

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001824-MR

JOHNNY WALTERS

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 01-CI-00403

LaDONNA WALTERS (now Bailey)

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from an order denying appellant's motion to alter or amend a dissolution decree which awarded the parties joint custody of the two minor children, with appellee being named residential custodian. Appellant argues that the trial court erred in awarding residential custody to appellee when there was evidence that appellee is living with a man out-of-wedlock, drinks alcohol in front of the children, and purchased a pair of thong underwear for their ten-

year-old daughter. Upon review of the record, we cannot say that the trial court abused its discretion in awarding residential custody to appellee. Hence, we affirm.

Appellant, Johnny Walters, and appellee, LaDonna Walters (now Bailey), were married in 1991. Two children were born of the marriage, Megan, born November 12, 1991, and Jonathan, born September 19, 1994. Johnny filed for divorce on November 15, 2001, and hearings on the matter followed on December 11, 2001, and April 18, 2002. On June 21, 2002, the court entered its decree of dissolution wherein it awarded the parties joint custody of the children with LaDonna being named residential custodian. The court found that, although both parties were fit and proper persons to have custody, LaDonna was "more able to meet the day to day needs of the children and can provide a more normal routine for the children because of the Petitioner's work schedule." The court acknowledged that LaDonna acted as primary caregiver until the temporary split custody order was entered. Johnny was given visitation according to the standard visitation schedule of the Eleventh Judicial Circuit. Johnny thereafter moved to alter or amend the custody and visitation portions of the decree. He cited the fact that LaDonna is living with a man out-of-wedlock with the children, drinks alcohol with this man in front of the children, and purchased a pair of thong underwear for Megan, as reasons

that he should have been awarded residential custody. Johnny also asked, in the alternative, that the court increase his overnight visitation with the children given the fact that the children spent more time in Johnny's custody during the parties' separation than the time allotted in the visitation schedule. In its order entered on August 2, 2002, the court recognized that LaDonna was now residing with her new boyfriend, that "inappropriate" clothing was purchased for the parties' daughter by LaDonna or one of her relatives, and that the children spent half of the time with Johnny during the parties' separation. In denying Johnny's motion to alter the residential custody order, the court found that "[a]lthough the Respondent's new living arrangement is not an ideal situation, there is no evidence to indicate that this arrangement will adversely affect the children." The court did, however, grant Johnny's motion for an increase in visitation, giving him one more night every other week and two more weeks of summer visitation. This appeal by Johnny followed.

Johnny characterizes LaDonna's conduct relative to the children as misconduct that endangers their moral well-being, which would necessitate awarding him residential custody. Broad discretion is vested in the trial court in decisions regarding custody, and those decisions will not be reversed absent an abuse of that discretion. Futrell v. Futrell, Ky., 346 S.W.2d

39 (1961). The test for determining custody of a minor child is the best interests of the child, not the most suitable person to have custody. Casale v. Casale, Ky., 549 S.W.2d 805 (1977); KRS 403.270(2). As to allegations of misconduct of a proposed custodian, the Court in Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983) stated:

[W]hen the misconduct of a proposed custodian is advanced as a factor in the determination of custody, evidence of such misconduct may be heard and received, but before giving any consideration to such misconduct, the court must conclude, in his reasonable discretion, that such misconduct has affected, or is likely to affect, the child adversely.

In his affidavit in support of his motion to alter or amend, Johnny alleges that LaDonna and her children are now living with her new boyfriend, that she and her boyfriend drink alcohol in front of the children, and that LaDonna purchased a pair of thong underwear for Megan. In its order denying the motion to alter the residential custody award to LaDonna, the trial court specifically acknowledged that the living situation was not ideal and that the thong underwear were inappropriate for the ten-year-old daughter. However, the court found that there was no evidence that this living situation would adversely affect the children. We cannot say that the court erred in so finding. Other than drinking alcohol in front of the children, there was no allegation that LaDonna and her new boyfriend's

relationship was harmful to the children. As to the alcohol drinking, drinking alcohol is legal for those over 21 years of age, and Johnny does not contend that LaDonna or her boyfriend are alcoholics, drink to excess, promote underage drinking, or engage in any inappropriate behavior as a result of the drinking. As for the purchase of one pair of thong underwear for the child, we cannot say that said conduct merits a finding that it is not in the best interest of the children to be in LaDonna's residential custody.

Johnny cites to Hays v. Hays, Ky., 465 S.W.2d 715 (1971), as being a case where a custody award to the father was affirmed under similar circumstances. In reading that case, we see that there are certain important factors that distinguish it from the instant case. In Hays, not only was the mother cohabitating with a man out-of-wedlock, but there was also evidence that the mother showed little interest in the child, considerably neglected the child, and often stayed out after work and did not return home until late at night or early morning. There are no such allegations in the present case.

In sum, we cannot say that the trial court abused its discretion in awarding LaDonna residential custody. Accordingly, the order of the Taylor Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. I am of the opinion that it was an abuse of discretion for the trial court not to award residential custody of the children to Johnny. I would reverse.

