

RENDERED: FEBRUARY 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000136-ME

RHONDA KAY CALVERT

APPELLANT

v. APPEAL FROM BUTLER CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 03-CI-00078

ROGER DALE CALVERT, SR.

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

BARBER, JUDGE: Appellant, Rhonda Kay Calvert(Rhonda), appeals the custody award made by the Butler Circuit Court. The ruling of the Butler Circuit Court is affirmed.

Rhonda Kay Calvert filed for dissolution of her marriage to Appellee, Roger Dale Calvert (Roger). Rhonda and

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Roger are the parents of a minor son, born March 31, 1998. Both Roger and his son have the condition of dwarfism. Other than the usual childhood ailments, the minor child has no other medical condition or special needs.

At the time of the dissolution, Rhonda and Roger and their son lived next door to Rhonda's parents and her older brothers. Rhonda's parents and brothers provided care giving to the child when Rhonda was unavailable. The child spent a substantial portion of his life with his uncles and grandparents. When Rhonda left the marital home, she did not take the minor child with her. During a 14 month period after Rhonda left the marital residence, her parents were the primary caretakers of the child. Roger testified that he would continue to live next to Rhonda's parents, and that while he worked third shift, the child would be cared for by Rhonda's parents. Such a care giving arrangement is not grounds for reversal of a custody award. Aton v. Aton, 911 S.W.2d 612, 614 (Ky.App. 1995).

Rhonda claims that while with her parents and brothers the child was exposed to marijuana use on a regular basis. The witnesses admitted to past marijuana use by Rhonda's father and brothers, but asserted that such use no longer took place, and that such use had never been around the child. Both Rhonda and Roger testified that they had used marijuana in the past, but were not current users. No evidence of ongoing drug abuse was

shown in the record. The child has shown no evidence of having been in the presence of drug use at any time. All parties agree that the child is happy, doing well in school, and well integrated into the community.

Rhonda lives with her boyfriend, who is a convicted sex offender. In 1993, the boyfriend pled guilty to sodomy in the second degree, and sex abuse in the first degree. Those charges stemmed from abuse of a minor child, similar in age to Rhonda's child. The boyfriend served a period of incarceration and is presently on probation for those offenses. The record does not show any other incidents of criminal behavior on the part of the boyfriend. The court ruled that Rhonda could have visitation with the child in the presence of her boyfriend, and that no special protections were required during such visitations.

Rhonda's parents and brothers opposed her request for custody, and testified before the court that they were concerned about the presence of her boyfriend in the home with the child. Her mother and brother admitted refusing Rhonda permission to leave with the child. They testified that they had provided a substantial amount of care for the child during his life, and that he was well integrated into his school and community. Roger opposed Rhonda's request for custody, and provided evidence and testimony supporting his ability and willingness to

care for the child. Roger supports the care provided for the child by Rhonda's parents while he is at work.

The court noted that it was forced to weigh the risk of marijuana use around the child with the risk that the child might incur living with a sex offender. The court balanced the needs of the child, and reviewed the child's integration into his school and community, and his strong relationship with his maternal grandparents. The court granted the parents joint custody, with Roger designated primary custodian. Rhonda claims this determination was an abuse of discretion because of the past marijuana use by her father, and because Roger is presently unwilling to seek treatment for his son's dwarfism.

Rhonda asserts that she is "open to" medical treatment for her son in an attempt to increase his height. Roger testified that he is opposed to such medical procedures because they are unproven, risky, and painful, requiring the breaking and resetting of the child's bones. Roger has reached a full height of 4'5". Roger is gainfully employed and does not suffer limitations in his enjoyment of daily life. The court did not make a ruling on medical treatment of the child, as the parties agreed there was no pressing medical determination necessary at this point.

The court directed the parties to remain in communication with regard to the medical care of the child, and

to file additional motions should issues arise that they could not resolve. Although Rhonda claims that a dispute with regard to treatment of the child's dwarfism may arise in the future, a custody award cannot be disturbed on that ground. Custody is not to be changed unless it is proven that a parent is unwilling or unable to cooperate with the court's ruling. Mennemeyer v. Mennemeyer, 887 S.W.2d 555, 557 (Ky.App. 1994). No such showing can be made at the present time.

A child custody award should not be disturbed on appeal absent an abuse of discretion. Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). To be entitled to a grant of reversal, the complaining party must show that the decision at trial was clearly erroneous. Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000). Rhonda has made no such showing. For this reason, the trial court's determination is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela C. Bratcher
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Randall L. Short
Morgantown, Kentucky