

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001826-MR

WESLEY A. BURTON

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 05-CI-00591

CRYSTAL L. KEISER (NOW CASSIDY)

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,¹ SENIOR JUDGE.

HENRY, SENIOR JUDGE: Wesley A. Burton appeals from an order of the Greenup

Circuit Court that confirmed in its entirety a Report of the Domestic Relations

Commissioner (“DRC”). The court thereby awarded custody of Burton’s minor daughter,

Lynzi, to her mother, Crystal L. Keiser (now Cassidy), and provided limited visitation

privileges to Burton. Because the court did not describe with sufficient specificity the

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

type of custody being granted, applied the wrong standard in determining custody, and appears to have placed undue reliance on the visitation guidelines, we vacate the court's order and remand for further proceedings..

Lynzi, the child who is the subject of this appeal, was born on December 12, 2000. Burton and Keiser lived together for approximately four years after her birth, during which time they developed a childcare schedule that accorded with their working hours. Burton is employed at a Wal-Mart distribution center near Washington Courthouse, Ohio, where he works an extended shift from Saturday through Monday. Keiser works as a receptionist daily from Monday to Friday. While the couple was together, Keiser cared for Lynzi on weekends while Burton looked after her during the week. In early 2005, the couple separated, but agreed informally to continue this childcare arrangement, with Burton having custody of Lynzi from Tuesday through Friday, and Keiser from Saturday through Monday.

In October 2005, Keiser filed a petition in Greenup Circuit Court seeking full custody of Lynzi. While the case was pending, the parties entered into an agreed order providing for temporary joint custody which essentially continued the existing arrangement. The order specified that Burton was to have custody on Tuesdays from 11:30 a.m. to 6:00 p.m. and Wednesdays from 11:30 a.m. until Fridays at 6:00 p.m., when he was to return Lynzi to her mother. On April 22, 2006, Keiser married Brian Cassidy and moved to Fallsburg, Kentucky, which is approximately 45 minutes' drive from where the parties had previously been residing. In addition, Lynzi had reached kindergarten age.

When the hearing on Keiser's motion was held on July 11, 2006, the DRC was faced with the difficult task of making a custody recommendation that took into account the parents' differing work schedules, the distance between their residences, and the need for Lynzi to attend school daily.

After hearing testimony from Burton and Keiser as well as from friends and family members, the DRC concluded that "[d]espite the rather half-hearted attempts to find fault with each other the evidence is clear both parents love their daughter and want what they consider to be best for her and want to have her spend as much time in their lives as possible."

Although the DRC then noted that Keiser was willing to enter into a joint custody arrangement, with herself as the physical custodian and schedule A visitation for Burton, he never explicitly stated in his report whether he was recommending an award of joint custody or of sole custody to Keiser. The report stated in pertinent part as follows:

Seldom does the Commissioner encounter a fact situation which presents an almost impossible no-win situation. **There is no tender age preference for the mother, but however Kentucky case law has long held that if all things are equal then gender and age may be a consideration for the primary custody being with the mother and this appears to be appropriate in this case.**

In a effort to afford the father quality time with his daughter, the Commissioner recommend[s] that schedule B visitation be implemented to specifically allow the father to pick Linzie [sic] up for midweek overnight visitation immediately at the end of school and then return her to school

that next morning. This would mean that he would have time to visit with Linzie[sic] traveling both to and from Fallsburg and during the course of the evening prior to her bedtime, at least once a week. With the alternating overnight weekend visitation as to time and quality being what it is, because of the respondent's work schedule.

The circuit court adopted the DRC's report in full. Burton filed exceptions which the court overruled. This appeal followed.

Burton argues that the court erroneously applied the tender years presumption in awarding custody to Keiser. We agree. "[T]he legislature has eliminated the maternal preference standard by the readoption, effective in 1980, of [Kentucky Revised Statutes] KRS 403.270(1), with the addition that 'equal consideration shall be given to each parent.'" *Stafford v. Stafford*, 618 S.W.2d 578, 581 (Ky.App. 1981), *overruled on other grounds by Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982). Courts are required instead to make custody determinations solely in accordance with the "best interests of the child." KRS 403.270(2). The statute provides a non-exhaustive list of factors to assist the courts in making this determination. Although the DRC acknowledged that there is no tender age presumption under Kentucky law, he appears to have applied it nonetheless in awarding custody of Lynzi to Keiser. Furthermore, as we have already noted, the Report failed to specify whether the award was one of sole custody to Keiser, or joint custody to both parents. The custody award therefore lacks sufficient specificity and was made on the basis of improper criteria.

The DRC also appears to have relied unduly on the visitation guidelines, or perhaps felt constrained by the terms of the guidelines, in the award of visitation of one night per week to Burton. Although the language of the report is somewhat ambiguous, it implies that the terms of the guidelines preclude Burton from exercising any visitation beyond one night per week because the only other period afforded by the guidelines is alternating weekends. This Court has emphatically stressed the importance of an individualized determination of visitation, and has cautioned against adherence to the guidelines at the expense of such an individualized determination:

What constitutes “reasonable visitation” is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula.

. . .

We further emphasize that trial courts should not give undue weight to the terms of a “standard” visitation order. Frequently, judicial circuits or trial courts prepare these documents to aid the trial court in drafting visitation orders. As in the present case, these documents contain “typical” visitation schedules, as well as recitations of common conditions for managing visitation. However, the use of a standard visitation order should not supplant the trial court’s obligation to make its own findings of fact as required by [Kentucky Rules of Civil Procedure] CR 52.01.

. . .

[T]he trial court should not make any presumption in favor of a standard visitation schedule.

Drury v. Drury, 32 S.W.3d 521, 524-525 (Ky.App. 2000).

For the foregoing reasons, the order of the Greenup Circuit Court is hereby vacated, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

James E. Armstrong
Greenup, Kentucky