The post-decree motion filed by Johnny on June 26, 2002, did not make specific reference to CR¹ 59, but it was filed within ten days of the entry of the decree of dissolution of marriage and it used the language "[t]o alter or amend." I assume Johnny was relying on CR 59.01(g) which provides that a new trial may be granted based on "[n]ewly discovered evidence . . . which he could not, with reasonable diligence, have discovered and produced at the trial." Johnny filed an affidavit in support of his motion, as allowed by CR 59.03, which alleged "that since this Court's April 18, 2002, hearing in this action, the Respondent has not resided where she testified and rather has resided with her new boyfriend on Coakley Street and when the parties' children have been with her, said children have been kept there." Johnny also included in his affidavit the allegations concerning LaDonna and her new boyfriend drinking alcohol in front of the children and LaDonna buying thong underwear for the parties' ten-year-old daughter.

The trial court entered an order on August 2, 2002, which disposed of Johnny's motion, but failed to specifically

¹ Kentucky Rules of Civil Procedure.

set out the basis for the trial court's action. However, from the additional findings of fact and conclusions of law which were entered, I assume the trial court applied CR 59.07, which allows a trial court to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment."² The trial court accepted Johnny's allegations as true and entered the following conclusion of law concerning LaDonna's residence: "Although the Respondent's new living arrangement is not an ideal situation, there is no evidence to indicate that this arrangement will adversely affect the children."

In his appellate brief, Johnny addresses the issue of whether LaDonna's extramarital cohabitation is likely to adversely affect the children as follows:

Counsel for the Appellant respectfully submits that if by the Appellee living with her new boyfriend and taking the parties' children with her and not being married to her new boyfriend is not going to seriously adversely affect the parties' children's morals, then Counsel for Appellant respectfully submits he doesn't know what it will take to adversely affect said children. KRS 403.340(3)(d) provides that if the child's present environment endangers seriously his physical, mental, moral or emotional health, the trial court is to consider changing the residential custodian.

² See Carpenter v. Evans, Ky., 363 S.W.2d 108 (1962).

Counsel for Appellant respectfully asks has our society sunk to the level that it is not going to adversely affect children's moral health to see and live with a parent while that parent is not married to the person that she is living and sleeping with of the opposite sex? It doesn't take a rocket scientist to realize the adverse affect that this is going to have on the children's moral. If they see (which the parties' children are) that their mother is living and sleeping with a man, while not married to him, then it is going to be instilled in them that it is not necessary to be married to a person of the opposite sex while living with him or her.

The Majority Opinion provides very little discussion of Johnny's central issue. The Majority rejects Johnny's argument by mistakenly stating that "[o]ther than drinking alcohol in front of the children, there was no allegation that LaDonna and her new boyfriend's relationship was harmful to the children." This statement ignores the obvious moral question regarding LaDonna's conduct in raising the children in a home where she lives with her lover outside of marriage.

As our Supreme Court noted in Krug, supra, when a trial judge exercises his broad discretion in determining what is in the best interests of children in making a custody determination, "[i]n many instances he will be able to draw upon his own common sense, his experiences in life, and the common experiences of mankind and be able to reach a reasonable judgment concerning the likelihood that certain conduct or

environment will adversely affect children."³ I am of the opinion that in this case, where there has been no question raised concerning the fitness of Johnny, that it was an abuse of discretion for the trial court to award residential custody to LaDonna when common sense and common experiences of mankind require a finding that LaDonna's extramarital cohabitation in plain view of the children will seriously endanger the children's moral health.

In Whisman v. Whisman,⁴ the former Court of Appeals reversed the trial court's award of custody of a ten-year-old boy to the mother as an abuse of discretion and granted custody to the father. Among the factors considered by the Court was the mother's giving birth to two "illegitimate children and looking forward to maintaining her productivity with a new found prospective father."⁵

In Richie v. Richie,⁶ this Court affirmed the order of the trial court which restricted the father's visitation with the parties' five-year-old daughter to the mother's home on alternate weekends. This Court stated that such an order which was based on "the fact that the [father] was living with a woman

³ Id. at 793.

⁴ Ky., 401 S.W.2d 583 (1966).

⁵ Id. at 584.

⁶ Ky.App., 596 S.W.2d 32 (1980).

to whom he was not married . . . [was not] clearly erroneous or unreasonable.”⁷

In Powell v. Powell,⁸ the Court of Appeals had reversed the trial court’s modification of the custody of a boy from the mother to the father, but the Court of Appeals was then reversed by our Supreme Court which reinstated the trial court’s change of custody. The Supreme Court’s opinion quoted seven different factual findings by the trial court which it viewed as relevant; and it noted that the Court of Appeals had “state[d] that the findings numbered 10⁹ and 12¹⁰ were irrelevant because there was no evidence that the conduct was viewed by or did affect the child.” The Supreme Court then noted that in Krug, supra, it had stated that “the standard to be used in consideration of misconduct on the part of the custodian is not whether it has affected the child but whether it is likely to adversely affect the child.”¹¹ The Supreme Court then stated that “[t]he trial

⁷ Id. at 34.

