

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002393-MR

GERALD L. HUMPHREYS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CI-01991

TARA S. HUMPHREYS

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: EMBERTON, CHIEF JUDGE, KNOPF AND JOHNSON, JUDGES.

KNOPF, JUDGE: Gerald L. Humphreys appeals from an order of the Fayette Circuit Court awarding his ex-wife, Tara S. Humphreys, sole custody of their minor children. We affirm.

Gerald and Tara were married on November 27, 1993. This marriage produced two children, Robert Gerald (R.G.) and Natalie. Tara filed for divorce on May 25, 2001. The day after filing for divorce, Tara left the marital residence, taking R.G. and Natalie. Tara never informed Gerald where she took the

children. Rather, Gerald located Tara, R.G., and Natalie approximately five days later after obtaining her forwarding address from the storage company.

On July 17, 2001, the trial court entered an order temporarily granting Tara sole custody of R.G. and Natalie. The court also awarded Tara temporary child support and exclusive possession and use of the automobile. Gerald was granted temporary timesharing with the children. The trial court also ordered a custodial evaluation be conducted by Dr. David Feinberg in an effort to help resolve the child custody issues. During the litigation of this matter, Tara and Gerald were able to reach an agreement concerning the division of marital assets and debt. Unfortunately, the parties could not agree on the issue of child custody.

The trial court held an evidentiary hearing in this matter on July 31, 2002, and August 1, 2002, concerning the issue of child custody. During this hearing, Tara testified that Gerald would demonstrate a pattern of obsession with various issues during the course of their marriage. Tara noted that Gerald would obsess over their arguments, a neighbor smoking, medical issues and his own medications. According to Tara, Gerald suffered from constant back problems that required pain medication. Tara testified that Gerald would consume approximately 75 to 100 pills a month, including percocet,

Ultram, Soma, allergy medication and medications for anxiety. Tara expressed concern over Gerald's percocet usage because he would often take ten pills daily, and then go through a monthly withdrawal from the drug that caused him to stay in bed for two to three days at a time. Tara also stated that Gerald would regularly mix his medications with the children's medicine, or even leave his pills within R.G.'s reach.

Tara also testified concerning Gerald's behavior after their separation. Tara stated that Gerald once withheld information from her concerning R.G.'s illnesses. Gerald also changed the children's medication schedules without consulting her. Also, Tara and her brother-in-law, Forest Godby, both noted that Gerald would become verbally abusive, hostile, and belligerent towards them during timesharing exchanges.

Tara's mother, Joyce Simpson, also testified concerning Gerald's behavior relating to his prescription medication usage. According to Simpson, after her husband died, Gerald visited her and requested that she give him any percocet pills her husband did not consume prior to his death. Simpson stated that she refused to provide Gerald with any percocet.

During his testimony, Gerald stated that he shared numerous parenting responsibilities with Tara during the marriage. Gerald testified that he prepared the family's meals, did activities with both children, fed, clothed and put both

children to bed and took R.G. to the pediatrician 70% of the time. Gerald denied Tara's allegation that he was unable to control his pain medication usage and asserted that he used his medication as prescribed. Gerald further asserted that he is in complete control of his percocet usage. Gerald also denied being violent, hostile, or belligerent towards Tara or any members of her family during visitation exchanges. Even though Gerald acknowledged that Tara was "a good mother," Gerald expressed concern that Tara was not as responsive to the children's medical needs as he. Gerald believed that Tara should timely keep him informed when she takes the children to a doctor and when the children are sick.

The trial court also heard testimony from two psychologists who evaluated and consulted the parties during the course of these proceedings. First, Kelly Hagen testified that she diagnosed Gerald with depression and anxiety. Hagen noted that Gerald's symptoms began soon after Tara left with the children. Hagen further testified that Gerald is concerned for the children's well-being and is worried about not being able to interact with the children if they are placed in Tara's care. As for her treatment of Gerald, Hagen noted that Gerald dismissed her suggestion that he work on his anxiety. Hagen also testified that Gerald takes no responsibility for the demise of the marriage. Rather, Gerald believes that he is the

victim in Tara's decision to leave. Finally, Hagen remarked that she is unsure about the direction Gerald wants to take concerning his therapy.

