

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001216-MR

LESA MARIE QUILLEN

APPELLANT

v.

APPEAL FROM CARLISLE CIRCUIT COURT
HONORABLE WILLIAM L. SHADOAN, JUDGE
ACTION NO. 04-CI-00064

THOMAS WAYNE QUILLEN, JR.

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: DIXON AND KELLER, JUDGES; GRAVES, SENIOR JUDGE.¹

GRAVES, SENIOR JUDGE: Lesa Craven Quillen appeals from an order of the Carlisle Circuit Court awarding Thomas Wayne Quillen, Jr., primary residential custody of the parties' two minor children. We affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on October 2, 1993. They had two children during the marriage, Brittany LaShea, born March 29, 1994, and Megan Renee, born May 3, 2001. On September 10, 2004, Lesa filed a petition for dissolution of marriage.

On January 6, 2005, the trial court entered an interlocutory decree dissolving the marriage, reserving, however, among other things, issues surrounding the care, custody, control, and support of the children.

On May 8, 2006, an evidentiary hearing was held concerning the unresolved issues, including child custody. On May 17, 2006, the trial court entered an order awarding the parties joint custody of the children, with Thomas being designated as the primary residential custodian. This appeal followed.

STANDARD OF REVIEW

In custody matters tried by a court without a jury, the court's “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rule of Civil Procedure (CR) 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Id.* “Substantial evidence” is “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky.App. 1998), “when

the testimony is conflicting we may not substitute our decision for the judgment of the trial court.” *Id.* at 39.

After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *Sherfey*, 74 S.W.3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000). “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey*, 74 S.W.3d at 783. Essentially, while “[t]he exercise of discretion must be legally sound,” *id.*, in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

DISCUSSION

Before us, Lesa contends that the trial court erred by preferring a nonparent over a parent in its custody award, and by awarding her with less than standard visitation. We consider these arguments in turn.

PREFERENCE FOR NONPARENT

Lesa contends that the trial court erred by placing excessive emphasis upon the significance of Thomas's new wife, Candice Quillen, in its custody decision. Lesa characterizes this as the trial court having preferred a nonparent (Candice) over a parent (Lesa) in its custody decision in violation of well established law favoring a parent over a nonparent in custody decisions.

To place this argument in context, we begin by setting forth the trial court's relevant findings and discussion concerning its custody award as stated in its May 17, 2006, order:

SUPPLEMENTAL FINDINGS OF FACT:

. . . .

(8) The Court finds that the HUSBAND is the proper party to be designated as having primary possession of the children on a day-to-day basis and in making this decision the Court makes the following specific findings:

(a) That pursuant to a Court Order the Cabinet for Health & Family Services performed home evaluations on both HUSBAND's and WIFE's residence.

(b) The Cabinet had concerns that WIFE withheld the children from HUSBAND because he was behind in his child support. Also, the Cabinet had concerns that WIFE did not correctly report the harassing communication charges she had received for harassing HUSBAND. Further problems included the fact that WIFE prohibited the children from speaking about their stepmother and that the children were asked to comfort WIFE during her emotion[al] distress from the divorce. WIFE needs to separate her own personal needs or issues from the children and build a cooperative relationship with HUSBAND.

(c) The Cabinet found that the HUSBAND has the best interest of the children in mind and that they would have a stable environment in his home. The children could come home to Candice, their step-mother, who could help them with their homework after school.

(d) The Court finds that HUSBAND's mother, Judy Quillen, has played a large and important role in both children's lives since birth. Judy Quillen continues to provide much support, both emotionally and monetarily, for the children. Even though custody between HUSBAND and WIFE has been bitterly disputed, Judy Quillen has remained a constant in the children's lives and both HUSBAND and WIFE admit she is a good caregiver.

(e) The Court finds that when the children are in the possession of WIFE they are put in the middle of the problems caused by the parties' divorce. Whereas when the children are with the HUSBAND they are free from much of the stress caused by the divorce.

(f) The Court finds that there have been attempts by WIFE to portray these children's stepmother as abusive towards the children, especially Brittany. A recent incident where a scratch was found on the oldest girl's arm was reported to Social Services and the Kentucky State Police. Both Kentucky State Police and Social Services testified that there was no proof to substantiate any abuse by the stepmother.

(g) The Court finds that the oldest child has learning difficulties and the HUSBAND and stepmother and paternal grandmother are the ones most capable of helping her with her schoolwork.

....

SUPPLEMENTAL CONCLUSIONS OF LAW

....

(3) That the parties hereto shall be awarded the joint care, custody and control of the two minor children with HUSBAND being denominated as primary residential

custodian so long as he remains married and lives with his present wife. . . .

We disagree with Lesa's premise that Candice was preferred over her in the trial court's custody determination. The child custody contest was between Lesa and Thomas. The trial court's custody decision preferred Thomas over Lesa, not Candice over Lesa. We discern no violation of the general rule that parents are to be preferred over nonparents in custody determinations.

In any event, because Candice, as stepmother, would fulfill a crucial role if Thomas were awarded custody, Candice was, necessarily, a significant factor to be taken into consideration in the trial court's custody determination. Further, KRS 403.270(2)(c) provides that the trial court shall consider in its custody decision, “[t]he 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**[.]” (Emphasis added). As such, it would be expected that a review of her relationship with the children would be included in the trial court's findings of fact.

Moreover, upon the record as a whole, the trial court's findings concerning Candice Quillen, and its other findings significant to its custody award, are supported by substantial evidence. Further, in light of those findings, the trial court did not abuse its discretion in awarding custody of the minor children to Thomas, and we will accordingly not disturb its custody determination.

VISITATION

As argument II in her brief, Lesa contends that the trial court erred by awarding her less than standard visitation. However, in her statement of the case, Lesa states “[t]he issue of visitation, less than standard, has been resolved by Agreed Order dated February 15, 2007, but the Court's ruling illustrates that the Appellant was not treated fairly at the hearing.” Appellant Brief, pg. 3 n 1. As this matter has been resolved by agreed order, the argument is moot and we need not address this issue on the merits.

CONCLUSION

For the foregoing reasons the judgment of the Carlisle Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis L. Null, Jr.
Mayfield, Kentucky

BRIEF FOR APPELLEE:

Bryan E. Wilson
Mayfield, Kentucky