

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2007-CA-000810-ME

BRYANT KEITH JOHNSON

APPELLANT

v.

APPEAL FROM BOONE FAMILY COURT  
HONORABLE LINDA R. BRAMLAGE, JUDGE  
ACTION NO. 04-CI-01941

CYNTHIA DAVIS JOHNSON,  
THE MINOR CHILDREN VINCENT  
JOHNSON AND THOMAS JOHNSON AS  
REPRESENTED BY THE GUARDIAN  
AD LITEM, HON. IRENE RACHLINSKI

APPELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Bryant Keith Johnson appeals from findings of fact, conclusions of law, and a decree of dissolution entered by the Boone Family Court on February 16, 2007. Bryant argues that the trial court erred in failing to award him sole

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<sup>1</sup> 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 KRS 21.580.

custody of his two minor children and for denying his motion for a new trial based on newly discovered evidence. We affirm.

Bryant and Cynthia Davis Johnson were married on November 24, 1994, and separated ten years later, on November 28, 2004. During the course of the marriage, the parties had two children, Franklin Vincent Johnson (Vincent), born on June 29, 1995, and Thomas Connery Johnson (Thomas), born on September 13, 1996. Cynthia filed a petition for dissolution of marriage on December 6, 2004, seeking sole custody of the children. Bryant filed a response in which he also sought sole custody of the children. On December 22, 2004, a guardian ad litem was appointed to represent Vincent and Thomas. By agreed order, Dr. Robert W. Noelker was appointed to conduct a custody evaluation of Bryant and Cynthia. Dr. Noelker subsequently filed a report recommending that Bryant be awarded sole custody with liberal visitation for Cynthia.

A final hearing was held on the issues of custody, parenting time, and child support on February 12, 2007. At the hearing, Cynthia argued for a shared parenting arrangement. Bryant continued to request sole custody. The children were represented at the hearing by the guardian ad litem. Testimony was heard from the parties and from Dr. Noelker and Holly Maddy, Cynthia's therapist. On February 16, 2007, the trial court entered its findings of fact, conclusions of law, and decree of dissolution, awarding joint custody to Bryant and Cynthia with equal parenting time. Neither party was designated the primary residential custodian.

On February 23, 2007, Bryant filed a motion for a new trial pursuant to Kentucky Rules of Civil Procedure (CR) 59.01 based on newly discovered evidence. *See* CR 59.01(g). In support of his motion, Bryant attached a letter written by Vincent to the

court. In the letter, Vincent stated that he wanted his father to be awarded full custody and that he did not trust the guardian ad litem and felt that she had not allowed him to express his wishes as to the custody arrangement. The court denied the motion on March 21, 2007, and this appeal followed.

We review a trial court's findings of fact in custody matters for clear error, keeping in mind that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A factual finding is not clearly erroneous if it is supported by substantial evidence. ‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002). When a trial court applies the law to facts supported by substantial evidence, its award of custody “will not be disturbed unless it constitutes an abuse of discretion.” *Id.* Abuse of discretion is defined as “arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Id.* at 782-83.

Under Kentucky Revised Statutes (KRS) 403.270(2), a trial court is required to determine custody in accordance with the best interests of the child by considering the following factors:

- (a) The wishes of the child's parent or parents, and any de facto custodian, 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;
- (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;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Bryant argues that the trial court failed to give sufficient weight to evidence relating to three of these statutory subsections: (f), (e), and (b).

His first argument, under 403.270(2)(f), is based on what he characterizes as the overwhelming evidence of Cynthia's acts of abuse and domestic violence against him and the two children. Two domestic violence orders were issued against Cynthia: one on Bryant's behalf, entered on December 13, 2004, and one on behalf of the children, entered on January 7, 2005. The latter was issued on the allegations that Cynthia hit Thomas in the arm, causing a bruise nearly three inches in diameter; threw Thomas onto a bed; struck Vincent in the ribs with her fist; and had expressed suicidal and homicidal tendencies in the company of her daughter from a previous marriage. On January 7, 2005, the trial court held a hearing regarding the DVO on behalf of the children. The judge spoke with the children in her chambers, where they described how their mother struck them with her fist, a belt, and a spatula. Following the hearing, the trial court entered the DVO but continued to allow Cynthia to have shared parenting with Bryant.

