

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000571-MR

TROY LEE GIRDNER

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 77-CI-06070

LINDA FOLEY GIRDNER and
JOHN CHRISTOPHER GIRDNER

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

EMBERTON, CHIEF JUDGE. This is a dispute over the custody of the adult child of Linda and Troy Girdner who were divorced in 1977. Their son, Christopher Girdner, born on April 27, 1972, is mentally disabled.

In 1977, Linda was awarded custody of Christopher and Troy was given reasonable visitation. After Christopher's diagnosis of a mental disability, he was enrolled in a private school, St. Coletta's of Wisconsin. He remains a resident at

St. Coletta's and participates in programs for adults, but returns frequently to Knox County for holidays, birthdays, summer vacations and other occasions. Linda remains Chris's custodial parent and in 1994, after Chris was determined to be wholly disabled in managing his affairs and financial resources, she was appointed his guardian.

Troy's involvement with Chris has, by all accounts, been only recent. From 1978 until 1993, he exercised his visitation rights only about four or five times. From 1993 until 1998, he visited Chris when he was in Knox County but then had no interaction with Chris until Christmas 2000. Troy filed this motion for change of custody in October 2000.¹

A guardian ad litem was appointed to represent Chris at the hearing and although the guardian ad litem requested to visit St. Coletta's, the request was denied. At the custody hearing Dr. Cerreto, a psychologist, testified that Chris's relationship with Troy, his stepmother and stepsisters was positive for Chris. Although she had not visited St. Coletta's she was critical of the care Chris has received, and in her opinion, Chris would benefit from a move to Troy's home where he could live in a family and community environment. Troy also presented the testimony of Dr. Belew who also was in favor of a

¹ Subsequently, Linda filed a motion to enforce and increase child support. The support and custody issue were bifurcated and only the custody issue is involved in this appeal.

home setting for Chris, a place where he could learn social and living skills.

Richard Jackson, Director for the Community Mental Health Center for the Cumberland River Comprehensive Care Center, testified that the programs for mentally disabled individuals such as Chris are limited in Knox County and for those services that are available there is a waiting list of over 1,700 people. The private cost of the services that Chris presently receives would be \$40,000 to \$60,000 annually. He also testified that people with mental retardation such as Chris develop strong bonds with caregivers and a change after many years in an institutional setting can be traumatic.

Dr. Charles Huffman, Chairman of the Psychology Department at Cumberland College, testified that based on the failure of Troy to play a major part in Chris's life as a child, Linda should remain the primary custodian. Any change in Chris's life from the present setting would have to include a long-term plan to continue services, and that consideration must be given to the effect the transition from an institutional setting to a home environment would have on Chris.

Troy attempted to establish that Chris is endangered at St. Coletta's because of an alleged sexual attack that occurred in 1995. After St. Coletta's notified Linda of an inappropriate sexual incident involving Chris, Linda and Troy

visited the facility and were satisfied that Chris had not been the victim of sexual abuse. Until the present motion, Troy took no action to have Chris removed from what he now alleges is a harmful environment.

Chris has been declared to be wholly disabled. The circuit court retains jurisdiction over the parties' decree as it relates to a wholly dependent child.² KRS³ 405.020(2) states that the father and mother shall have joint custody of children who have reached eighteen and are wholly dependent because of a permanent physical, or mental, disability. In Abbott, supra, the court held that under the statute, the circuit court retains, and continues to retain, jurisdiction over the support provisions of its decree of dissolution as they affect a wholly dependent child who has reached the age of eighteen.⁴ Troy's contention that the reference to joint custody in KRS 405.020(2) automatically gives joint custody to the parents when a physically, or mentally, disabled child reaches eighteen is specious. In Abbott, supra, the court held that under the statute, the circuit court retains jurisdiction over the support provisions of its decree of dissolution as they affect wholly

² See KRS 405.020(2); Abbott v. Abbott, Ky. App., 673 S.W.2d 723, 725-26 (1983).

³ Kentucky Revised Statutes.

⁴ Id. at 726.

dependent children who have reached the age of eighteen.⁵

Although custody was not an issue in that case, certainly if the court retains jurisdiction over support issues it likewise retains jurisdiction over custody issues.

The trial court considered the statutory factors set forth in KRS 403.340 when considering Troy's motion for modification of custody and we cannot set aside the trial court's finding unless it is clearly erroneous.⁶ Chris has not been integrated into either Troy's or Linda's family. His residential home, for the great majority of his life, has been St. Coletta's. It has been in recent years that Troy has taken even a minimal interest in Chris's life. While this court certainly hopes Troy will continue his parental involvement, it is not willing to drastically change Chris's life based upon an awakening of Troy's parental urges. Moreover, there is no evidence that once uprooted from St. Coletta's Chris would be capable of living in a home environment and based on the testimony of Mr. Jackson, Knox County cannot provide him with proper services. Based upon the evidence, such a traumatic change in Chris's environment could have dire consequences for this young man.

⁵ Id. at 726.

⁶ Dull v. George, Ky. App., 982 S.W.2d 227 (1998).

Linda has attempted to cast some doubt on Troy's motives in his desire for Chris to live with him, specifically, to avoid payment for Chris's care at St. Coletta's. We need not speculate as to Troy's motivation and optimistically assume it is for the love of his child. While it may be that in an ideal world all mentally and physically disabled people live in a nurturing home environment, this is not such a world. There is no evidence that Chris's present environment presents a serious physical, mental, moral, or emotional threat to his health, or that it would serve his best interest to be removed from St. Coletta's at this time and placed with Troy.

The judgment of the circuit court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

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