⁸ Ky., 665 S.W.2d 312 (1984).

⁹ “10. That during the time that Jason was living with his mother a woman by the name of Jackie McKenzie came into the house of Mrs. Santana [the mother] at the request of said Eddie Rodriguez, to whom she was not married, and they lived together as husband and wife in that home with those children and with Mrs. Santana for a period of time.”

¹⁰ “12. Mrs. Santana [the mother] had sex relations in the house where the children were at least twice with people other than her husband.”

¹¹ Id.

court was correct to consider sexual misconduct of the mother and her friends in making a determination as to the custody of the child."¹²

While there are not many published cases in Kentucky addressing this issue, the issue has been widely litigated and many articles have addressed it.¹³ "[M]ost of the courts that have discussed a parent's constitutional right to privacy in the context of custody or visitation have rejected the parent's argument that the parent's extramarital sexual relationships were constitutionally protected from court regulation, when contact with such relationships was not seen as being in the best interests of the child."¹⁴ While recognizing the rights of divorced parents to the custody of and visitation with their children, many courts have also recognized that exposing children to extramarital sexual relationships is bad for their moral development. Accordingly, these courts have taken steps to structure custody or visitation "as to insulate the children from the parent's extramarital sexual relationships."¹⁵

¹² Id. at 313-14.

¹³ See Diane M. Allen, J.D., Annotation, Propriety of Provision of Custody or Visitation Order Designed to Insulate Child From Parent's Extramarital Sexual Relationships, 40 A.L.R. 4th 812 (1985); Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law, 60 U.Pitt.L.Rev. 1111 (1999); and Wadlington, Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Law, 63 Va.L.Rev. 249 (1977).

¹⁴ 40 A.L.R.4th at 815.

¹⁵ Id.

The Supreme Court of South Dakota in Spaulding v. Spaulding,¹⁶ recognized that “[i]f the [parent’s] misconduct is committed in the presence of a child old enough to see and recognize [the] improprieties as such, then the harmful effect of the bad conduct upon the child is self-evident.”¹⁷ The Supreme Court of Virginia in Brown v. Brown,¹⁸ affirmed the trial court’s change of custody from the mother to the father when the mother “openly cohabit[ed] in the presence of her two young children” with a man to whom she was not married.¹⁹ The Court noted that “[t]he moral climate in which children are to be raised is an important consideration for the court in determining custody, and . . . [a]n illicit relationship to which minor children are exposed cannot be condoned.”²⁰ The Court quoted Beck v. Beck,²¹ for the axiom that “[i]t is within

¹⁶ S.D., 278 N.W.2d 639, 641 (1979).

¹⁷ This standard has been applied numerous times, including: Wolff v. Wolff, S.D., 349 N.W.2d 656 (1984)(where the Supreme Court reversed the trial court’s award of custody to the father when the father’s misconduct included the father and son living in the same home with the father’s “live-in girlfriend”); Rivers v. Rivers, S.D., 322 N.W.2d 864 (1982)(where the Supreme Court affirmed the trial court’s restriction on visitation “so as to prevent overnight visitation of the children with the father any night he allows [the woman], to whom he is not married[,] to spend the night with him”); and Madson v. Madson, S.D., 313 N.W.2d 42 (1981)(where the Supreme Court reversed the trial court’s award of custody to the mother when the mother’s misconduct included the mother and child living in the same home with one of the mother’s “paramours”).

¹⁸ Va., 237 S.E.2d 89 (1977).

¹⁹ Id. at 92.

²⁰ Id. at 91.

²¹ La.App., 341 So.2d 580, 582 (1977).

common knowledge and experience that a child learns by example, especially from his parents. Such utter disregard for moral guidance and social standards can have ill effect on the young son."²² In Melancon v. Bergerson,²³ the Court of Appeals of Louisiana in changing the "domiciliary parent" in a joint custody award from the mother to the father noted that "[t]he jurisprudence in Louisiana has consistently viewed with great disdain a mother living in open concubinage with her paramour."

I agree with the statement by the Court of Appeals of Florida in Commander v. Commander,²⁴ that "the courts have not reached the level of impotency in protecting and preserving the institutions of marriage and family that they are powerless to prevent impressionable young children from being thrust into the middle of a cohabitation living arrangement, such as in the case at bar, which would tend to foster the development of a distorted view by such children of acceptable norms of family life in our society."²⁵ I would reverse the trial court's award of residential custody to LaDonna as an abuse of discretion.

²² Id.

²³ La.App., 598 So.2d 694, 697 (1992).

²⁴ Fla.App, 493 So.2d 530, 532 (1986).

²⁵ See also Bourlon v. Bourlon, Okla.Civ.App., 670 P.2d 1004 (1983); and L.H.Y. v. J.M.Y., Mo.App., 535 S.W.2d 304 (1976).

BRIEF FOR APPELLANT:

Phil Allan Bertram
Campbellsville, Kentucky

BRIEF FOR APPELLEE:

Shelly S. Miller
Campbellsville, Kentucky