

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002246-MR

LELA DANIEL (LAYNE)

APPELLANT

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JANIE MCKENZIE-WELLS, JUDGE
ACTION NO. 06-CI-00253

JEFFREY SCOTT DANIEL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

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

KELLER, JUDGE: Lela Daniel Layne (Lela) appeals from the family court's order allocating the parties' debt and property and determining custody of the parties' minor children. On appeal, Lela argues that the court failed to make

¹ Senior Judge John W. 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.

findings of fact, failed to appoint a guardian *ad litem* for the children, abused its discretion when it designated Jeffrey Scott Daniel (Scott)² primary residential custodian, and should have recused, all of which constitute reversible error.

Having reviewed the court's order and the record, we affirm.

FACTS

Lela and Scott were married on July 15, 1995. Two children were born of the marriage, a son (Kash) on June 24, 1997, and a daughter (Julia) on June 8, 2001. During the course of the marriage, the parties separated and reconciled on several occasions. The last reconciliation failed and, on June 20, 2006, Scott filed a petition for dissolution of the parties' marriage which asked the court to divide the parties' property and debt and to award the parties joint custody of the minor children. By agreement, the parties attended a reconciliation conference; however, that attempt to resolve their differences proved to be unsuccessful.

On January 30, 2007, Lela filed a motion seeking permanent custody, child support, maintenance, and the family home. Following a hearing on that motion, the court entered an agreed order setting forth a visitation schedule and requiring Scott to make all mortgage and utility payments on the marital residence. The parties' relationship continued to deteriorate and, in June 2007, Scott filed a motion for custody and child support.

Following a hearing on July 30, 2007, the court entered an order awarding the parties temporary joint custody and denying Lela's motion for

² Throughout the proceedings, the parties have referred to Mr. Daniel as Scott; therefore, we will do so as well.

temporary maintenance. The court also ordered the parties, when in the presence of the children, to refrain from drinking alcoholic beverages and speaking harshly about each other and to limit contact with significant others. In its order, the court found that it was in the best interest of the children to continue attending school in Paintsville, where Scott resided, rather than transferring to Betsy Layne, where Lela resided. Finally, the court recommended that the parties use the grandparents to exchange the children in order to minimize any disagreement and ordered Scott to provide Lela with a copy of the health insurance card for the children.

On September 28, 2007, Lela filed a motion to hold Scott in contempt, arguing that he had not provided a copy of the health insurance card for the children and that he had made degrading remarks, used foul language, and yelled at her when they met to exchange the children. Lela also filed motions asking the court to appoint a guardian *ad litem* for the children and to set a specific Thursday for Scott's timesharing.

On October 29, 2007, Lela filed a motion for change of venue noting that Scott's father is the County Judge/Executive in Johnson County, where the case was being heard. Because of this relationship, Lela believed she might not get a fair hearing.

On November 15, 2007, the court entered an order requiring the parties to refrain from making disparaging remarks, appointing a guardian *ad litem*, and denying the motion for change of venue. We note that Lela, on February 12, 2008, filed a motion asking the court to conduct an *in camera* interview of the

children. In her motion, Lela noted that the parties “decided on [sic] seeking someone from a care facility to” interview the children rather than using a guardian *ad litem*. Lela indicated that, because of scheduling difficulties, that interview could not take place; thus the request for the court to conduct the interview.

On March 31, 2008, the court granted the parties a dissolution of their marriage but retained jurisdiction to decide all other issues. On April 29, 2008, two weeks before the scheduled final hearing, Lela filed an emergency motion for custody and contempt. In her motion Lela stated that Scott had placed a number of her personal items in plastic bags and left the bags on her front porch without previously notifying her. She also alleged that Scott had grabbed their daughter by the chin and neck and “had her cornered against the kitchen table telling her not to talk back to him.” On May 14, 2008, the court stated that it would address Lela’s motion on the last day of the final hearing.

At the final hearing, which the court conducted for approximately five hours on February 19, 2008, for approximately five and a half hours on March 25, 2008, and for approximately six and a half hours on May 15, 2008, the parties testified and presented testimony from relatives, neighbors, and friends. We summarize that testimony below; however, by way of brief summary, we note that Lela and her witnesses testified generally that she was a good, caring mother and that Scott was controlling and verbally abusive but also a caring father. On the other hand, Scott and his witnesses testified that he took the primary role as caregiver for the children and was a good, caring father while Lela was not

involved in the children's lives and, although she loved the children, she was more focused on her well-being than that of the children.

1. Scott's Testimony

Scott works as a sales representative for Glaxo Smith Kline and earns \$80,400 per year plus incentive bonuses. Lela works as a school teacher. After they married, the couple lived in Floyd County then Pikeville, eventually moving to Paintsville, where they built the marital residence. Scott testified that his mother "loaned"³ the couple the money to purchase the lot for the house and his father paid for surveying and site preparation as well as for some of the concrete work.

