

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001690-MR

PATRICIA TIBBS

APPELLANT

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 01-CI-00966

MIKE TIBBS

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Patricia Tibbs has appealed from the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Warren Circuit Court on May 23, 2002, which awarded joint custody to her and her former husband, Mike Tibbs, and designated Mike as the primary residential custodian of Austin and Haley Tibbs. Having concluded that the family court made appropriate findings of fact and that it did not

abuse its discretion by designating Mike as the primary residential custodian, we affirm.

Mike and Patricia were married in Warren County, Kentucky, on August 7, 1993. The marriage produced two children, Austin, who was born on August 6, 1995, and Haley, who was born on July 20, 1998. Mike and Patricia separated on May 15, 2001, however, they both continued to reside in the marital residence located in Oakland, Warren County, Kentucky, until August 2001.

On July 31, 2001, Mike filed a petition for dissolution of the marriage and a motion for temporary joint custody and exclusive possession of the marital residence. Mike also filed a petition for an emergency protective order against Patricia. On August 1, 2001, Patricia was forced to vacate the marital residence,¹ and she moved in with her mother. Austin and Haley continued to reside with their father at the marital residence. On August 13, 2001, the family court dismissed Mike's petition for an emergency protective order after holding a hearing on the issue pursuant to KRS 403.745.

On August 24, 2001, an agreed visitation order was entered into between the parties stipulating that Patricia was entitled to visitation with her children on Thursday evenings and alternating weekends during the pendency of the custody

¹ See Kentucky Revised Statutes (KRS) 403.740(1)(d).

proceedings. In September 2001 Patricia moved into a two-bedroom apartment in Bowling Green, Kentucky, where she currently resides. On September 24, 2001, Patricia filed a motion for temporary maintenance, but she never filed a motion for temporary custody of the children. During the pendency of this action, the children continued to reside with their father at the marital residence.

A trial was held on January 9, 2002, and March 27, 2002, for the purpose of addressing numerous issues pertaining to the divorce. Mike and Patricia both agreed that a joint custody arrangement was in the best interests of their children, however, they disagreed as to who should be designated as the primary residential custodian. Several witnesses testified on behalf of both parties concerning the custody issue. At the conclusion of the trial on March 27, 2002, the family court awarded Mike and Patricia joint custody of their two minor children and designated Mike as the primary residential custodian. In setting forth the parameters of the joint custody arrangement, the family court noted that Mike's status as the primary residential custodian did not constitute a controlling or superior right in relation to Patricia's parenting rights. In closing, the family court acknowledged Mike's concern that Patricia was engaged in a lesbian relationship, however, the family court concluded that Mike had failed to introduce any

"factual proof" suggesting that Patricia was involved in such a relationship. Consequently, the family court declined to make any findings in respect to this issue.

On May 23, 2002, the family court entered a decree of dissolution of marriage along with findings of fact and conclusions of law concerning, among other things, the joint custody award and the primary residential custodian determination. The decree of dissolution states, in relevant part, as follows:

The court has considered both parties' request for a joint custody relationship with their two children. Having considered all evidence and testimony presented the court concludes that there shall be a joint custody arrangement of the parties' two children with [Mike] being designated as their residential custodian.

. . .

[Patricia] shall receive her rights of joint custody in accordance with the schedule for non-residential custodians adopted by this court . . . with the exception that when [Mike] is scheduled to work a 24 hour shift on a Friday, Saturday, or Sunday, that otherwise falls on [Mike's] weekend of exercise of joint custody, then on such occasions, [Patricia] may make arrangements to pick up the children from the daycare provider of such children after the children have finished school, assuming this falls on a Friday, or after she gets off work, and keep the children with [her] until [Mike] gets off from work and makes

arrangements to pick the children up from [her].²

On June 3, 2002, Patricia filed a motion to alter, amend, or vacate the family court's determination that Mike was to be the primary residential custodian of the children.³ Patricia also filed an alternative motion pursuant to CR 52.02 requesting the family court to enter specific findings concerning its determination that Mike was to be the primary residential custodian of the children. On July 9, 2002, the family court entered an order amending the decree of dissolution entered on May 23, 2003, and denying Patricia's motion to alter, amend, or vacate. The family court's order states, in relevant part, as follows:

The Decree of Dissolution of Marriage which incorporated the Custody Decree was entered by this Court on May 23, 2002. The Decree designated the father, Mike Tibbs, to be the parent who would maintain the primary residence of the parties' two minor children. This designation was made after due consideration of all facts and evidence presented at the trial and in the best interest of the children. More specifically, the Court intends to allow the children to maintain their residence at the residence where they have grown accustomed avoiding the need for the children to have to move from place to place while the mother, Patricia Tibbs, stabilizes her living arrangements. Both parents are deemed to be fit and proper parents for the two children and should continue with the

² Mike is employed as a firefighter with the Bowling Green Fire Department.

