

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001364-MR

ROBERT FRALEY

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 01-CI-00027

REBECCA MARIEA FRALEY

APPELLEE

OPINION
AFFIRMING IN PART
AND REVERSING AND REMANDING IN PART

** ** * * * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Robert Fraley (Robert), appeals a Carter Circuit Court judgment which reduced the visitation recommended by the Domestic Relations Commissioner to the limited visitation schedule usually recommended by the Carter Circuit Court. We find the reduction in visitation to be unsupported by the record, and remand for a more appropriate visitation schedule. Appellant also asserts error in the court's denial of joint custody. The record shows persistent and severe conflict between the parents such that denial of

joint custody is not clear error. The court's determination as to custodial parent is affirmed.

The parties were married in 1998. A week after their daughter was born in 2001, Appellee, Rebecca Mariea Fraley (Rebecca), moved out of the marital residence. A decree of dissolution of marriage was entered on November 13, 2001. Both parties behaved abysmally toward one another with regard to attempts to share visitation and care of the child. There were angry exchanges, minor physical contact, and false and ridiculous assertions of improper conduct by the other parent. Despite the ongoing inability of the parties to communicate calmly with each other, every attempt was made to have a joint custody arrangement work.

The Domestic Relations Commissioner initially granted the parties joint custody of the infant, with residential custody being with the mother, and supervised visitation for the father. Visitation was supervised by Rebecca, or by Robert's sister or mother. This determination was based in part on the fact that Rebecca was breastfeeding the child, and therefore had to be present to feed it, as well as complaints by Rebecca that Robert did not know how to care for the child. Conflict between the parents escalated, and it became necessary for the visitation to be supervised by the Cabinet for Families and Children. Visitation was increased periodically as the infant

grew older, and as Robert showed his experience and ability to care for her. Rebecca insisted on nursing the child exclusively, which cut down on the time Robert could spend with the child. The parents had conflict over whether the child's nutritional needs were being met. Robert claims that Rebecca should have provided milk in a bottle for him to feed the child, so that his visitation could be lengthier, and so that Rebecca did not have to be present when he spent time with the child.

At one year of age the infant was weaned. Robert requested additional visitation. The parties agreed to be evaluated by Dr. Lane Veltkamp. Dr. Veltkamp concluded that the child had a strong attachment to both parents, and recommended that joint custody be continued. Dr. Veltkamp suggested that the child spend 12 nights per month with Robert. Dr. Veltkamp stressed the importance of frequent contact to bonding for a child under the age of 3. Dr. John Guidubaldi also observed Robert with the child for 7½ hours, and determined that there was a strong positive parent/child bond between Robert and his daughter. Dr. Guidubaldi stressed the importance of frequent ongoing contact between the child and Robert. Dr. Guidubaldi reviewed the visitation guidelines of the Carter Circuit Court (37th Judicial District), and found them to be unduly restrictive. Dr. Guidubaldi expressed concern over the infrequency of visitation, and gave his opinion that the

visitation provided therein was "woefully inadequate," particularly in consideration of the child's young age. Both expert witnesses provided opinions supporting and highly recommending that Robert have visitation greatly in excess of that provided by the Carter circuit court's usual visitation schedule. Both witnesses noted that the court's usual guidelines did not take into account modern knowledge about the needs of a minor child for contact with the non-custodial parent, or the particular circumstances of this case.

The DRC issued his report and recommendations. The DRC recommended that Rebecca have sole custody of the child, but granted Robert visitation each Wednesday for 5 hours, and an overnight visit each weekend, in accordance with the evidence before him, and the recommendations of the expert witnesses. The DRC recommended that when the child reached 2 years of age, the visitation be increased so that the Wednesday night visitation extended overnight. Increased visitation was recommended as the child grew older, with a re-evaluation once the child reached school age. The family court reviewed the DRC's recommendations, but reduced the visitation to the usual Carter County guidelines. Robert appeals this drastic curtailment in visitation with his daughter, and argues that the record clearly established the propriety of additional

visitation for his child in particular, and all children of a young age in general.

What constitutes reasonable visitation is a matter that must be based on the particular circumstances of each case, rather than by any set formula. Drury v. Drury, Ky. App., 32 S.W.3d 521, 524 (2000). Visitation schedules must be crafted to allow both parents as much involvement in their children's lives as possible. Id. While reliance on the general visitation schedule used by a court is not grounds for reversal in and of itself, where such reliance is imposed without regard for the record or the best interests of the child, such reliance is improper. Drury v. Drury, supra., 32 S.W.3d 521 at 523, 524 (2000).

In the present case, Robert had extensive visitation with his daughter, desired additional visitation, and provided expert testimony regarding the importance of extensive visitation. Robert scheduled his employment and lifestyle so as to be available to care for the child during visitation periods and to provide maximum bonding with the child. Additionally, Robert took steps including a request for joint custody of the child in order to be an even closer and more involved parent. The record shows that the child thrived on the love and attention received from the parents under the schedule recommended by the DRC. No evidence supported the desirability

or appropriateness of a drastic reduction in his visitation rights. The law requires that the best interests of the child must prevail. KRS 403.270(2).

The uncontroverted expert testimony in the record supports what makes intuitive sense, children, particularly very young children, need prolonged and regular contact with a non-custodial parent in order to develop and maintain a close relationship with that parent. Reduction in visitation time is appropriate only where the best interests of the child clearly dictate such a reduction. Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995). This court has noted that it is sad and inappropriate when a non-custodial parent who wants to maintain a close and involved relationship with his child is denied that by application of the standard limited visitation agreement. Smith v. Smith, Ky. App., 869 S.W.2d 55 (1994).

Reducing visitation time from that already in place is inappropriate and detrimental to the parent and child unless it is supported by evidence clearly requiring such a reduction. Stewart v. Burton, Ky. App., 108 S.W.3d 647, 650 (2003). No such evidence was provided in the present case, and none is provided on appeal. In fact, the record clearly shows that Robert is increasing his parenting abilities; has a close relationship with the child, and makes every effort to be an informed and involved parent. For this reason, we reverse the

curtailment in visitation, and remand the action for a visitation schedule more in line with the ability and desire of the non-custodial parent, and the recommendation of the expert witnesses.

Robert objects to the grant of sole custody to Rebecca, rather than joint custody to both parties. The record is clear in providing extensive evidence of ongoing strife between the parties. There is no evidence supporting a belief that the parties can act in a cooperative manner with regard to the raising of the minor child now or in the future. Where there is a clear inability to cooperate, a court is within its rights to deny joint custody, or modify a prior joint custody award. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994), *overruled in part*, Scheer v. Zeigler, Ky. App., 21 S.W.3d 807, 814 (2003), holding that a court must apply all the statutory factors in determining the propriety of joint custody. Even where a court permits joint custody as serving the child's best interest, the court must designate with which parent the child shall primarily reside. Drury v. Drury, Ky. App., 32 S.W.3d 521, 524 (2000). While cooperation between the parties is not the only factor to be used to determine whether joint custody is appropriate, when there is an ongoing history of lack of cooperation and suspicion which shows no sign of improving in the future, denial of joint custody may be appropriate. Squires

v. Squires, Ky., 854 S.W.2d 765, 768 (1993). For this reason, we find no reversible error in the court's determination that sole custody should be awarded to Rebecca.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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