Scott testified that he purchased all of the furniture for the house, made all of the mortgage payments, and paid all of the utility bills. According to Scott, Lela kept her salary and used it to purchase clothes and some groceries.

In terms of child care, Scott testified that, after the family moved to Paintsville, he always got the children out of bed in the morning, fixed their breakfast, got them dressed, and took them to school. Furthermore, he generally picked the children up from school and prepared the evening meals. Scott also testified that he was active in the children's extra-curricular activities, coaching various sports which Kash plays, and attending all of his games. Scott's parents, who live nearby, see the children nearly every day and occasionally pick the children up from school when Scott cannot do so. According to Scott, Lela never

³ We note that Scott characterized this as a loan; however, it does not appear that there was any promissory note or other documentation memorializing the transaction. Furthermore, it appears from the record that the money has not been repaid and Scott's mother has not sought and probably will not seek repayment.

prepared meals, rarely attended the children's activities, and contributed little, if anything, to running the household. Scott asked the court to award him custody because of his relationship with the children and their ties to the Paintsville community.

On cross-examination, Scott denied arguing with Lela and making disparaging comments about her in front of the children. Furthermore he denied threatening Lela and stated that when she left him in the past, it was to be with her family, not because of his behavior. Scott also denied telling Lela that she could not win because the case was being heard in Johnson County, where his father is county judge/executive.

Finally, we note that, at the end of Lela's proof, she played an audiotape recording of an argument that Scott denied they had. On the recording Scott can be heard making disparaging comments to Lela, calling her psychotic and accusing her of stealing. Although it is not clear if Kash was in the room when those comments were made, he was in the house.

2. Bill Mike Runyon (Runyon)

Runyon is the assistant principal and athletic director at Paintsville High School. Runyon testified that Scott is an assistant coach for the basketball team and Kash is one of the team's ball boys. According to Runyon, Scott is well regarded in the community, puts his children first, and appears to be a loving father. Furthermore, Runyon testified that the children are well-grounded in the community and would have a difficult time if forced to move.

3. Jimmy Daniels (Daniels)

Daniels, a teacher's aid and coach in the Paintsville schools, testified that he has known Scott most of his life. He has observed Scott with the children, although he sees Scott more with Kash than Julia. According to Daniels, Kash is well-grounded in the community.

4. Billy Phelps (Phelps)

Phelps, a funeral director, knows both Scott and Lela and his son is a friend of Kash's. According to Phelps, Scott attends more of Kash's games than Lela does. He could not testify how active either parent was with Julia, but concluded that Scott is a good parent.

5. Jane Ann Daniels (Ms. Daniels)

Ms. Daniels is married to Jimmy Daniels and is a self-employed cosmetic shop owner. She has known both Lela and Scott for a number of years and has observed Scott with the children. Ms. Daniels testified that Scott is at most of Kash's activities, and he generally has Julia with him; however, Lela was not at Kash's games very often.

6. Amy Salyer (Salyer)

Salyer works in the accounting department at Mountain Comprehensive Care and has known both Scott and Lela for four years. Kash and Salyer's son are friends and Salyer has observed Scott at Kash's games. While at the games, Scott has Julia with him and arranges for another parent to watch her

while he coaches. As with other witnesses, Salyer testified that Lela is not present at Kash's games as often as Scott.

7. Paul Deaton (Deaton)

Deaton, a local attorney, knows Scott from living in the neighborhood. He has observed Scott, but not Lela, with the children and opined that Scott is a good father.

8. Rob Miller (Miller)

Miller, a local attorney, testified that he has known Scott and Lela for four or five years because their sons play ball together. According to Miller, Scott has a close bond with both children. When asked if he had anything to add to assist the judge in making her decision, Miller testified that Lela stated, in front of Kash, that Scott and his father bought things for Kash to "get him on their side."

9. Kim Shomo (Shomo)

Shomo lives across the street from the marital home and was a good friend of Lela's when she lived there. Shomo testified that she was concerned about Julia because Lela was often away from home on weekends and Julia appeared "starved for attention." Lela told Shomo that, when she went out of town, she went to "clubs," and Lela showed Shomo photographs of men she had met. Shomo testified that, on at least one occasion, Lela received a phone call from one of those men while visiting with Shomo.

10. Roger Daniel (Daniel)

Daniel is Scott's brother and a Deputy United States Marshall. Daniel testified that he believes Lela is a good mother and that she has never acted inappropriately with the children in his presence. Lela spoke with Daniel several times about the state of her marriage to Scott, but Daniel could not remember what advice he gave her. On one occasion, Lela came to Daniel's house and spent the night because she did not want to stay with Scott.

