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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002554-ME

MARIO RAMIREZ

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 03-CI-00345

APRIL DAWN BAKER RAMIREZ;  
LOIS FERGUSON

APPELLEES

AND: NO. 2006-CA-000010-ME

APRIL DAWN BAKER; LOIS FERGUSON

CROSS-APPELLANTS

v. CROSS-APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE LARRY MILLER, JUDGE  
ACTION NO. 03-CI-00345

MARIO VARGAS RAMIREZ

CROSS-APPELLEE

OPINION  
AFFIRMING

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BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY,<sup>1</sup> SENIOR JUDGES.

JUDGE, WINE: Mario Ramirez and April Dawn Baker each appeal a final custody and visitation order of the Breathitt Circuit Court granting joint custody of their two children and designating Baker as the residential custodian. Ramirez asserts that the trial court improperly considered his immigration status in its designation of a residential custodian; Baker argues that the trial court gave insufficient consideration to that issue and to other factors which would make an award of joint custody inappropriate. We find no clear error or abuse of discretion in any of the trial court's rulings. Hence, we affirm.

Ramirez and Baker were married on April 23, 2000, and separated on August 28, 2003. Two children were born of the marriage, Nathan Cordale Vargas Ramirez and Brady Luis Vargas Ramirez. Baker filed a petition for dissolution of the marriage on September 17, 2003, seeking, among other things, sole custody of the two children. At the same time, Baker sought and obtained a domestic violence order (DVO) from the Breathitt District Court. That order also granted custody of the children to Baker. Subsequently, however, the trial court granted custody to the maternal grandmother, who in turn returned the children to Ramirez. In his response, Ramirez also sought custody of the children. The trial court entered an order on July 24, 2004,

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<sup>1</sup> Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

dissolving the marriage and reserving the issues of custody and visitation for later adjudication.

The matter was referred for a hearing before the domestic relations commissioner (DRC). Ramirez is a native of Mexico, and Baker alleges that he is in the country illegally. Prior to the DRC's hearing, the trial court directed Ramirez to produce any documentation in his possession showing his immigration status. Ramirez did not produce any documentation, but he admitted that he does not have a social security number or a driver's license. When asked at the DRC hearing, "Are you an illegal alien?" he responded by pleading the Fifth Amendment. The DRC concluded that Ramirez's likely status as an illegal alien was significant to his ability to serve as custodian for the children because of the danger of deportation. Consequently, the DRC recommended that sole custody of the children be granted to Baker. Ramirez filed objections to the DRC's report, arguing that his immigration status was not a relevant factor to determine custody under KRS 403.270(2).

On August 9, 2004, the trial court entered a temporary order granting joint custody of the children, splitting the children between the parents as defined in KRS 403.212(2)(h); designating Baker as the residential custodian of Brady and Ramirez as the residential custodian of Nathan. The court also referred the matter back to the DRC for an additional hearing. Following that hearing, the DRC recommended joint custody, with Baker being designated as residential custodian of both children. However, the trial court did not modify its previous temporary order.

In October 2005, Baker filed motions to reopen and to change temporary custody. At the hearing on the motions, Baker presented evidence that Nathan, the child in Ramirez's custody, had been having disciplinary problems at school and had been referred to counseling. Based on these behavioral problems, the DRC recommended that Baker receive custody of both children. The DRC also stated that he was still concerned about Ramirez's immigration status because "the situation still exists wherein he can be deported and that is troubling."

On December 9, 2005, the trial court entered a final judgment on the custody issues. The court continued the award of joint custody. But based on Nathan's emotional and behavioral issues while in Ramirez's possession, the court designated Baker as the residential custodian of both children. This appeal and cross-appeal followed.

Both Ramirez and Baker argue that the trial court erred in its consideration of Ramirez's immigration status as a factor in determining custody. Ramirez points out that immigration status is not a listed factor under KRS 403.270 and should not have been considered in making the custody determination. Conversely, Baker asserts that the trial court gave insufficient weight to Ramirez's status, and that other factors make the award of joint custody inappropriate. Therefore, Baker contends that the trial court should have awarded her sole custody of both children

As a general rule, the trial court has broad discretion in determining the best interests of children when awarding child custody. *Squires v. Squires*, 854 S.W.2d 765,

769 (Ky. 1993); *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). In reviewing a child custody determination, the appellate 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. *Poe v. Poe*, 711 S.W.2d 849, 852 (Ky.App. 1986).

