

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002268-ME

THOMAS A. SORRELL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-00577

MICHELLE SORRELL

APPELLEE

OPINION AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

WINE, JUDGE: Thomas Sorrell appeals from child custody and support orders issued by the Boyd Circuit Court as part of the dissolution of his marriage to Michelle Sorrell. He argues that the trial court abused its discretion by awarding joint custody of the children under a shared parenting arrangement. He also argues that the trial court abused its discretion by deviating from the child support

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

guidelines and by ordering that Michelle be designated as payee for their youngest child's Social Security Disability ("SSD") dependent benefits. We find no clear error or abuse of discretion in the trial court's award of joint custody or its designation of Michelle as payee for the child's benefits. However, we conclude that the trial court's findings were not sufficient to explain its allocation of children's expenses between the parents. Hence, we affirm in part, reverse in part, and remand for additional findings of fact and conclusions of law.

Thomas and Michelle Sorrell were married in 1993 and they separated on April 24, 2008. Three children were born of the marriage. On April 29, 2008, Michelle filed a petition for dissolution of the marriage. In her motion for temporary relief filed with the petition, Michelle requested that she be granted primary physical and residential custody of the children, exclusive use and possession of the marital residence, and that the social security disability payments received on behalf of the children due to Thomas's disability be granted to her in lieu of child support. Thomas opposed the motion and requested primary residential and physical custody of the children and possession of the marital residence. He also requested child support pursuant to the guidelines.

The trial court referred the motions to the Domestic Relations Commissioner ("DRC"). Following various hearings and motions, the DRC issued four reports, on May 14, 2008, February 23, 2009, March 10, 2009, and July 30, 2009, respectively. In her first report entered on May 14, 2008, the DRC granted Michelle temporary custody of the children and exclusive use of the

marital residence. In pertinent part, the DRC recommended that the parties have joint custody of the children with Michelle designated as the residential custodian. Subsequently, on January 15, 2009, the trial court entered an agreed order granting the parties joint custody of the children under a custody and timesharing agreement which the parties had previously entered.

In her second report issued on February 23, 2009, the DRC recommended that Thomas be ordered to surrender all keys to the marital residence. The DRC took all remaining issues under advisement and indicated her intent to re-interview the children due to the significant amount of time which had elapsed since the children were last interviewed. Following that interview, the DRC entered a third report and recommendation on March 10, 2009. In pertinent part, the DRC recommended that the parties have joint custody of the children “with a true shared parenting arrangement.” The DRC did not explicitly designate a primary residential parent, but recommended that the court continue the prior arrangement under which Michelle’s residence would be designated as the children’s “home base” for purposes of school designation. The DRC further recommended that Thomas should remain the payee for the children’s SSD benefits, that Michelle’s request for maintenance be denied, and that the parties should be responsible for their own attorney fees and be equally responsible for payment of the Commissioner’s fee.

Thomas filed exceptions to the third report, disputing the DRC’s findings that he had waived a hearing on custody and requesting an evidentiary

hearing on the issue. The trial court referred the matter back to the DRC for an evidentiary hearing, which was held on May 27, 2009. Following that hearing, the DRC issued her fourth report on July 30, 2009, which again recommended joint custody under the same terms. The DRC further recommended that Michelle give Thomas the first option of caring for the children while she is working. Finally, the DRC recommended that Thomas remain the payee for the two older children's SSD benefits, but that Michelle be designated as the payee for the parties' youngest child.

Both parties filed exceptions to the DRC's final report. The trial court entered an order August 18, 2009, granting some of Michelle's exceptions, but did not address any of Thomas's exceptions. In a subsequent order entered on August 29, 2009, the trial court denied all of the remaining exceptions. Thereafter, on September 3, 2009, the trial court entered a final decree of dissolution of the marriage which incorporated the DRC's July 30 report. Thomas now appeals.

Thomas first argues that the trial court abused its discretion by granting the parties joint custody under a shared parenting arrangement. He argues that the trial court failed to consider evidence that he was the primary caretaker for the children during the marriage. Thomas also contends that the trial court failed to consider the children's stated desire to live with him. Consequently, Thomas maintains that the weight of the evidence would support granting him sole custody, or in the alternative, joint custody with him designated as the primary residential parent.

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 (Ky. App. 1986). The court's “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Kentucky Rule(s) of Civil Procedure (“CR”) 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” *Id.* “‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Id.* After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

We find no clear error or abuse of discretion in this case. The provisions of Kentucky Revised Statute(s) (“KRS”) 403.270(5) authorize the trial court to grant joint custody if and when that designation is in the child's best interest. Furthermore, KRS 403.270(2) requires a trial court to determine custody in accordance with the child's best interest, giving equal consideration to each parent. The court must consider all relevant factors, including:

- (a) The wishes of the child's parent or parents ... 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; [and]
- (e) The mental and physical health of all individuals involved[.]

In this case, the DRC made extensive findings concerning the relevant factors. With respect to the first factor, Thomas maintains that the children have had more conflicts with Michelle and have expressed a desire to live with him. But while the children's wishes are a relevant factor to consider under KRS 403.270(2)(b), they are not a controlling factor in determining their best interests. The DRC interviewed the parties' two older children on two occasions. Although the DRC did not disclose the content of those interviews, the DRC indicated that both parents have created an atmosphere where the children feel that they must choose sides. Despite this, the DRC concluded that the children want to spend time with both parents and will benefit from doing so. While the evidence was conflicting, the trial court's findings on this matter were not clearly erroneous.