11. Paige Daniel (Paige)

Paige, who is Scott's mother, testified that Lela was never at home and that Scott acted as the caregiver for the children. According to Paige, Scott always put the children first and Lela was often away from home. On cross-examination, Paige testified that Lela had complained to her about Scott's behavior, and Paige stated that she talked with Scott about his behavior. Paige denied trying to physically assault Lela at a "pre-birthday party" for Kash.

12. Roger Daniel (Roger)

Roger, the county judge/executive and Scott's father, testified that he and Paige spend a good deal of time with the children. According to Roger, Scott attends the majority of the children's extra-curricular activities, but Lela rarely does. Roger expressed concern about Lela getting custody because she seemed more interested in her schedule and activities than in the children's. With regard to the marital home, Roger testified that Paige paid for the lot, and that he paid an

additional \$17,000 to \$18,000 for surveying, site work, drainage, seeding, and curbs.

13. Ann Derossett (Derossett)

Derossett, the assistant principal of Betsy Layne Elementary School, testified that she has worked with Lela for five years and that Lela appears to be a good mother. Additionally, Derossett testified that Lela had confided to her that Scott had been verbally and mentally abusive and that Lela was concerned about the impact Scott's behavior might have on the children. On cross-examination, Derossett testified that she had seen Scott with the children and that he seemed to be attentive.

14. Patricia Layne (Layne)

Layne, who is Lela's mother, testified that she had doubts about Scott and Lela's relationship from the beginning. According to Layne, Lela left Scott on several occasions because of Scott's behavior. She noted one occasion when Lela stated that Scott had pushed her and put his hands around her neck. Because Layne feared for Lela's safety, she encouraged Lela to leave Scott. Layne noted that, while living with Scott, Lela suffered from panic attacks and anxiety. However, Lela had no such symptoms since the couple separated. As to the children, Layne stated that she believes both need counseling and that Kash appeared to be "full of anger." On cross-examination, Layne testified that she did not believe there was anything wrong with Lela spending an occasional "girls' weekend" away from her family.

15. Lisa Hale (Hale)

Hale, Lela's twin sister, testified that Scott was usually not present when she visited Lela. According to Hale, Lela is a good mother. Hale testified that Lela reported various incidents of abuse by Scott. After one such incident, Hale observed bruises on Lela's arms. Hale testified that she encouraged Lela to leave Scott because she feared for Lela's safety.

16. Charlotte Rogers (Rogers)

Rogers, Director of the Family Resource Center at Betsy Layne Elementary School, testified that she has known Lela most of her life. Rogers testified that Lela is a good mother. Lela complained to Rogers about Scott's abusive behavior and Rogers advised Lela to leave the marriage if she felt she was in danger. Rogers noted that Lela had been nervous and tense the last few years of the marriage and that Kash was tense, rough with Julia, and spoke harshly to Lela.

17. Lana Ross (Ross)

Ross, who is Lela's cousin, testified that she and Lela spoke about Lela's marital problems. Ross stated that she believes that Scott has "control issues" and that he did not want to be involved with Lela's family. Ross also testified that Lela is a good mother.

18. Lela Layne

Lela testified that she has taught elementary school for the past nineteen years. She agreed that Scott made the house payments and paid for

utilities. She used her salary to pay for her expenses, for food, and for household decorations, etc.

Lela and Scott separated three times before Scott filed for dissolution. According to Lela, each separation flowed from Scott's abusive behavior, behavior that continued after he filed. The parties went to counseling and attempted to reconcile, but were unsuccessful.

With regard to the children, Lela testified that she did participate in their extra-curricular activities. However, she admitted that she is not as involved with Kash's activities as Scott. Lela testified that, when the family moved to Paintsville, she continued to teach in Betsy Layne, which is approximately a 45-minute drive from Paintsville. Because of Lela's commute, the couple agreed that Scott would be primarily responsible for transporting the children to and from school. However, contrary to Scott's testimony, Lela testified that she did prepare meals and that she got the children's breakfast and clothes ready for them before she left for work.

With regard to her "girls' weekends," Lela testified that she and Scott had agreed to spend time away to "ease" the children into separation. Furthermore, Lela testified that she wanted Scott to see what it would be like to care for the children by himself. Lela denied telling Shomo that she met men at clubs while away and denied that she received telephone calls from any of those men. Furthermore, Lela denied telling Miller that Scott and Roger were trying to buy Kash's loyalty.

Lela testified at length to various incidents of abuse, noting in particular that Scott had shoved her, grabbed her by the neck, and bruised her arms. Lela noted that Scott had spoken to her harshly in front of the children and others on a number of occasions and that Scott had also spoken harshly and abusively to the children.

Finally, Lela testified that she is involved with another man. However, she denied that she is “engaged” or that she has any immediate plans to marry. In the event she would marry this man, she would likely move to Pikeville.

