by non-bizarre

² At some point, Melissa left Louisiana and returned to Kentucky with N.L. Melissa and Shane maintained separate residences in very close proximity to one another.

delusions, feelings of persecution, vague illness unconnected with any physical cause and severe lack of trust.” Shane further alleged that Melissa’s condition had deteriorated since her diagnosis in 2008 and was seriously affecting the well-being of their son. By order entered July 1, 2015, Shane was awarded temporary emergency custody of N.L. The family court subsequently appointed Cynthia Griffin as friend of the court for the minor child, N.L., to represent the child’s interest in the dissolution proceeding.

Per the family court’s request, Griffin filed a report as friend of the court for N.L. In the report, Griffin expressed concern that Melissa admitted to fleeing the state with N.L., believing that she and N.L. were being watched during the trip. During this trip, Melissa required N.L. to stay on the floor of the vehicle to avoid being detected, and communicated with N.L. using only silent hand gestures. Griffin also expressed concern that Melissa continued to insist that N.L. had severe food allergies despite medical evidence to the contrary. Griffin reported that Melissa unnecessarily placed severe restrictions on N.L.’s diet and insisted the child carry an EpiPen. Also of concern to Griffin was Melissa’s reoccurring belief that she and N.L. were being watched. Griffin noted that Melissa acknowledged she had covered the bathroom lights/showerhead with foil and required N.L. to bathe in the dark to avoid being seen. Griffin was also troubled by Melissa’s continued insistence that Shane had sexually abused N.L.

despite investigations by police, medical professionals, and other agencies to the contrary. Griffin likewise reported she was particularly concerned by N.L.'s statement that Melissa had coerced him to report false allegations of sexual abuse by his father. Griffin ultimately recommended that Shane be awarded sole custody of N.L. and that Melissa be awarded weekly telephonic visitation.

Following a two-day evidentiary hearing, by order entered November 22, 2016, the family court adopted Griffin's recommendations set out in her report. The family court awarded Shane sole custody of N.L. and granted Melissa weekly telephonic visitation. The family court also entered Findings of Fact, Conclusions of Law and Judgment/Decree on November 22, 2016, dissolving the parties' marriage and incorporating therein a previously executed settlement agreement. This appeal follows.

Melissa first contends the family court erred by awarding Shane sole custody of N.L.³ Melissa asserts that she was the primary caregiver for N.L. and had devoted her entire life to him.⁴ Melissa does not believe her mental health issues or her behavior is problematic.

³ It should initially be noted that Melissa is proceeding *pro se* on appeal, and her arguments were often difficult to discern. This Court has made every effort to fully address each of her arguments on appeal.

⁴ Melissa's specific contention is as follows:

[N.L.] is [Melissa's] only child who was delivered after approximately 9 ½ years of marriage when [Melissa] was of

It is well-established that an initial custody determination is governed by Kentucky Revised Statutes (KRS) 403.270(2),⁵ which provides that the “court shall determine custody in accordance with the best interests of the child.” In so doing, the court shall “consider all relevant factors” and shall specifically consider:

- (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;
- (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 defined in KRS 403.720[.]

KRS 403.270(2)(a)-(f).

advanced maternal age. Currently, it is improbable that she will ever be able to conceive any more children as she turned 50 in November, 2017. Since she has not seen her child, [N.L.], in more than two years, she would like to be able to see him and to be part of his life. It is unnatural for the safe parent to lose custody of the child.

Melissa’s Brief at 23.

⁵ We cite to Kentucky Revised Statutes 403.270 as it appeared in 2016.

KRS 403.270 mandates that custody be determined in accordance with the best interests of the child. The best interests determination is a conclusion of law reached by the court after fact finding under Kentucky Rules of Civil Procedure (CR) 52.01. *Anderson v. Johnson*, 350 S.W.3d 453, 458-59 (Ky. 2011). We review the family court's findings of fact under the clearly erroneous standard. CR 52.01; *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *See Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). Our review shall proceed accordingly.

