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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002132-MR

STEPHANIE MULLINS — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE WILLIAM ENGLE, III, JUDGE
ACTION NO. 04-CI-00102

TIMOTHY MULLINS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

HOWARD, JUDGE: Stephanie Mullins (hereinafter Stephanie) appeals from the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered by the Perry Circuit Court, to the extent that such decree awarded custody of the two minor children of these parties, Tiffany Mullins and Tyler Mullins, jointly to both parties and designated the Appellee, Timothy Mullins (hereinafter Timothy), as primary residential

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) (b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

custodian. Stephanie was awarded specific visitation. Because we do not find any abuse of discretion on the part of the trial court, either in its award of joint custody or in its designation of the primary residential custodian, we affirm.[2]

Stephanie and Timothy were married for 15 years. They had two children, Tiffany, age 12 at the time of the divorce, and Tyler, age 9. Timothy is employed with the Kentucky State Police and is also a member of the Army National Guard. At the time of the hearing in this case, he had recently returned from a tour of active duty in the Middle East. Stephanie has primarily been a homemaker. The circuit court noted in its decree that Stephanie was pregnant at that time with a child whose father was not Timothy, and which was apparently conceived while he was away on active military duty.

Considerable evidence was heard by the Domestic Relations Commissioner of the Perry Circuit Court, the Honorable Denise M. Davidson, at a hearing held July 25, 2005, concerning the custody of the children. The commissioner then filed a recommended Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage with the circuit court. Stephanie filed exceptions to the recommendations, which were overruled by the Circuit Judge, the Honorable William Engle, III. The decree, as recommended by the domestic relations commissioner, was entered on August

[2] Stephanie does not state whether she is appealing from the award of joint custody, or merely from the designation of Timothy as primary residential custodian. She simply states that she appeals from the order by which "the Perry Circuit Court awarded custody of the Parties [sic] minor children to Appellee." We note that in her Response to the Petition for Dissolution of Marriage, she asked that the parties be awarded joint custody. We therefore assume that her intention is to appeal only from the designation of Timothy as the primary residential custodian.

16, 2005. Further facts will be discussed below, as necessary to our consideration of the issues presented to us.

Custody of minor children in Kentucky is governed by KRS 403.270, which states, in relevant part,

> (2)The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents, . . . 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;
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> (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; . . .
>
> (3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

It is established that, in awarding custody of a child, "a trial judge has a broad discretion in determining what is in the best interests of children." *Krug v. Krug,* 647 S.W.2d 790, 793 (Ky. 1983).

Similarly, we have held that in custody cases, "we must affirm the trial court's factual findings unless they are clearly erroneous, and due regard must be given to

the opportunity of the trial judge to view the credibility of the witnesses." *Polley v. Allen,* 132 S.W.3d 223, 228 (Ky. App. 2004); *Reichle v. Reichle,* 719 S.W.2d 442 (Ky. 1986).

Stephanie raises three arguments on this appeal. First, she asserts that, while there was some evidence of misconduct on her part, "there was no testimony that Appellant's alleged misconduct had affected her children or her ability to parent effectively." Second, she asserts that Timothy's military obligations may very likely require him to go overseas again and that, since he has indicated that his intentions are to leave the children with his parents if such occurs, he is really seeking custody for them and not for himself. Finally, she argues that the best interests of the children require that they live with her, as she has been their "primary care-giver" throughout their lives. We will discuss each of these arguments in turn.

As to Stephanie's alleged misconduct, there was evidence introduced that she was currently facing criminal drug charges, that she had previously been in drug rehabilitation three times and that the children had temporarily been removed from her custody by the Perry District Court and placed with their paternal grandparents, while their father was away on military duty, due to her drug use. There was testimony that Tyler, her nine-year-old son, had seen her roll a marijuana cigarette and that she took the children with her to see her current boyfriend, the father of her expected child, who was a convicted felon and "known drug dealer." There were also allegations that she had engaged in "doctor shopping," to obtain prescription medications. In addition to the

drug-related issues, there was testimony that Stephanie had attempted suicide on one previous occasion and had been arrested for domestic violence, apparently against her own parents.