19. Jack Salyer (Jack)

Jack testified by way of deposition that he has known Scott most of his life. He coaches little league with Scott and stated that Scott is attentive to his children. Jack has seen Lela at Kash’s games.

20. Gwen Tackett (Tackett)

Tackett, a dental hygienist, testified by deposition that Lela has brought the children to all of their dental appointments and that Scott has never been with them.

22. Beth Phelps (Beth)

Beth, a part-time speech therapist, testified that Lela and the children love each other and that Scott is a good caretaker. Beth noted that the couple had argued in her presence and that, when arguing, Scott tended to make sarcastic comments to or about Lela.

23. Testimony Regarding the Boat

Because Lela has raised an issue with regard to a fishing boat in Scott's possession and Scott, Lela, and Scott's father, Roger, testified about that issue, we summarize that testimony separately.

Scott testified that, at about the time he and Lela got married, Roger bought him a fishing boat. Roger testified that, after Scott graduated from college Scott wanted Roger to co-sign a loan so that he could purchase a fishing boat. Roger said he would not co-sign a loan but would "lend" the money to Scott to purchase the boat. According to Roger, he told Scott that he could pay back the "loan," but he was not required to do so. Both Scott and Roger testified that, over time, Scott traded that boat for a better boat and that Roger paid any difference between the trade value and the cost of the new boat. Seven or eight of these transactions took place during Scott and Lela's marriage. Each time, Roger "lent" Scott the additional money, with the understanding that Scott could pay it back but that he was not obligated to do so. All of the boats, except the one at issue, were titled in Scott's name.

Near the time Scott filed for dissolution, he obtained the boat at issue. According to Roger, the trade in value of Scott's old boat was \$26,000 and Scott needed an additional \$6,000 to purchase the newest boat. Roger agreed to lend Scott the \$6,000, with the understanding that the boat be titled in Roger's name. Roger testified that he wanted the boat to be in his name because he did not want it to be considered marital property.

Lela testified that Scott spent \$36,000 for the boat, \$30,000 of which she believes came from marital funds. In support of her contention, Lela testified that Scott had given checks to his parents in the amount of \$30,000 at or near the time the boat was purchased.

24. The Family Court's Final Order

Because the sufficiency of the family court's findings in its final order is at issue, we set forth the relevant portions of that order below:

The Court held extensive hearings with regard to this matter and with regard to all issues presented herein and specifically heard the evidence presented on February 19, 2008, March 25, 2008, and May 15, 2008. The Court considered the extensive testimony taken in this matter including that of the Petitioner, JEFFREY SCOTT DANIEL, and the Respondent, LELA LAYNE, along with the following witnesses, BILL MIKE RUNYON, Assistant Principal and Basketball Coach at Paintsville High School; JIMMY DANIELS, Paintsville High School Teachers Aide and Coach; BILLY PHELPS, Funeral Director/Embalmer; JANE ANN DANIELS, Self-employed Cosmetic Store Owner; AMY SALYER, Friend; PAUL DEATON, Attorney; ROBERT MILLER, Attorney; and KIM SHOMO, Neighbor. The Court also considered the testimony presented herein of PAIGE DANIEL, the Petitioner's Mother; MARILYN BARNES, Retired School Teacher from Betsy Lane; TOMMY SPEARS, Retired Minister from Betsy Layne; THELMA SPEARS, Tommy's Wife; R.T. "TUCKER" DANIEL, Petitioner's Father; ANN DEROSSETT, Assistant Principal at Betsy Layne Elementary; PATRICIA LAYNE, Respondent's Mother; LISA HALE, Respondent's Twin Sister; CHARLOTTE ROGERS, Director of Family Resource Center at Betsy Layne Elementary; and LANA LAYNE, Respondent's Cousin. The Court will not reiterate the entire testimony of all of these parties in this matter as it was extensive but all evidence has been considered, including the Court's

various interviews with the children, before making the rulings contained therein.

FINDINGS OF FACT

The parties hereto have two minor children, KASH L. DANIEL, age 11, and JULIA PAIGE DANIEL, age 7. Both children currently attend Paintsville Elementary School in Johnson County, Kentucky. The Petitioner, JEFFREY SCOTT DANIEL, is a Pharmaceutical Sales Representative employed by Glaxo Smith Kline Beecham Corporation. The Respondent, LELA LAYNE, is an Elementary School Teacher employed by the Floyd County Board of Education and teaches at Betsy Layne Elementary in Floyd County, Kentucky. The parties were married on June 15, 1995 and separated in January of 2007. The Court entered a Bifurcated Decree of Dissolution of Marriage on March 27, 2008, reserving the issue of custody of the parties' minor children, as well as distribution of property and allocation of debt.

