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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000677-ME

WENDY EKLUND — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-01099

BRIAN EKLUND — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

WINE, JUDGE: Wendy Eklund ("Wendy") appeals from a decree of the Hardin Family Court dissolving her marriage to Brian Eklund ("Brian"). She argues that the trial court abused its discretion by designating Brian as the primary residential custodian for the children and in its unequal division of certain marital assets. Under the circumstances presented in this case, we cannot find that the trial court based these decisions on clearly

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

erroneous factual findings or that the court's rulings on these matters constituted an abuse of its discretion. Hence, we affirm.

Wendy and Brian were married in 1991 in Hardin County, Kentucky. Four children were born of the marriage: A.E. (d.o.b. 9/20/91); K.E. (d.o.b. 8/28/93); C.E. (d.o.b. 8/19/99); and S.E. (d.o.b 12/7/01). The parties separated in June 2001, and Wendy filed a petition for dissolution of the marriage on June 9, 2001.

Shortly thereafter, Wendy filed a motion for temporary custody of the children, child support, and possession of the marital residence. Following a hearing, the court granted joint custody of the children, designating Wendy as the primary residential custodian. In reaching this decision, the court noted the testimony that Wendy had been the children's primary caretaker and that Brian's career as a physician limited his time to perform these duties. The trial court also ordered Brian to pay temporary child support and maintenance. In addition, the court gave Wendy temporary exclusive possession of the marital residence and directed Brian to pay household expenses such as the mortgage and utility payments.

While this matter was pending, the parties and the children took part in counseling with Chanin Brown ("Brown"), a licensed professional clinical counselor. They also had a custodial evaluation performed by Sally Brenzel ("Brenzel"), a licensed clinical psychologist. In January 2006, the trial court modified the parenting time schedule. Under the amended order, Brian had parenting time with the two youngest children every Wednesday after school until Friday morning and every second week from

Wednesday after school until the following Monday morning. The court also directed that the two older children shall be allowed to choose the times they spend with each parent "based upon their wishes and schedules."

The matter proceeded to an evidentiary hearing on August 10, 2006, on all pending issues. In addition to their own testimony, the parties submitted the custodial evaluation by Brenzel, the deposition testimony of Brown, and other witnesses. The trial court declined to interview the children, stating that their wishes "are not terribly helpful in making a custody determination in this case." After reviewing the factors set forth in KRS 403.270, the trial court determined that joint custody was still in the best interests of the children.

But on the issue of primary residential custodian, the trial court determined that the current arrangement was no longer appropriate. The court found that, while both parents had previously had emotional problems and had behaved inappropriately, neither parent suffered from any mental health problems and they were both fit. Nevertheless, the court concluded that Brian was more emotionally stable than Wendy. The court added that it did not believe the current shared custody arrangement was beneficial to the children. The court also expressed concerns that Wendy did not adequately supervise the children. In addition, the court was concerned that Wendy may have plans to move to Texas to be with her boyfriend, and that such a relocation would be harmful to the children. The court was also concerned that Wendy had failed to adequately set boundaries for the children. Consequently, the trial court designated Brian as the primary

residential custodian. The trial court also addressed the contested issues relating to division of marital property.

Wendy filed a motion to reconsider, CR 59.05, primarily contesting the trial court's decision to designate Brian as the children's residential custodian. She took issue with the trial court's concern that the current shared custody arrangement was not working. She also stated that she was no longer dating her boyfriend from Texas and had no plans to move out of state. Wendy further contended that the court's decision was contrary to the recommendation of the custodial evaluator. She also asked the court to reconsider its unequal division of the investment and retirement accounts, and the court's order directing her to be responsible for 90% of the children's uncovered medical expenses. The trial court granted the motion with respect to the latter issue, but otherwise denied the motion to alter the judgment. This appeal followed. Additional facts will be set forth later in this opinion as necessary.