On October 8, 2005, Cynthia was arrested for violating the DVO because seven bruises were found on Thomas's arm, which were sustained while he was in her care.

Although the evidence of Cynthia's history of abuse against the children is deeply disturbing and should not be minimized, Bryant himself admits that there was no evidence of any abuse occurring after the DVO violation of October 2005. The trial court based its custody decision in large part on its finding that Cynthia's mental state was improving, according to the testimony of the therapist, Holly Maddy, and on the fact that Cynthia had not committed any violent acts against the children for a considerable period of time. Bryant argues that Cynthia only managed to refrain from abusing the children because she feared going to jail and that her history shows she is at great risk to commit future acts of domestic violence.

In its findings, the trial court acknowledged that it had entered the DVOs against Cynthia, but it noted that it had continued to allow Cynthia to have shared parenting of the children and that few serious problems had occurred during that time. The fact that Cynthia was able to participate in a shared parenting arrangement for approximately two years, with no recurrence of any violence against the children for approximately fifteen months, is substantial evidence supporting the trial court's conclusion that such an arrangement could be continued. Furthermore, even Dr. Robert W. Noelker, whose report supported Bryant's bid for sole custody, recommended regular, frequent, and liberal visitation for Cynthia, with no suggestion that she needed to be supervised.

Bryant next contends that the trial court gave insufficient consideration to evidence of Cynthia's psychological history as required under KRS 403.270(e). He

contends that her mental state is so precarious that it poses a detriment to the mental and physical health of the children. The evidence shows that Cynthia has suffered from depression and attention deficit hyperactivity disorder (ADHD) for much of her life. She has also suffered from drug and alcohol dependency, as well as anger management problems.

Bryant contends that the court placed too much stress on the statement by Holly Maddy, Cynthia's therapist, that Cynthia was "progressing and improving in her coping skills, assertions skills, self esteem, concentration and organization skills."

Bryant argues that the court ignored Maddy's less favorable testimony on cross-examination, when she opined that Cynthia will continue to experience mental health problems for the rest of her life and that she had been referred to Maddy by Dr. Bruce Schneider to address problems with depression, dependency, and anger management.

Maddy also testified that Cynthia had had suicidal thoughts in the past, and that she had problems with organization and parenting skills, particularly in coping with Vincent, who is over-active and restless. Additionally, Maddy testified that Cynthia had a troubled relationship with Elizabeth, her daughter from a previous marriage, who has committed self-mutilation and has screamed, cursed, and physically fought with Cynthia. He further points out that, by contrast, there was no testimony that he suffered from any mental health problems.

The court nonetheless chose to give less weight to Dr. Noelker's recommendation of sole custody for Bryant because his report was based on data relating to Cynthia's mental state that was, in some instances, several years old. For example, Dr. Noelker relied on a diagnosis of ADHD by a Dr. Hughes that dated from 1999 and on

some letters written by Cynthia more than ten to thirteen years previously that were submitted by Bryant to Dr. Noelker.

Bryant has drawn our attention to Dr. Noelker's testimony that he had merely used Dr. Hughes's diagnosis as a "historical document" that dated the onset of Cynthia's ADHD. Dr. Noelker also testified, however, that such testing should be repeated two years after the initial diagnosis. Furthermore, the trial court did acknowledge, as Bryant admits, that Cynthia had been experiencing depression and ADHD for a large portion of her life. More importantly, Dr. Noelker's custody evaluations of Cynthia and Bryant are dated December 20, 2005, more than a year before the final hearing, during which period Cynthia was attending therapy with Holly Maddy. We conclude that the trial court's decision to rely on Maddy's more current assessment of Cynthia's mental state was well within its discretion.

Bryant also points out that the court incorrectly stated that Dr. Noelker had found that he has an obsessive compulsive personality and is overly controlling. Dr. Noelker administered a test to Bryant which showed that there were elevations on scales that measure the presence of histrionic and obsessive compulsive personality features, but he did not actually diagnose Bryant with this disorder. Dr. Noelker did not describe Bryant as overly controlling; this term was used by Cynthia's counsel and by the guardian ad litem.