CONCLUSIONS OF LAW

1. The parties have non-marital property to be restored.
2. The parties have marital property to be distributed.
3. The parties have marital debt to be allocated.
4. The Court herein must determine the fit and proper party to have custody of the minor children herein and determine visitation and child support issues.

ORDER AND JUDGMENT

1. The parties hereto have a marital home at 121 Frank Street, Staffordsville, Kentucky. This home is located in a subdivision referred to as Cross Creek II. The parties presented appraisals with regard to this property. Both appraisals showed a market value of \$340,000.00 with regard to this home. This home also

has a mortgage lien in the approximate amount of \$250,000.00. The marital home is hereby awarded to the Petitioner, JEFFREY SCOTT DANIEL, along with the remaining mortgage thereon. The Respondent, LELA LAYNE, is hereby entitled to 1/2 of the equity in the home, that being approximately \$45,000.00 (1/2 of \$90,000.00 equity). If the Petitioner is not able to pay to the Respondent that amount due her for her equitable interest in this property, then the property shall be sold by the Master Commissioner of this Court and the proceeds shall be divided equally between the parties hereto after all fees and expenses of the sale have been paid. The appliances shall remain within the marital home.

There was testimony with regard to amounts which were loaned to the parties to purchase the lot upon which the marital home sits and for site preparation. The Court finds that this was a gift to both parties as there was no documentation showing that this was a loan that required re-payment by either party upon sale of the home or distribution herein.

2. There was evidence presented to the Court with regard to Bass Boats which were purchased during the marriage. The Court finds that the funds used to purchase these Bass Boats can be traced to a gift from the Petitioner's father and therefore concludes that it is the Petitioner's non-marital property. As the Bass Boat the Petitioner currently owns is in his father's name, no distribution is necessary.

3. With regard to the items of personal property which the parties during the marriage accumulated, the parties indicated that they should be able to agree upon a division of same. The Court does order that the children's bedroom furniture and all accessories therein are to remain with the children. If the parties are unable to agree with regard to the remaining items of personal property, other than the appliances which have heretofore been left in the home, they may petition the Court for a division of those items to which they cannot agree.

4. The parties have indicated that there was a Certificate of Deposit in both parties' names, which was purchased during the marriage. The amount of this Certificate shall be equally divided between the parties hereto, as well as any non-business, joint bank accounts that the parties had at the time of the separation. The parties are awarded any other bank accounts in their respective names to the owner thereof.

5. The parties have also testified that they have two vehicles which are marital property, that being a 1997 Tahoe and a 1999 Explorer. The 1997 Tahoe is hereby awarded to the Petitioner along with any remaining debt thereon. The 1999 Explorer is hereby awarded to the Respondent along with any remaining debt thereon.

6. The parties herein have maintained separate credit cards, and the Court herein allocates liability for payment of these credit cards to the owner of same and that party shall indemnify and hold the other party harmless from payment thereon. If any credit cards exist to which both the Petitioner and the Respondent's name are listed on the card, those credit cards shall be split 50/50 between the parties hereto with regard to all purchases made during the marriage and prior to the separation of the parties. Any amounts charged to a credit card which is in both parties' name after the separation of the parties shall be the responsibility of the party incurring same.

7. The parties testified with regard to their various retirement accounts. The Petitioner testified that he has a GSK Retirement Savings Account and an IRA Account. The Respondent testified that she has a Teachers' Retirement Account and a Deferred Compensation Account. Under Kentucky Law, the Court is not to consider KTRS pension plans in the division of marital property. However, the law requires the Court to offset the Retirement Savings Account and IRA of the Petitioner to the extent that the Respondent's Retirement Accounts are not considered. Therefore, the Respondent will receive 1/2 of any remaining amount in the

Petitioner's Retirement Savings Account and IRA Account that is not directly offset by the amounts in her own Teachers' Retirement and Deferred Compensation Account as of the date of Dissolution of Marriage.

8. The Court now looks at the main issue addressed by the parties during the extensive hearings held in this matter, that being custody. This Court finds that it has jurisdiction under KRS 403.822 to make a custody determination with regard to the parties' minor children and the Court further finds that this Court within the State of Kentucky has jurisdiction over the subject matter and the parties to this action with regard to same. Under KRS 403.270, each case must be given individual consideration and the best interest of the children involved must be considered with no preference for Joint or Sole Custody. Further, Joint Custody does not require equal time sharing, and one of the parties may be designated by the Court as the primary residential custodian. The factors to be considered in determining the best interest of the children under KRS 403.270, include the wishes of the parents, the wishes of the children, the interaction and inter-relationship of the children with their parents, siblings and any other persons who may significantly affect the children's best interest, the children's adjustment to their home, school and community, the mental and physical health of all individuals involved, and information, records and evidence of domestic violence if the domestic violence affected the child and the child's relationship to his/her parents. The law prefers to keep siblings together.