It is true that there was no direct testimony that Stephanie's conduct had, to date, harmed her children. However, it is not necessary that harm be shown to have already occurred, only that such an adverse effect on the child is "likely," in the court's "reasonable discretion." *Krug v. Krug, supra,* at 793. In *Krug,* the Kentucky Supreme Court further stated,

> In many instances [a trial judge] will be able to draw upon his own common sense, his experience in life, and the common experience of mankind and be able to reach a reasoned judgment concerning the likelihood that certain conduct or environment will adversely affect children. It does not take a child psychologist or a social worker to recognize that exposure of children to neglect or abuse in many forms is likely to affect them adversely. Many kinds of neglect or abuse or exposure to unwholesome environment speak for themselves, and the proof of the neglect or abuse or exposure is in itself sufficient to permit a conclusion that its continuation would adversely affect children.
>
> We also think the trial court is not precluded from consideration of circumstances where the neglect, abuse or environment has not yet adversely affected the children but which, in his discretion, will adversely affect them if permitted to continue. In other words, a judge is not required to wait until the children have already been harmed before he can give consideration to the conduct causing the harm. *Krug, supra.,* at 793.

We believe this language perfectly describes the evidence in this case of Stephanie's drug use. We note that KRS 600.020, in defining an "abused or neglected

child," specifically mentions a child whose parent " [e]ngages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse." KRS 600.020(4). It is a reasonable inference from the evidence of record that Stephanie has an ongoing problem with drug abuse, and that it is likely that the children would be harmed by the exposure to that abuse which they would inevitably experience if she were their primary custodian.

The trial court did not abuse its discretion in considering this evidence, and its determination that that the interests of the children were best served by designating Timothy as their primary residential custodian was not clearly erroneous.

Stephanie next argues that the court erred in designating Timothy as the primary residential custodian because, due to his military obligations, he would not be available to care for the children and that this was, *de facto*, an award of custody to the paternal grandparents. We note that at the time of the circuit court hearing, the grandparents apparently had temporary custody of the children, pursuant to the district court order removing them from Stephanie's care. Nonetheless, Stephanie is correct that absent a finding that she is unfit, she is entitled to permanent custody over a non-parent, even a grandparent. *Reynardus v. Garcia,* 437 S.W.2d 740 (Ky. 1968); *Chandler v. Chandler,* 535 S.W.2d 71 (Ky. 1976). The circuit court made no finding that Stephanie was an unfit parent.

However, the trial court did not award custody to the grandparents. Custody of these children was awarded jointly to Timothy and Stephanie, with Timothy designated as primary residential custodian. He testified that he was "99 per cent sure" that he would not be returning to the Middle East, and that he would be available to raise his children. While the circuit court did not make specific findings of fact on this issue, there was sufficient evidence to have supported such a finding. The circuit court did not abuse its discretion in this regard. If Timothy were deployed overseas again, KRS 403.340(5) provides a specific statutory provision concerning temporary modification of a custody decree when the custodian is called to active military duty.

Finally, Stephanie argues that the best interests of the children require that she be their primary residential custodian because she has been their "primary care-giver" for their entire lives, as their father was away, either with his law-enforcement work or on active military duty. While this is undoubtedly a proper factor for the court to consider, we note that it is not one of the factors set out in KRS 403.270, which the court is *required* to consider. Moreover, there was conflicting evidence on this issue. Timothy testified that he had been the primary care-giver for the children because of Stephanie's drug problem. While we do not doubt that Stephanie likely spent more time with the children than Timothy, during the marriage – she did not generally work outside the home and he worked full time – there was sufficient evidence of record to support a finding either way on this issue. Furthermore, this is only one factor, and we cannot say

that the circuit court abused its discretion in weighing the factors and determining that the best interests of the children compelled awarding primary residential custody to Timothy.

We are concerned with the overall absence of findings of fact regarding the custody of these children in the decree of dissolution. KRS 403.270(2), as quoted above, requires that the court consider various factors in determining the best interests of the child. A divorce or custody hearing is an "action tried upon the facts without a jury," under CR 52.01. Therefore, the court as finder of fact must make such findings, and must do so "specifically." These findings must include consideration of the factors set out in KRS 403.270(2). *Stafford v. Stafford,* 618 S.W.2d 578, 580 (Ky. App. 1981), *disapproved on other grounds by Largent v. Largent,* 643 S.W. 2d 261 (Ky. 1982). In this case, the "Findings of Fact, Conclusions of Law and Decree of Dissolution" contains no specific findings of fact concerning the custody of these children. There is no mention of the factors set out in KRS 403.270(2). There is not even a specific finding that the custody arrangement ordered is in the best interests of the children. While we find in the record more than sufficient evidence to support the findings of fact that must, by implication, be behind the circuit court's custody order, we would be strongly inclined to reverse and remand for such specific findings except that this issue was not raised on this appeal, nor preserved for appeal by a CR 52.02 motion, asking for such findings. CR 52.04 states,

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought

> to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

See also *Crain v. Dean,* 741 S.W.2d 655 (Ky. 1987) and *Cherry v. Cherry,* 634 S.W.2d 423 (Ky. 1982).

The custody order of the Perry Circuit Court is therefore affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

David A. Johnson
Hazard, Kentucky