Although we agree that the trial court did misstate Dr. Noelker's remarks, the error is not such as to undermine the validity of the court's findings. Ultimately, the court was not bound to accept the recommendations of Dr. Noelker. Our supreme court has cautioned that "[c]ustody decisions should be based on all the statutory factors and

not just on psychological evaluations. It is an improper delegation of the statutory duty of the court to rely solely on the recommendations of psychologists.” *Reichle v. Reichle*, 719 S.W.2d 442, 445 (Ky. 1986).

Bryant’s final argument concerns the wishes of the children as to their custodian, pursuant to KRS 403.270(2)(b). He contends that his children clearly wished their father to be awarded sole custody, yet the court ignored their wishes in concluding, based in part on the report of the guardian ad litem, that “both boys enjoy the parenting arrangement as it is now. They enjoy being with both parents and have few complaints about either parent.” As evidence for his motion for a new trial, Bryant submitted to the court a letter written by Vincent after the custody hearing, in which he states that he wants his father to have full custody, that he was unhappy with the “half and half” parenting arrangement, and that the guardian ad litem had not allowed him to talk about issues at his mother’s house and had tried to force him to make untrue statements about his father’s house.

It is the role of the court as the factfinder to weigh the evidence. *See Moore v. Asente*, 110 S.W.3d 336, 355 (Ky. 2003). In this case, the court, which had a longstanding familiarity with the case, chose to rely on its earlier conversations with the children preceding the entry of the DVO and on evidence presented by the guardian ad litem. In light of the fact that the record contains evidence that both parents are manipulative and not above using the children to retaliate against one another, the trial court was not bound to accept Vincent’s letter as an objective statement of the child’s wishes. Moreover, the wishes of the child are not dispositive. *See Poe v. Poe*, 711 S.W.2d 849, 851 (Ky.App. 1986). They are only one factor to be weighed by the court in

performing the “best interest” analysis. *See* KRS 403.270(2). Under these circumstances, we cannot conclude that the trial court abused its broad discretion in denying Bryant’s motion for a new trial based on newly discovered evidence. *See Glidewell v. Glidewell*, 859 S.W.2d 675, 677 (Ky.App. 1993).

Finally, Bryant contends that the court ignored important evidence while overstressing less significant evidence. First, he argues that the court erred in failing to mention Cynthia’s admission at the hearing that she was responsible for the children’s considerable number of school absences and tardies. Second, he contends that the court also overlooked the issue of whether the children were eating properly while in the other party’s care. Vincent has no large intestine and therefore requires approximately twice the daily caloric intake of a normal individual. Bryant testified that Vincent lost approximately ten pounds over a five-day period while in Cynthia’s care.

On the other hand, however, the record also contains evidence that Bryant made Vincent run around the block because he took too long to eat his dinner. (Bryant apparently sets a clock in order to time how long it takes Vincent to eat his dinner; if it takes more than thirty minutes, he must run around the block). Bryant also appears to be convinced that Thomas is overweight. The guardian ad litem stated that she was “very concerned about [Bryant’s] fixation on food. This GAL is very aware that V.J. [Vincent] has health issues that require monitoring of his food intake but the children report that the father focuses too much on food and is a concern to both children. T.J. [Thomas] was particularly concerned because he thinks his father believes he is overweight and that is very upsetting to T.J.”

Third, Bryant contends that the trial court placed too much weight on evidence that he had failed to report to Cynthia a visit by Thomas to the dentist and a trip to the hospital with Vincent. Vincent was taken to hospital on a Friday, and Bryant did not inform Cynthia that he was in the hospital until late on the following Monday. Vincent was discharged from the hospital on Tuesday. Although it was later explained that Thomas informed his mother that he had been to the dentist, Bryant did admit at the hearing that he had been wrong not to inform Cynthia of the hospital visit.

In reviewing these three issues, we see nothing erroneous in the trial court's inclusion or exclusion of these matters in its findings of fact. A trial court's findings are not subject to reversal, "even if there is substantial and credible evidence on both sides of the issues." *White v. Howard*, 394 S.W.2d 589 (Ky. 1965). A reviewing court may not substitute findings of fact for those of the trial court where they were not clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460 (Ky.1979).

Having reviewed the record and considered the arguments of counsel, we are unable to conclude that the trial court's findings were clearly erroneous or that it abused its discretion in awarding joint custody to Bryant and Cynthia with equal parenting time and no primary residential custodian. We therefore affirm the findings of fact, conclusions of law, and decree of dissolution entered by the Boone Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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