The decision with regard to custody is a difficult one for the Court. It is obvious to the Court that both parties love these children very much and that both parties wish to be the primary custodian of the children. However, the Court must look toward the stability of these children during this difficult time in their lives. Applying all the factors above and interviewing the children and taking into account their preferences, as well as their needs, the Court herein awards Joint Custody of the parties' minor children to the Petitioner and the Respondent, with the Petitioner, JEFFREY SCOTT

DANIEL, being designated as the primary residential custodian. This will insure that the children reside at the marital home in Painstville, Johnson County, Kentucky and continue to attend the Paintsville City Schools in which they are currently enrolled. The Respondent herein testified that if she received custody of the children that she would be moving from her current residence in Prestonsburg, Floyd County, Kentucky to Pikeville, Pike County, Kentucky and that the children would be enrolled in school there. The Court does not find that a change in the children's home, school and community is in their best interest at this time.

The Court was also presented with an Emergency Motion for Custody filed on behalf of the Respondent, LELA LAYNE, with regard to an alleged domestic violence incident between the Petitioner and the minor child, Julia. After interviewing the child, the Court determined that a domestic violence incident did not occur. However, the parties herein are both ADMONISHED to work with each other for the best interest of these children and to refrain from any acts or threats of domestic violence or abuse against each other. The preponderance of the evidence herein showed two very loving parents who cared for and nurtured both of their children in a much better way after their separation and when living in separate residences than when living together.

9. The Court awards the Respondent, LELA LAYNE, a minimum of Standard Visitation under the Guidelines of the 24th Judicial Circuit. The Court also further awards the Respondent one extra weekend per month visitation with the minor children. If the parties cannot agree upon this weekend, then the Court will herein decide which weekend this shall be. If the parties are unable to agree upon an exchange point for this visitation, either party may petition the Court to make a determination with regard to same.

10. Child Support is hereby assessed in accordance with the Child Support Guidelines. If the parties are unable to agree on this amount, then they may

submit separate child support worksheets to the Court for a determination of same.

11. Neither party has requested maintenance herein.

12. This is a final and appealable order and there is no just cause for delay of its entry.

STANDARD OF REVIEW

There are different standards of review for the issues raised by Lela.

We will set forth the appropriate standards as necessary when analyzing each issue.

ANALYSIS

The primary issues raised by Lela revolve around the sufficiency of the family court's findings of fact and its decision to name Scott as the primary residential custodian of the children. Secondary issues revolve around the court's failure to appoint a guardian *ad litem*, its failure to make a record of its interview with the children, its failure to disclose the results of its interviews with the children, and its refusal to recuse. We address the secondary issues first.

1. Failure to Appoint a Guardian *Ad Litem*

Lela argues that the family court erred when it failed to appoint a guardian *ad litem*. We note that Lela filed a motion seeking appointment of a guardian *ad litem*, which the court granted. However, before a guardian was appointed, Lela advised the court that the parties had agreed to have the children interviewed by "someone from a care facility." For reasons that are unclear from the record, that interview could not be scheduled; therefore, Lela asked the court to

interview the children. Because Lela asked the court to interview the children in lieu of appointment of a guardian *ad litem*, she waived this issue and we will not further address it.

2. Failure to Make a Record of or to Disclose the Results of the Interviews

KRS 403.270(2) sets forth the factors a court must consider when making a determination regarding custody. One of those factors is the wishes of the child as to his or her custodian. In order to determine a child's wishes, the court may "interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record of the case." KRS 403.290(1).

Lela correctly notes that the record is devoid of either a recording of the interviews the court conducted with the children or any report of those interviews. Scott argues that, because neither party specifically asked that a record be made before the interviews, Lela waived her argument. The language in KRS 403.290(1) is mandatory and, absent a waiver by the parties, the court is required to make such a record. However, in order to preserve this issue for our review, a party is required to first bring it to the family court's attention so that the family court can remedy the error. *See Kaplon v. Chase*, 690 S.W.2d 761, 763 (Ky. App. 1985). Lela did not bring this to the attention of the family court at the time of the hearing or at any point thereafter.

Lela argues that a party should not be required to bring to the attention of the family court its failure to follow a statutorily mandated duty. In support of her argument, Lela cites to *Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004).

However, *Couch* can be distinguished because, in *Couch* one of the parties asked the court to unseal the record of interviews with the children, a request the court refused. No such request was made in this case.

Furthermore, the family courts are not perfect and sometimes overlook their duties. Under Kentucky Rules of Civil Procedure (CR) 52.02, 52.03, and 52.04 a party, who believes that a family court has not complied with its statutory duties, may and should ask the court to do so. The purpose of these rules is to permit the family court to correct any errors before bringing matters to the Court of Appeals, if for no other reason than to forward judicial economy.