Wendy argues that the trial court abused its discretion by designating Brian as the primary residential custodian for all the children. KRS 403.270(2) provides that in marriage dissolution proceedings, courts "shall determine custody in accordance with the best interests of the child . . . ." The same standard applies to the designation of the child's primary residence. *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003). Wendy contends that the trial court was required to find that a change had occurred in the circumstances of the children or the custodian, as required by KRS 403.340(3). However, the 2004 order was a temporary custody order. Consequently, when the matter

was presented for final adjudication, the trial court properly considered the custody issue under the standard set out in KRS 403.270, rather than the standard for modifying a permanent custody order set out in KRS 403.340. *See* KRS 403.160(6)(a). *See also Shifflet v. Shifflet*, 891 S.W.2d 392, 393 (Ky. 1995).

Under KRS 403.270(2), the trial court shall determine custody based on the best interests of the child. Factors relevant to this determination include, among other things, the wishes of the parents, the wishes of the child, the interaction of the child with his parents and siblings, the child's adjustment to his home, school, and community, and information and evidence of domestic violence. *See* KRS 403.270(2)(a)-(d) and (f). The trial court discussed each of these factors in its decree.

Wendy takes issue with the sufficiency of the evidence supporting the trial court's findings regarding these factors. In reviewing a child custody determination, this Court reviews the trial court's factual findings for clear error. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or not supported by substantial evidence. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). "'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id*. While many of the factual matters were highly disputed, we conclude that the trial court's findings regarding custody were supported by substantial evidence of record.

Wendy first argues that the trial court erred by refusing to interview the children to determine their wishes regarding custody and visitation. But while KRS 403.290(1) allows a court to interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation, the decision to interview a child is completely discretionary and within the province of the trial court. *Brown v. Brown*, 510 S.W.2d 14, 16 (Ky. 1974). In this case, the views and wishes of the children were reflected in the report by the custodial evaluator, Brenzel, and in the deposition testimony of the family counselor, Brown. The trial court did not abuse its discretion by declining to conduct its own interviews with the children.

Along these same lines, Wendy next argues that the trial court failed to give sufficient weight to the Brenzel's report and Brown's deposition testimony. In making a custody determination, a trial court may seek the advice of professional personnel. KRS 403.290(2). In addition, KRS 403.300(2) authorizes a trial court to appoint a custodial evaluator and to consider the evaluator's report as evidence in custody proceedings. But contrary to Wendy's position, the trial court is not obligated to accept an expert's recommendations regarding custody. Rather, the weight to be given such testimony is for the trial court to determine. CR 52.01.

Furthermore, we find no indication that the trial court disregarded this evidence. Brenzel found that both parents were fit to have custody. While she recommended that the current shared custody arrangement be continued with some minor modifications, she conceded that there is no ideal arrangement. Brown did not make any

recommendation as to custody, but she did state that the children would benefit from having a more flexible parenting time schedule.

In its decree, the trial court stated that it considered Brenzel's report and Brown's deposition, but it did not specifically address their opinions. However, Wendy did not ask the trial court for more specific findings with regard to this evidence. CR 52.04. Furthermore, the trial court's findings reflect significant aspects of Brenzel's report, Brown's deposition, and the other testimony presented at the hearing. Under the circumstances, we are satisfied that the trial court gave appropriate consideration to the expert testimony.

Wendy further argues that there was no substantial evidence to support the trial court's belief that she was likely to move to Texas to be with her boyfriend, Keith Utter. Wendy notes that both she and Utter testified that they had no immediate plans to marry and move in together. In addition, Wendy stated emphatically at trial that she had no plans to move to Texas. And in her motion to reconsider, Wendy informed the court that she and Utter were no longer seeing each other. Consequently, Wendy asserts that the trial court's concern about the possibility of her relocating was unfounded by any evidence.