In addition, a trial court's decision on the type of custody, *i.e.*, sole or joint, should not be disturbed absent an abuse of discretion. *Squires*, 854 S.W.2d at 770; *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion implies arbitrary or capricious action that results in an unreasonable and unfair decision. *Sherfrey v. Sherfrey*, 74 S.W.3d 777, 783 (Ky.App. 2002), *citing Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). More specifically, a trial court's designation of the primary residential custodian is a factual issue that should not be overturned if supported by substantial evidence. *Aton v. Aton*, 911 S.W.2d 612, 615-16 (Ky.App. 1995), *abrogated in part on other issues by Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003). "Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Sherfrey*, 74 S.W.3d at 782.

As a preliminary matter, we note that the court set out the split custody arrangement under the terms of a temporary custody order. Thus, 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 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).

We agree with Ramirez that KRS 403.270(2) does not list immigration status as a factor to be considered in determining custody. However, the statute indicates that the listed factors are illustrative, not exclusive. KRS 403.270(3) also allows the court to consider the conduct of a proposed custodian insofar as it affects his relationship to the child. The DRC's concerns about Ramirez's immigration status do not reflect a blanket bias against illegal immigrants. Rather, the DRC stated that he believed there was a significant risk that Ramirez could be deported, which could affect his ability to serve as residential custodian of the children. Furthermore, the DRC noted that Ramirez does not have a driver's license but there was evidence that he drives, and he does not have a green card, but there was evidence that he sometimes works under a different name. The trial court properly considered this conduct as it reflects on Ramirez's ability to provide a stable home.

Moreover, the trial court did not consider Ramirez's immigration status to be the deciding factor in determining custody. Indeed, the trial court did not adopt either of the DRC's recommended findings and orders. Rather, on both occasions, the court made its own findings of fact and did not mention Ramirez's status as a factor.

Furthermore, the trial court designated Ramirez as the residential custodian of Nathan under the temporary order, and the court modified custody only when Baker presented evidence that Nathan was developing behavioral and emotional problems which Ramirez was not adequately addressing. As this decision was supported by substantial evidence, we cannot find that the trial court clearly erred or abused its discretion by designating Baker as the residential custodian of both children.

Likewise, we cannot find that the trial court abused its discretion by granting joint custody of the children. Although Ramirez's likely immigration status is relevant, it is not a controlling factor in determining custody. Baker focuses heavily on the district court's entry of a DVO against Ramirez at the time of separation. However, there was no evidence that the alleged domestic violence affected the children, nor was there any evidence that Ramirez violated the DVO during the period the parties had split custody of the children.

The DRC found that Ramirez is a loving and fit parent. There was significant evidence that he has been an able caretaker for the children when they were in his custody. And while Nathan developed behavioral problems while in Ramirez's custody, there is no evidence that Ramirez is not fit to assist in parental decision-making for the child. Furthermore, Baker testified at the hearing that she and Ramirez could discuss major decisions in the children's lives. She also stated that she had no problem with allowing Ramirez to have access to medical and school records of both children.

Consequently, the trial court could reasonably conclude that the parties were able to cooperate sufficiently to make practical an award of joint custody.

Finally, Baker claims that there is a risk that Ramirez could take the children to Mexico. But she has never stated a factual basis for this fear. There is no evidence that Ramirez has ever left the country while the parties were married, and Ramirez has never threatened to take the children. At the time of separation, Ramirez took both children to Texas to visit with his sister. However, he returned the children to Baker when ordered by the Breathitt District Court. And contrary to Baker's assertion, Mexico could not become the children's habitual residence if Ramirez improperly takes them during his visitation period. *See Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. App. 1999), noting that under the Hague Convention, the removal or the retention of a child to a different county is to be considered wrongful where it is in breach of rights of sole or joint custody. Therefore, Baker's contention that she would be without a remedy if Ramirez removed the children to Mexico is both speculative and without merit.

Of course, the trial court retains jurisdiction to intervene to resolve any future problems which may arise from this arrangement. And we would urge both parties to set aside their animosity and work together for the good of their children. But under the circumstances, we cannot find that the trial court abused its discretion either by awarding joint custody of the children or by designating Baker as their residential custodian.



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

ALL CONCUR.

BRIEFS FOR APPELLANT/CROSS-  
APPELLEE:

Melissa C. Howard  
Jackson, Kentucky

BRIEF FOR APPELLEE/CROSS-  
APPELLANT, APRIL DAWN BAKER:

Virginia Meagher  
Jackson, Kentucky

NO BRIEF FILED FOR  
APPELLEE/CROSS-APPELLANT, LOIS  
FERGUSON