In addition to bringing any alleged errors to the attention of the family court, a party to an appeal is required to set forth those alleged errors in her prehearing statement. CR 76.03. If a party does not set forth an issue in her prehearing statement, that issue is not properly before this Court. Lela did not list the family court's failure to make a record of its interviews with the children in either her initial prehearing statement or her amended prehearing statement. Because Lela failed to raise the issue before the family court or to list it in her prehearing statement, we are precluded from addressing it.

Although we cannot consider this issue, we note that Lela asks this Court to reverse the family court's designation of Scott as primary residential

custodian because the family court failed to make the mandated record. Even if we considered the issue, we could not grant the relief Lela seeks but could only remand the matter to the family court to make the necessary record. Therefore, while Lela might “win” the battle, she would no doubt still lose the war.

Finally on this issue, we note that Lela argued in her brief that “[t]here is nothing in the trial court’s opinion that indicated that the children’s wishes were considered[.]” That argument is misleading at best. The court did not set forth in any detail what the children said during their interviews. However, the court specifically stated that it interviewed the children and took “into account their preferences, as well as their needs[.]”

3. Failure to Recuse

Lela argues that, based on Canon 2 of the Kentucky Code of Judicial Conduct (KCJC), the family court judge should have *sua sponte* recused. Scott argues that Lela moved for a change of venue but did not ask the judge to recuse. Initially we note that Lela did file several motions seeking a change of venue, which the trial court denied. During an in-chambers discussion prior to presentation of evidence, Lela moved the judge to recuse. That motion was also denied. Therefore, Scott’s argument is unfounded.

As to Lela’s argument, we note that paragraph A of Canon 2 of the KCJC states that a judge “shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Rules of the Supreme Court (SCR) 4.300. Paragraph D of the Canon states that

[a] judge shall not allow family, social, political or other relationships to impair the judge's objectivity. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

SCR 4.300.

Lela faults the judge for not recusing because Scott's father is the Judge/Executive of Johnson County. However, Lela has not pointed to any evidence this relationship had any impact on the court's decision. In fact, Lela has not provided any evidence that, other than the geographical relationship, the judge has or had any social, political, or other relationship to Scott's father. Nor has she provided any evidence that there was any appearance of impropriety anywhere but in her own mind.

Lela also argues that the judge should have recused because two other witnesses were local attorneys who appeared before her, one witness was the daughter of a former circuit court judge, and one witness was "a local basketball hero." There is no evidence that either attorney practiced before the judge or that the judge had any type of social or political relationship with the attorneys or the other witnesses. Furthermore, as with Scott's father, there is no evidence that there was any appearance of impropriety anywhere but in Lela's mind.

For the foregoing reasons, we discern no error in the judge's refusal to recuse.

4. Sufficiency of Findings

Lela questions the sufficiency of the court's findings with regard to custody of the children and allocation of property and debt. We address each separately below.

a. Disposition of Property and Debt

Lela argues that the family court erred when it failed to grant her any marital interest in the fishing boat, when it found her solely responsible for credit card debt in her name, and when it failed to make findings of fact about and failed to distribute \$25,000 as reflected by a "statement sent to Scott at his parents address."

As to the fishing boat, Lela argues that the court should have deemed it marital property because Scott could not produce any documentary evidence that his father lent him the money to purchase the boat. Lela's argument is flawed for two reasons. First, the family court did not find that the boat transactions were loans. It found that those transactions were gifts. A gift is "a voluntary and gratuitous giving of something by one without compensation to another who takes it without valuable consideration." *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977). Although Scott and Roger testified that Scott borrowed the money for the first and subsequent fishing boats, Roger testified that he had no expectation of being repaid. Furthermore, there was no evidence that Roger received any consideration in exchange for financing the purchase of the boats. Therefore, the family court's finding that the boats were gifts is supported by the record.

Second, although it is presumed that all property acquired during the course of a marriage is marital, property acquired by gift or in exchange for property acquired prior to marriage is deemed non-marital. *See Terwilliger v Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002), and KRS 403.190(2)(a) and (b). Scott obtained the original fishing boat by gift prior to the marriage, thus that boat was non-marital property. All other boats were purchased with money from the sale/exchange of the original and/or subsequent boats subsidized with money given to Scott by Roger. Therefore, the evidence supports a finding that the boat is non-marital property because it was acquired in exchange for non-marital property with the addition of monetary gifts.