In the November 22, 2016, order,⁶ the family court engaged in a best interests analysis of the relevant factors pursuant to KRS 403.270(2). In particular, the family court found the following regarding the best interest factors set forth in KRS 403.270(2)(a)-(f). Pursuant to subsection (2)(a), the family court considered the wishes of the child's parents. The family court found that each parent desired sole custody of N.L. with strictly limited contact by the other parent. Regarding subsection (2)(b), the family court considered the wishes of the child. The family court found that N.L. wished to remain with his father and have limited supervised contact with his mother. Relevant to the subsection (2)(c), the family court

⁶ In the November 22, 2016, order, the family court adopted the recommendations contained in the report prepared by Cynthia Griffin, friend of the court for the minor child, N.L.

considered the child's interaction and interrelationship with his parents and other persons that may significantly affect his interests. The family court found that N.L. had a close relationship with his father and reported having many friends in Kentucky. The family court also found that N.L. appears uncomfortable in his relationship with his mother and his maternal grandmother. Pursuant to subsection (2)(d), the family court considered the child's adjustment to home, school and community. The family court found that N.L. was well adjusted in Kentucky and was involved in various activities including basketball, football, golf, church, boy scouts and school. And, the family court found that N.L. preferred to live with Shane in Kentucky. Relevant to subsection (2)(e), the family court made findings regarding the physical and mental health of all the parties involved. The family court found that N.L. had been diagnosed as being on the autism spectrum but was otherwise healthy. As to Shane, the family court found that his psychological evaluation was normal. As for Melissa, the family court found that she had been diagnosed as having a delusional disorder and lived in a constant state of paranoia. Regarding subsection (2)(f), the family court considered information related to domestic violence. The family court found that Melissa had reported a potential assault by Shane but this report, as well as her numerous reports of sexual abuse against N.L., were baseless according to law enforcement and the Cabinet.

Ultimately, the family court determined that Melissa's ongoing mental health issues posed a "serious threat" to N.L.'s life. We believe the family court's findings of fact were supported by substantial evidence of a probative value. Considering the family court's findings of fact, we also conclude that the family court properly determined that it was in N.L.'s best interests to award sole custody to Shane.

Melissa also argues that the family court erred by denying her reasonable visitation with N.L. More specifically, Melissa asserts that allowing her weekly telephonic visitation with N.L. was not reasonable visitation.

It is well established that visitation/time-sharing is governed by KRS 403.320. Pursuant to KRS 403.320, a parent not granted custody "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." Thus, KRS 403.320 creates a presumption that visitation is in the best interests of the child. *Baldwin v. Mollette*, 527 S.W.3d 830, 834 (Ky. App. 2017) (citing *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994)). And, the burden of demonstrating that visitation with the child would endanger seriously the child's health is placed upon the parent attempting to deny visitation. *Id.* at 834 (citing *Smith*, 869 S.W.2d at 56).

In the case *sub judice*, there was a finding of serious endangerment by the family court as concerns Melissa in its order of November 22, 2016. The family court specifically stated that because of Melissa's unaddressed mental health issues, particularly her paranoia, that Melissa "would pose a serious threat to this child's life if she was able to take him again." Given Melissa's untreated mental health issues and her history of taking the child without Shane's knowledge, we believe weekly telephonic visitation is reasonable under the circumstances. Hence, we hold that Melissa's argument that the family court erred by denying her reasonable visitation with N.L. is without merit.

Finally, Melissa argues that the family court erred by denying her request for maintenance of \$2,500 per month. For the following reasons, we disagree.

Pursuant to KRS 403.200(1)(a)-(b), the family court may award maintenance where it finds that the spouse seeking maintenance "[l]acks sufficient property, including marital property, apportioned to him, to provide for his reasonable needs . . . and [i]s unable to support himself through appropriate employment"

In the case *sub judice*, the evidence established that Melissa had two bachelor's degrees in education and had previously taught middle school. Melissa was awarded her marital portion of Shane's military retirement pay (37.5%), her

marital share of the parties' retirement funds, and her marital share of Shane's retirement from his employment as a defense contractor. Melissa received substantial assets as well as future income from the family court. Melissa failed to present any evidence upon whether she lacked sufficient property to provide for her reasonable needs and also presented no evidence that she could not support herself through appropriate employment. As Melissa failed to present any evidence to support her argument, the family court did not err by denying Melissa's request for maintenance.

For the foregoing reasons, the Order of the Hardin Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa Lee, *Pro Se*
DeRidder, Louisiana

BRIEF FOR APPELLEE:

Douglas E. Miller
Radcliff, Kentucky