³ See Kentucky Rules of Civil Procedure (CR) 59.05.

joint parenting plan as established by the Decree provided the restrictions set forth [therein] are maintained. Any reference to the word "visitation" [contained in] the Decree shall be **amended** and substituted with the phrase "joint custodian time," this revision should assist the parties in understanding that this is a co-parenting/joint custody arrangement [emphasis original].

This appeal followed.

Patricia raises two issues on appeal. First, Patricia contends the family court erred by failing to make specific findings concerning its designation of Mike as the primary residential custodian of the children. Second, Patricia claims the family court abused its discretion by "relying upon unproven allegations [of] lesbianism" in designating Mike as the primary residential custodian.

In McFarland v. McFarland,⁴ this Court held that pursuant to CR 52.01 a trial court is required to set forth specific findings in accordance with the factors enumerated in KRS 403.270(1) when making a custody determination.⁵ As previously discussed, the family court in the case sub judice approved of Mike and Patricia's suggestion that they be awarded joint custody of their two minor children. Thus, Patricia does not contend that the family court failed to make specific

⁴ Ky.App., 804 S.W.2d 17 (1991).

⁵ Id. at 18.

findings concerning its award of joint custody, but she does take issue with the family court's designation of Mike as the primary residential custodian.

In Fenwick v. Fenwick,⁶ the Supreme Court of Kentucky defined the term "primary residential custodian" as it applies to joint custody arrangements. The Court noted that the term "primary residential custodian" is generally used to "refer to the party with whom the child will primarily reside."⁷ The Court explained that unless the parties or the court elect otherwise, "designating a party as the primary residential custodian logically confers on that party: (1) the primary role in minor day-to-day decisions concerning the child; (2) the responsibility for providing a residence, i.e., a 'home base,' for the child, and (3) the normal routine care and control of the child."⁸ The Court further noted that a trial court "must again consider the child's best interests in connection with its decision to designate one of the parties as the primary residential custodian."⁹

The family court in the case sub judice clearly considered Austin and Haley's best interests in designating Mike

⁶ Ky., 114 S.W.3d 767 (2003).

⁷ Id. at 779.

⁸ Id.

⁹ Id.

as the primary residential custodian. As previously discussed, in its order dated July 9, 2002, the family court concluded that it was in "the best interests of the children . . . to maintain their residence at the residence where they have grown accustomed avoiding the need for the children to have to move from place to place while [Patricia] stabilizes her living arrangements." Patricia testified at trial that Stacy Lingar and her daughter, Jordan, spent the night at her two-bedroom apartment once or twice a week. Patricia further testified that on occasion she spent the night at Lingar's apartment, which is located in the same apartment complex. In addition, Patricia testified that if she were designated as the primary residential custodian she intended to transfer the children to a different school district, closer to her apartment. Certainly, a child's adjustment to his or her home, school, and community is a relevant factor which should be taken into consideration when determining which parent is to be designated as the primary residential custodian.¹⁰ Clearly, the evidence presented at trial supports the family court's determination that Mike was able to provide the children with a more stable home environment. Consequently, we conclude that the family court's factual findings on this issue were sufficient.

¹⁰ See, e.g., KRS 403.270(1)(d).

Patricia next argues that the family court abused its discretion by "relying upon unproven allegations [of] lesbianism" in designating Mike as the primary residential custodian. We find no merit to this contention. As previously discussed, the family court specifically declined to make any findings concerning this issue. In fact, the family court concluded that Mike had failed to introduce any "factual proof" suggesting that Patricia was involved in such a relationship. The record does not support Patricia's claim that the family court relied upon any allegations of lesbianism in designating Mike as the primary residential custodian.

Based upon the foregoing reasons, the findings of fact, conclusions of law, and decree of dissolution of marriage entered by the Warren Circuit Court on May 23, 2002, as amended on July 9, 2002, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

D. Bailey Walton
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Kenneth A. Meredith, II
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