While Wendy filed a timely motion to reconsider, CR 59.05 does not permit a court to consider new evidence which did not exist at the time of trial. *Gullion v. Gullion*, 163 S.W.3d 888, 893-94 (Ky. 2005). *But see Rayborn v. Rayborn*, 185 S.W.3d 641 (Ky. 2006), holding that a change in circumstances occurring after the entry of the

decree but before entry of the judgment cannot serve as a basis for a subsequent modification of maintenance pursuant to KRS 403.250. *Id.* at 643-44. Consequently, the trial court properly declined to consider Wendy's assertions regarding her relationship with Utter since the evidentiary hearing.

We agree with Wendy that there was no direct evidence that she planned to relocate with the children. But given Wendy's relationship and conduct with Utter up to the time of the hearing, the trial court simply chose not to believe her testimony that she had no plans to relocate. The trial court is entitled to judge the credibility of witnesses and to draw reasonable conclusions from the evidence. Furthermore, Brenzel's report specifically recommended that such a relocation would not be in the best interests of the children.

Moreover, even if the trial court's concerns on this matter are speculative, the court also found Brian is more emotionally stable than Wendy. Wendy takes issues with this finding, pointing to Brian's conduct during the marriage and the separation. She also refers to Brian's prior admissions that he has had a major depressive episode and that he suffers from obsessive-compulsive personality disorder. However, Brenzel's report extensively discussed Wendy's and Brian's mental health history. While both have previously had mental health issues, Brenzel concluded that "Brian and Wendy have been and continue to be fully functional people and parents." Similarly, the trial court noted that both parties have had emotional problems in the past, and both have behaved

inappropriately during this divorce. Nevertheless, the court concluded that both parties were fit to have custody.

Given this evidence, the trial court's decision to assign a primary residential custodian essentially comes down to a matter of discretion. *Sherfey v. Sherfey*, 74 S.W.3d at 783. In considering the best interests of the children, the trial court considered the current shared custody arrangement, but concluded that the older two children would benefit from spending more time with their father. The court was also concerned about Wendy's failure to monitor the computer usage of the older children and her "lack of alarm at this situation and inability to fully appreciate the seriousness of the potential danger this can pose for minor children. The Court fears that Wendy is too desirous of being a friend to her children instead of a parent and has not set boundaries necessary for their safety." Given the evidence, we cannot find that designating either parent would have been an abuse of discretion. Therefore, the trial court did not abuse its discretion by designating Brian as the primary residential custodian.[2]

Wendy's second argument concerns the trial court's division of the marital property. For the most part, the trial court evenly divided the marital property. However, the court did not evenly divide the parties' joint investment account and Individual Retirement Accounts (IRAs). The parties' joint investment account had a balance of $66,000.00 at the time of separation. But by the time of the hearing, Brian had

[2] We might suggest that the trial court could have exercised greater flexibility in setting a parenting schedule beyond what is set out in the standard visitation schedule. *See Drury v. Drury*, 32 S.W.3d 521 (Ky.App. 2000). However, that issue is not presented in this appeal.

withdrawn approximately $25,000.00, leaving a balance of $41,000.00. The trial court found that only $2,200.00 of those withdrawals were authorized, and divided the remaining $63,800.00 accordingly. However, the court only awarded Wendy 25% of that amount, or $15,950.00. Similarly, the parties owned two IRAs: one in Wendy's name with a $13,000.00 balance, and one in Brian's name with a $45,000.00 balance. The trial court awarded each party their account without any offset of other marital property.

Wendy concedes that the trial court is not required to divide the marital property equally, but in "just proportions" without regard to marital misconduct and after considering the factors set out in KRS 403.190(1)(a)-(d). *See also Russell v. Russell*, 878 S.W.2d 24, 25 (Ky.App. 1994). She also concedes that she made no request for additional findings, as required by CR 52.04. In this case, the trial court evenly divided the other marital property and ordered Brian to pay Wendy $93,500.00 to equalize the division of those assets. Although the court awarded Brian the marital residence, it also assigned the mortgage debts to him. As previously discussed, the court designated Brian as the primary residential custodian. Under the circumstances, we cannot find that the trial court's unequal division of these assets constituted an abuse of discretion. *Davis v. Davis,* 777 S.W.2d 230, 233 (Ky. 1989).

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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