

RENDERED: OCTOBER 21, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002478-ME

CANDI CLEM CHILDERS

APPELLANT

APPEAL FROM WHITLEY CIRCUIT COURT
v. HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 03-CI-00714

KENNETH WAYNE CLEM

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.¹

VANMETER, JUDGE: This is an appeal from an order entered by the Whitley Circuit Court in a child custody modification proceeding. For the reasons stated hereafter, we affirm.

The Bell Circuit Court entered an order in 1999 dissolving the marriage of appellant Candi Clem Childers and appellee Kenneth Wayne Clem, and awarding Candi sole custody of the parties' three sons who were born in 1993, 1994 and 1997. On November 13, 2003 Kenneth filed both a petition to transfer venue to the Whitley Circuit Court and an ex parte emergency

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

motion seeking immediate custody of the children. The Whitley Circuit Court entered an emergency custody order (ECO) in Kenneth's favor, and on December 1 Candi filed a verified response to Kenneth's petition and emergency motion. On March 26, 2004 she filed a motion seeking immediate custody of the children.

Hearings were conducted before a domestic relations commissioner (DRC). Based on the DRC's recommendations, the court awarded sole custody of the children to Kenneth after finding:

6. The parties each presented evidence in an attempt to malign the other; however, this court must closely examine the present circumstances under which the children are found to determine which parent is the fit and proper person to have custody of the children and ultimately what is in the best interest of these children. Kenneth presented evidence that the children are presently living in his home in Corbin, Kentucky where they are enrolled in school and appear to be doing well. The children are also receiving counseling with Cumberland River Comprehensive Care Center. Kenneth has relatives in the area with whom the children have strong bonds, and the children appear to have adjusted well to their present home, school and community.

7. Candi presented evidence that she has two (2) younger children by a subsequent relationship as well as three older children with whom these children were close. She testified that she has a suitable home and presented evidence that the children performed well in school when they were residing with her.

8. The fact that concerns this court most, however, is that for the past several years it appears that the children had little stability in their lives while in the custody of Candi. While Candi denies this fact, it is evident from the records introduced herein that the children were frequently left with Kenneth in Kentucky for various periods of time, and often abruptly uprooted by Candi and removed to North Carolina.

9. Based upon the foregoing, the court has given equal consideration to each parent, and has considered all relevant factors set forth in KRS 403.270(2), and finds that it is in the best interest of the children that Kenneth continue to have the care, custody and control of the children, subject to visitation by Candi. The court has given due consideration to facts indicating that the parties have been unable to cooperate with one another considering decisions regarding schooling and health care concerns. This coupled with the fact that there is a great distance between the residences of the parties makes a joint custody arrangement impractical.

This appeal followed. Kenneth, who no longer is represented by counsel, did not file a brief on appeal.

First, Candi contends that the trial court erred by exercising jurisdiction in this matter. She asserts that she and the children lived in North Carolina for several years immediately prior to this action, and that because "[t]he substantial evidence concerning the children's care, protection, training, and personal relationships was overwhelmingly in North Carolina," that state has jurisdiction over this custody matter

pursuant to KRS 403.420(1)² and KRS 403.824(1)(a).³ However, it is undisputed that no custody action was filed or pending in North Carolina during the pendency of this proceeding, and the trial court noted that there was evidence "that at various times the children resided in Kentucky and attended schools in the Whitley and Laurel County areas, while residing with Kenneth." Given the conflicting evidence, including that regarding the children's contacts with both states, we cannot say that the trial court erred by finding, "pursuant to KRS 403.420(1)(b),(c) and (d)," that it was in the children's best interests for the court to assume jurisdiction herein.

Next, Candi contends that the trial court erred by failing to find that the November 13, 2003 ECO expired, and that custody was reinstated in her, once seventy-two hours passed from the ECO's issuance without a temporary removal hearing pursuant to KRS 620.060(3). However, KRS 620.060(3) specifically provides that the seventy-two hour period "may be extended or delayed upon the waiver or request of the child's parent or other person exercising custodial control or supervision." As the record indicates that this issue was not raised until Candi filed her exceptions to the DRC's report some

² Part of the Uniform Child Custody Jurisdiction Act, the repeal of which was effective July 13, 2004.

³ Part of the Uniform Child Custody Jurisdiction and Enforcement Act, effective July 13, 2004.

eleven months after the ECO was issued, it is clear that any objection to the court's failure to conduct a seventy-two hour hearing was waived. Hence, Candi is not entitled to relief on this ground.

Next, Candi contends that substantial evidence does not support the trial court's findings of fact. We disagree.

As stated below, both parties "presented evidence in an attempt to malign the other," as well as evidence of his or her own competency and the other's alleged lack thereof. Further, the parties presented evidence regarding the children's school enrollment, which Candi summarized in her exceptions to the DRC's report as follows:

a. During the 1998-1999 school year,

- (1) 89 days in Stanly County Schools, Albemarle, North Carolina;
- (2) 101 days in Mount Gilead Elementary, Mount Gilead, North Carolina;

b. During the 1999-2000 school year,

- (1) 172 days in Mount Gilead Elementary, Mount Gilead, North Carolina;

c. During the 2001-2002 school year,

- (1) 93 days in Hunter Hills Elementary, Corbin, Kentucky;
- (2) According to Candi's testimony, the children attended school in North Carolina the remainder of the year.

d. During the 2002-2003 school year,

(1) 151 days in North Albemarle
Elementary, Albemarle, North Carolina;

e. During the 2003-2004 school year,

(1) 51 days in North Albemarle
Elementary, Albemarle, North Carolina;
(2) the first time entry September 9,
2003 in Oak Grove Elementary, Corbin,
Kentucky.

Although it seems reasonable to assume that each school term was approximately as long as the 1998-1999 term during which the oldest child attended school in North Carolina for 190 days, Candi failed to explain why the children attended school in North Carolina for only 172 days during the 1999-2000 term, for only nine weeks (August 8 to October 4) during the 2000-2001 term,⁴ and for only 151 days during the 2002-2003 term. However, it is undisputed that the children attended school in Kentucky for 93 days during the 2001-2002 term, and Kenneth asserted that they attended school in Kentucky during the remainder of the 2002-2003 school term. Thus, there was substantial evidence to show that the children lived and attended school in Kentucky for significant periods of time during the years immediately prior to the ECO, and to support the trial court's findings that

for the past several years it appears that the children had little stability in their lives while in the custody of Candi. While Candi denies this fact, it is evident from

⁴ We have found no probative evidence pertaining to school attendance during the remainder of the 2000-2001 school term.

the records introduced herein that the children were frequently left with Kenneth in Kentucky for various periods of time, and often abruptly uprooted by Candi and removed to North Carolina.

Finally, Candi contends that the trial court erred by failing to make essential findings of fact pertaining to the children's wishes regarding their custodian. However, there is nothing in the record to indicate that the trial court in any way relied upon the DRC's *in camera* interview of the three young children, or that the children's interview or wishes were in any way essential to the court's determination of custody. Hence, Candi is not entitled to relief on the ground that the trial court failed "to make a finding of fact on an issue essential to the judgment"⁵ when it failed to make any findings relating to the interview of the children.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John R. Milton
Barbourville, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed

⁵ CR 52.04.