Next, Lela argues that the court erred by requiring her to pay all the credit card debt in her name. We disagree. Initially, we note that Lela's citation to KRS 403.190 to support her argument that the credit card debt should have been equitably divided is misplaced. KRS 403.190 deals with the division of marital property, not marital debt. Unlike marital property, there is no presumption that debt incurred during marriage is marital debt. Therefore, the party claiming that debt is marital, has the burden of proof. *See Bodie v. Bodie*, 590 S.W.2d 895, 896 (Ky. App. 1979). Although Lela testified that she purchased clothing and other items for the children with her credit card, Scott testified that he made all such purchases. Therefore, the court was free to determine that Lela's credit card debt is her responsibility.

Lela also appears to be arguing that the court misconstrued the evidence regarding credit card debt. In support of this apparent argument, Lela states that the court “required Lela to pay all credit cards in her name and for joint credit cards to be paid equally. The only problem with this statement is that there was no evidence present [sic] about any credit cards or any credit cards that were in the parties’ joint names.” This misconstrues both the evidence and what the family court found. There was some, albeit minimal, testimony regarding credit card debt. However, the parties filed mandatory case disclosures which contained credit card information. Therefore, there was evidence presented about credit card debt. Furthermore, the parties focused their testimony and witnesses primarily on issues related to child custody, to the exclusion of issues related to debt. Because of the dearth of evidence related to credit card debt, we discern no error in the court’s prophylactic finding that any joint credit card debt should be divided between the parties.

As to the “\$25,000,” Lela again misconstrues the record and the trial court’s findings. In her brief, Lela states that “Scott had \$25,187.67 in his name on August 18, 2006, approximately four (4) months prior to separation” and that “[t]here was no accounting for this money.” Lela then implies that Scott was “trying to hide this money from” her. In his mandatory case disclosure, Scott identified a certificate of deposit in the amount of \$25,187.67 and conceded that it was marital property. The court found that all non-business joint bank accounts and a jointly held certificate of deposit were to be divided evenly between the

parties. This finding by the court includes the \$25,187.67 certificate of deposit. Therefore, the court did account for the certificate of deposit and we discern no error.

b. Designation of Primary Residential Custodian

Lela argues that the court did not make specific findings of fact regarding custody thus making it impossible for us to effectively review the court's order. Again, we disagree. In doing so, we note that the court's opinion is sparse, at best, in the section designated FINDINGS OF FACT. In that section, the court sets forth basic jurisdictional facts and a brief summary of the procedural history of the case. The court does not summarize, in any detail, the testimony and documentary evidence it reviewed.

However, in its CONCLUSIONS OF LAW the court makes findings of fact that support its ultimate judgment. For example, the court states that “[i]t is obvious . . . that both parties love these children very much and that both parties wish to be the primary custodian of the children.” Furthermore, the court states that designating Scott as primary residential custodian will

insure the children reside at the marital home in Paintsville, Johnson County, Kentucky, and continue to attend the Paintsville City Schools in which they are currently enrolled. The Respondent herein testified that if she received custody of the children that she would be moving from her current residence in Prestonsburg . . . to Pikeville . . . and that the children would be enrolled in school there. The Court does not find that a change in the children's home, school and community is in their best interest at this time.

The court stated that it had interviewed Julia regarding alleged domestic violence and “determined that a domestic violence incident did not occur.” Finally, the court stated that “[t]he preponderance of the evidence herein showed two very loving parents who cared for and nurtured both of their children in a much better way after their separation and when living in separate residences than when living together.” All of the preceding, although contained in the portion of the order designated CONCLUSIONS OF LAW are findings of fact. While we might prefer for the court to organize its final orders differently, we cannot say that the order is so deficient as to prevent meaningful appellate review.

5. Designation of Scott as Primary Residential Custodian

The standard of review in child custody cases is whether the family court’s factual findings are clearly erroneous. *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). “A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person.” *Id.* at 219.

Lela argues that the family court did not adequately consider the factors set forth in KRS 403.270 when it designated Scott as primary residential custodian. As noted above, while it might have been better if the family court had set forth a more lengthy summary of the evidence presented, the court’s findings of fact were sufficient. The court listed the KRS 403.270 factors and noted that it had considered them. In designating Scott as the primary residential custodian, the court determined that keeping the children in the marital home, their community,

and their current school system was in their best interest. That finding by the court is supported by ample evidence.

Lela argues that the court essentially ignored the testimony regarding domestic violence that she put forth. Again, while the court did not summarize this testimony or directly address it, the court did indicate that it had considered it. We have reviewed the record and there is evidence on both sides of this issue.

Although Lela would have had the court make a different choice with regard to the children's living arrangement, we cannot say that the evidence in her favor was so overwhelming as to compel it to do so. Therefore, we hold that the court did not abuse its discretion by designating Scott as primary residential custodian.

Finally, we agree with the court's admonishments to the parties on the record and in its order to put aside their differences and work for the best interest of their children.

CONCLUSION

For the reasons set forth above, we affirm the family court

ALL CONCUR.

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