

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001431-MR

CHRISTOPHER BURTON

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 08-CI-00159

DIANE BURTON

APPELLEE

OPINION  
AFFIRMING IN PART  
REVERSING IN PART  
AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,<sup>1</sup> SENIOR JUDGE.

TAYLOR, CHIEF JUDGE: Christopher Burton brings this appeal from Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage (decree) entered in the Adair Circuit Court on July 1, 2009, dissolving the parties' marriage,

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

awarding custody, establishing timesharing/visitation and dividing certain real property. We affirm in part, reverse in part, and remand.

Christopher and Diane Burton were married September 28, 1996.

Three children were born of the parties' marriage – a son on November 4, 2000, and twin daughters on April 21, 2006. The parties were divorced by decree of dissolution of marriage entered in the Adair Circuit Court on July 1, 2009.

Pursuant to the decree, the circuit court awarded the parties joint custody of their three children. Diane was designated primary residential parent, and Christopher was awarded timesharing/visitation. Specifically, Christopher was granted timesharing every other weekend and every Tuesday or Wednesday night until 8:00 p.m. Christopher was also ordered to pay child support in the amount of \$1,157.40 per month and to provide health insurance for the children. The court further ordered that Diane and the children would remain in the parties' marital residence and, in particular:

6. [Diane] and the minor children should have the use of said home until it is sold as provided immediately hereinbelow;

7. Each of the parties should commence making one-half the mortgage payments on said property to South Central Bank in Glasgow, Kentucky commencing with the April 2009 payment. Said monthly mortgage payments shall be made by the parties hereto in equal amounts to said mortgagee, one-half by [Diane] and one-half by [Christopher] until the twin daughters attain their majority or [Diane] co-habits with a male individual, remarries, dies or ceases to use said house as her residence, whichever first occurs, at such time, said residence shall be sold in such a manner as the parties agree or as the Court orders upon application; . . .

.....

9. The Deed to the subject property should be redrawn and recorded to reflect that the parties are the title holders of said real estate to be held by them as tenants in common[.]

The court determined that Christopher's 401K and any stock he held in his employer's company, Amazon.com, be divided equally between the parties. This appeal follows.

Christopher contends the circuit court erred by not awarding a more equal timesharing arrangement with the children. Christopher's entire argument on the timesharing/visitation issue is as follows:

[T]he trial court did grant [Christopher] joint custody and somewhat reasonable visitation with his children, [Christopher's] proposed time sharing custody arrangement would have allowed both parties to more equally share the financial burdens associated with their children's needs, and would have allowed all parties more available income to devote toward their children.

Christopher's Brief at 9.

It appears that Christopher is more concerned with sharing the "financial burden" associated with the children than he is with spending additional time with the children. Nevertheless, we address Christopher's assertion that the circuit court should have granted a more equal timesharing arrangement.

Our review of the circuit court's award of custody is limited to whether the court's findings of fact are clearly erroneous or whether the court abused its discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974); *Frances v.*

*Frances*, 266 S.W.3d 754 (Ky. 2008). A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003). Our review shall proceed accordingly.

We begin by noting the Supreme Court opinion in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). In *Pennington*, the Court pointed out that when parents are granted joint custody with one parent designated the primary residential parent and the other parent exercising timesharing/visitation, the arrangement should be referred to as “shared custody.” *Id.* With shared joint custody, timesharing “frequently mirrors a typical sole custody pattern where the child may live with one parent during the week and reside with the other on alternate weekends.” *Id.* at 764-765.

Under the precepts of *Pennington*, we think the custody arrangement between Christopher and Diane constituted a “shared custody” arrangement. *See id.* Moreover, the record reveals that the circuit court adopted the timesharing/visitation arrangement previously agreed to by the parties during the pendency of the action. The parties had been operating under this agreement for several months. Christopher’s motivation for seeking more equal timesharing appears to be an attempt to reduce his child support obligation. In fact, Christopher failed to set forth a cogent argument as to how the circuit court erred in its award of shared custody to the parties. Based upon our review of the record, we do not believe the circuit court abused its discretion by awarding joint shared custody with Diane designated primary residential parent and awarding

Christopher reasonable visitation. As such, we view Christopher's contention as being without merit.

Christopher next contends the circuit court erred in its award of child support and division of marital property. Specifically, Christopher asserts that the circuit court erred by including proceeds from the sale of Christopher's restricted stock units (RSU) in his employer's company, Amazon.com, as income for purposes of child support and by simultaneously awarding one-half of the value of retained RSU to Diane as marital property. Christopher believes that the circuit court should have either considered the proceeds from the sale of RSU as income or as a marital asset but not as both.

In the case at hand, the facts reveal that twice every year Christopher was granted RSU from his employer, Amazon.com. Apparently, Christopher had the option of selling RSU upon each share's maturity. According to Christopher's testimony, he routinely chose to sell the stock upon maturity, and such cash amounts were reported on Christopher's past W-2 tax forms as income. Thus, in calculating Christopher's income for child support purposes, the circuit court considered Christopher's total income, which included the cash proceeds from the sale of RSU.

On the other hand, Christopher also retained RSU, which remained in an account awaiting maturity. These RSU had not been sold and were not included as income for child support purposes. However, the retained RSU was considered by the circuit court as a marital asset and equally divided between the parties.

Thus, there was no “double dipping” as alleged by Christopher. Rather, the circuit court properly classified the proceeds from the sale of RSU as income and RSU retained by Christopher as a marital asset. As such, we reject Christopher’s contention that the circuit court erred in its calculation of child support and division of marital property.

Christopher finally contends the circuit court erred by allowing Diane and the children to remain in the marital residence until the twins reached the age of majority and by requiring Christopher to pay one-half of the mortgage.

Christopher alleges that the marital residence should be sold and the proceeds divided between the parties.

The circuit court’s division of marital assets is reviewed for abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Kentucky Revised Statutes (KRS) 403.190(1)(d) specifically provides the circuit court with authority to permit the spouse with custody of the children to remain in the marital resident for a reasonable period. *Spratling v. Spratling*, 720 S.W.2d 936 (Ky. App. 1986).

In this case, the circuit court ruled that Diane and the children may remain in the marital residence until the twins reach the age of majority or Diane remarries, dies, or ceases to utilize said residence. The twins are currently four years old, which means that Christopher would be required to pay one-half of the mortgage for the next fourteen years. The total monthly mortgage payment was \$955 and one-half thereof equals \$477.50. Over fourteen years, Christopher would

pay over \$80,000 in mortgage payments. Considering this large sum of money and Christopher's particular financial condition, we are compelled to conclude that the circuit court erred by requiring Christopher to pay one-half of the mortgage for fourteen years. *See Spratling*, 720 S.W.2d 936. We, thus, remand for the circuit court to reconsider the proper distribution of the marital residence under KRS 403.190.

For the foregoing reasons, the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage of the Adair Circuit Court are affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeremy A. Wood  
Danny Butler  
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BRIEF FOR APPELLEE:

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