Psychologist Dr. David Feinberg testified concerning the results of the custodial evaluation he conducted in 2001. Dr. Feinberg noted that Tara and Gerald were both actively involved in the lives of their children and both parents had strong, positive bonds with them. During the evaluation, Dr. Feinberg found Tara to be the primary caregiver for the children because she was more logical and structured. Tara also appeared to be more relaxed in her interactions with the children and was knowledgeable about the children's developmental stages and needs. Dr. Feinberg also found that Gerald's relationship with R.G. and Natalie was very strong. However, Dr. Feinberg noted that Gerald carries his negative feelings into his relationship with the children. In his report, Dr. Feinberg cited Gerald's prolonged and tearful goodbyes with the children upon their return to Tara, his verbal exchanges with Tara in front of the children and his repeated expression of his "need" for the children all represent examples of negative behavior that could affect R.G. and Natalie. Dr. Feinberg recommended that the trial court award Tara and Gerald joint custody of the children with Tara's home as the primary residence. Dr. Feinberg's report conditioned joint custody on Gerald entering counseling

to help him address his overwhelming anxiety, his obsessive thoughts, and his unhealthy dependence on the children. Further, Dr. Feinberg noted that Gerald needed considerable divorce recovery because of his extensive anger with Tara and his expression of anger in front of R.G. and Natalie. Yet, Dr. Feinberg testified that, even if Gerald did not receive counseling, he would still recommend joint custody.

Finally, several witnesses testified at the hearing on Gerald's behalf concerning his abilities as a parent. Robert Hinkle, Richard Wilkins, Chard Gavitt, and Cheryl Ball all testified that Gerald's parenting skills and interactions with the children were excellent and that Gerald was actively involved in the lives of his children. Each witness testified that Gerald acted appropriately around the children.

After hearing all of the evidence, the trial court entered its findings of fact, conclusions of law and decree of dissolution of marriage on August 23, 2002. In this judgment, the trial court awarded sole custody of R.G. and Natalie to Tara. Gerald received extensive timesharing rights and was given the opportunity to take the children to school. The parties were also ordered to complete a parenting workshop. Further, Gerald was ordered to continue his individual counseling until both the counselor and his actions show that counseling was no longer necessary. After the trial court

rendered this decision, Gerald filed a motion to amend for specific findings.

On October 21, 2002, the trial court entered a new judgment. In this new judgment, the trial court reaffirmed its award of sole custody to Tara. The trial court stated that it arrived at this decision largely upon concerns about Gerald's dependence on prescription painkillers, Gerald's inability to rationally or calmly discuss issues concerning the children and his lack of progress in counseling. This appeal followed.

On appeal, Gerald brings forward only one assertion of error for our review. Gerald argues that the trial court erred in awarding Tara sole custody of R.G. and Natalie because it failed to properly apply the statutory standards governing custodial determinations as contained in KRS 403.270.

Initially, it is important to note that in reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that she abused her discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). "[I]n custody cases, great weight must be given to the finding of the [trial judge] concerning custody and . . . his conclusions will not be disturbed except where he has abused his discretion . . ." Borjesson v. Borjesson, Ky., 437 S.W.2d 191, 193 (1969). Thus, it is clear that the trial court has broad

discretion in determining what is in the best interests of a child in making a custody decision. Krug v. Krug, Ky., 647 S.W.2d 790 (1983).

KRS 403.270(5) provides that the trial court "may grant joint custody to the child's parents . . . if it is in the best interest of the child." In determining whether joint custody should be granted, the court must consider the best interest of the child doctrine, as set forth in KRS 403.270(2). Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993). KRS 403.270(2) provides in pertinent part as follows:

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(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;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

Contrary to Gerald's assertions, there is no evidence in the record before us that the trial court failed to apply the relevant factors listed in KRS 403.270(2). In its October 21, 2002, written findings of fact, the trial court clearly considered the best interests of R.G. and Natalie, as Kentucky law requires. While the trial court did not provide specific findings as to every factor enumerated in KRS 403.270(2), it did provide specific findings concerning several significant factors. The trial court extensively considered evidence of Tara and Gerald's frequent and positive interactions with the children and determined that sole custody would not jeopardize these relationships. The trial court also found that the children would be better acclimated and better able to adjust to their environment in Tara's care because she has been the primary care-giver of the children since infancy. Moreover, the court found Tara to be more stable, to be more willing to place the needs of the children first, and to have been consistently responsible for making decisions that are in the childrens' best interest. Finally, the court gave considerable attention to KRS 403.270(2)(e). In examining the mental and physical health of all individuals involved in this custody proceeding, the trial court considered extensive evidence of Gerald's dependence on

painkillers and his pattern of withdrawal symptoms from his pain medication. The evidence clearly demonstrated that, due to his medication consumption and resulting withdrawal symptoms, Gerald has been unable to recognize, address and control his anxiety, obsessive thoughts, and his hostility and anger towards Tara. The trial court also acknowledged that Gerald has made little progress in attaining the goals of his individual therapy.

In view of the entire record before us, it is clear to us that the court considered the best interests of the children herein by analyzing and applying the relevant factors listed in KRS 403.270(2). The record clearly demonstrates that there was sufficient evidence for the court to conclude that, at the time of the hearing, the best interests of the children would not be served by awarding joint custody to both parents. Accordingly, we cannot conclude that the trial court abused its discretion by awarding Tara sole custody of R.G. and Natalie. CR 52.01.

For the aforementioned reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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