

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000532-MR

CATHY BARNES McANINCH

APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 02-CI-00005

THOMAS JUNIOR PITTMAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, MILLER¹, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This appeal involves a change in child custody from the mother to the father after the (thirty-four-month-old) child had been beaten by the stepfather. Although the mother may have been a good mother, she was unwilling or unable to protect the child from potential future abuse by the stepfather. The trial court's finding that the change in custody would best protect the child was not clearly erroneous and the change in custody with supervised visitation to the mother was not an abuse of discretion. Thus, we affirm.

¹Judge Miller concurred in this opinion prior to his retirement effective January 1, 2003.

By an agreed judgment entered June 22, 1999, Thomas J. Pittman was adjudged to be the father of a baby boy (T.J.) born January 18, 1999, to Cathy Lynn Barnes McAninch. The paternity judgment also ordered Thomas to pay child support, but there was no custody determination or visitation schedule included in the order until the one in question in this appeal. However, the mother had actual custody of T.J.

At the time of the paternity judgment, Thomas was single and living with his parents. He had dropped out of high school but was and is still employed as a tree trimmer. Cathy married Steven McAninch and resides with him in a mobile home within twenty-five to forty feet of Steven's parents' house. Also living in the mobile home is another minor child, a girl, born to Cathy from a previous relationship. Cathy is a stay-at-home mom. Steven collects a disability check for an eye injury and ~~A~~nerves.@

On November 28, 2001, when T.J. was less than three years of age, he needed to use the bathroom at about 6:30 a.m. After he was put back in bed, he started crying. Steven went into the child's bedroom and struck T.J. in the face. T.J. was bleeding in the nose and mouth, and his teeth were loose. Subsequently, his face bruised. Cathy sought and obtained an emergency protective order (EPO) and moved back in with her parents the same day. Steven was arrested and charged with assault in the second degree, a felony, but was indicted for assault in the fourth degree, a misdemeanor.

On December 13, 2001, the Cabinet for Families and Children (Cabinet) filed a complaint in juvenile court seeking protection for T.J. as an abused and neglected child. On January 10, 2002, Steven pled guilty to assault in the fourth degree and was given a six-month sentence, to serve fifteen days. As part of the sentence, Steven was ordered to stay away from T.J. until he completed an anger management-counseling program. On January 10, 2002, Thomas filed a petition for custody of T.J. and the Cabinet obtained temporary custody of T.J. The Cabinet temporarily placed T.J. with Thomas. On January 28, 2002, a final hearing was scheduled on the Cabinet's request for custody. At that time, the court continued all custody matters to February 5, 2002.

At the February 5, 2002, hearing, the court heard additional evidence that Cathy had moved back in the mobile home and that Steven was living next door, at his parent's house. Also, there was evidence introduced that Cathy intended to stay with Steven and was now pregnant with his child. Cathy testified that when she wanted to see Steven she would either meet him in an old house behind the trailer or take the children to Steven's parents while he came over to visit her in the trailer.

The court made findings that Thomas was a fit and proper person who could care for T.J. and that Cathy was either unable or unwilling to protect T.J. from Steven and should only have supervised visitation in order to protect T.J. from further harm. The court further found that any potential harm likely to be caused to T.J. by awarding custody to Thomas would be

outweighed by a healthier environment, and thus, Thomas was awarded custody with supervised visitation only to Cathy.

On appeal, Cathy argues that the trial court did not consider the best interest of the child in conformity with KRS 403.270, sections one and three, now sections two and five. Presently, KRS 403.270(2) sets forth the ~~A~~best interest of the child@standard with equal consideration given to each parent (section five authorizes joint custody), considering all relevant factors which are defined as:

- (a) The wishes of this 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;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

We agree with Thomas that the child's age nullifies consideration of KRS 403.270(2)(b) and (d); that subsections (h)

and (i) are not applicable; and that subsection (a) is a wash. That left subsections (c), (e), (f), and (g) for the court to weigh, and KRS 403.270(3), which directs that domestic violence by parents and nonparents and its effect on the child's relationship to both parents be considered in determining custody.

The trial court was not concerned with Cathy's treatment of T.J., and indeed this Court compliments Cathy's protection of her infant son by moving out, seeking treatment, and for seeking the EPO. Where the trial court had a problem with Cathy's conduct was in her dropping the EPO and moving back in Steven's mobile home with Steven next door. Cathy made it clear that she and Steven were back together and she intended on continuing this relationship despite the possible harm to T.J. The trial court concluded that Cathy was unable or unwilling to protect T.J. from Steven, that Thomas could provide sufficiently for T.J., and that the separation from Cathy was far outweighed by T.J.'s safety.

On appeal, this Court does not review the evidence and make its own conclusions but reviews the evidence, the conclusions, and then determines whether the trial court was clearly erroneous. CR 52.01; see Drury v. Drury, Ky. App., 32 S.W.3d 521 (2000); Dull v. George, Ky. App., 982 S.W.2d 227 (1998). We opine the trial court did not abuse its discretion. In reviewing the facts, it is clear that Cathy was a good mother for T.J.'s first three years and she took corrective action when the abuse occurred. However, a parent's duty to protect the

child does not end until the child reaches majority. After the abuse, Steven was ordered to stay away from T.J. until he attended and completed an anger management program. Cathy was unwilling or unable (as the court believed) to protect T.J. further. She moved back into Steven's trailer with Steven next door. She sees Steven on a regular basis and Steven even comes over to the trailer. Our role is not to question why Cathy puts up with this arrangement, but whether T.J. is sufficiently being protected. The trial court did not think the arrangement was workable to protect T.J. and found Cathy was picking Steven over T.J. We agree with the trial court and cannot say its findings and conclusions were clearly erroneous or that it abused its discretion in awarding the father custody with supervised visitation to the mother.

For the foregoing reasons, the judgment of the Casey Circuit Court is affirmed.

MILLER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

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