Thomas also disputes the DRC's findings concerning the interaction and relationship between the children and their respective parents. The DRC noted that both parties have taken an active role in raising the children. Thomas has been disabled with a back and leg injury since January 2004. After becoming disabled, Thomas remained at home with the children and Michelle began working full time. However, Michelle testified that she cared for the children before Thomas became disabled and she continued to do so after Thomas became disabled. She testified that she attended parent-teacher conferences, did the household chores, got the children ready for school and has taken care of other child-care tasks.

Both Thomas and Michelle dispute the extent of the other's involvement with the children. Thomas also asserts that Michelle has had a volatile relationship with their oldest daughter. The DRC did not disregard this evidence, but concluded:

It is very evident that the parties have different parenting styles, one stricter and the other more laid back. The children are very aware of these differences and react accordingly. In addition, [Michelle] works a substantial amount of time while [Thomas] is disabled, receiving Social Security Disability benefits, so he is at home more.

The DRC acknowledged the conflict between the parties and how it affected the children, but declined to lay the blame for that conflict entirely on either parent. Instead, the DRC found that the children need both of their parents to be involved in their lives. The DRC directed the parties to continue counseling for the children and attempted to fashion a time-sharing schedule which allowed both parents the maximum amount of time with the children. The DRC also encouraged the parties to work together for the best interests of the children. These conclusions were supported by substantial evidence and are entirely in accord with the letter and intent of KRS 403.270. Therefore, the trial court did not abuse its discretion by adopting the DRC's findings and conclusions concerning custody.

Thomas also argues that the trial court abused its discretion in setting child support. Since the parties have a true shared-parenting arrangement, the DRC concluded that the child support guidelines of KRS 403.211 were not appropriate in this situation. Rather, the DRC concluded that Thomas and

Michelle should share “somewhat equally” in the cost of parenting the children. Consequently, the DRC recommended that neither party be ordered to pay child support. However, the DRC also recommended that Michelle be designated as payee for the SSD dependent benefits received on behalf of the parties’ youngest child.

Thomas challenges both aspects of the trial court’s order. As noted above, Thomas has been disabled since 2004. He receives SSD benefits in the amount of \$1,700.00 per month and \$320 a month as payee for SSD dependent benefits for each of his children. He also receives \$1,600.00 per month in pension benefits from his union. Thus, his total income is about \$3,300.00 a month, plus the \$960.00 which he receives on behalf of the children. In contrast, Michelle earns approximately \$85,000 per year, or about \$7,080.00 per month. She also pays for the children’s medical and dental insurance at a cost of \$56.08 per month.

Thomas essentially concedes that the shared parenting arrangement warranted a deviation from the child support guidelines. But he argues that the trial court failed to consider Michelle’s substantially greater income in setting the parties’ respective obligations. He also argues that the trial court compounded this error by directing that Michelle be designated as payee for the youngest child’s SSD dependent benefits.

We find no error with respect to Michelle’s designation as payee for the youngest child’s SSD dependent benefits. KRS 403.211(15) specifies that “[a] payment of money received by a child as a result of a parental disability shall be

credited against the child support obligation of the parent. A payment shall not be counted as income to either parent when calculating a child support obligation.” By its own terms, the statute would only require that Thomas receive a credit for the SSD benefits received on the children’s behalf against his child support obligation. *See also Artrip v. Noe*, 311 S.W.3d 229, 232-33 (Ky. 2010).

In this case, the trial court did not order Thomas to pay child support, but merely directed that Michelle be designated as payee for the youngest child’s SSD benefits. Further, since disability benefits received by the children cannot be considered as income to either parent, we cannot find that a change in the payee designation effectively operates as child support under these circumstances. Therefore, the trial court’s order does not directly implicate the provisions of KRS 403.211(15).

Furthermore, we agree that the trial court properly considered the shared parenting arrangement as a justification for deviating from the child support guidelines. KRS 403.211(3)(g). *See also Downey v. Rogers*, 847 S.W.2d 63, 65 (Ky. App. 1993). However, the DRC’s findings, as adopted by the trial court, do not set out how it arrived at its method of setting support in this case. The trial court found that the parties should equally share both time with and expenses for the children. But the court did not rely on the guidelines to determine the children’s expenses or make any independent findings concerning the children’s expenses. Moreover, the court did not make any findings concerning which party would incur these expenses under the shared parenting arrangement. KRS

403.211(2) clearly requires the court to make “a written finding or specific finding on the record” justifying any such deviation. *See Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 401 (Ky. App. 2000), citing *Bradley v. Bradley*, 473 S.W.2d 117, 118 (Ky. 1971). Such findings must include both the reason for deviating from the guidelines and the criteria used to determine the amount of the adjustment from the guidelines. KRS 403.211(3).

Michelle responds that Thomas failed to request more specific findings on this issue, as required by CR 52.04. But in his exceptions filed on August 10, 2009, Thomas asked the court to apply the child support guidelines at least to determine the allocation of expenses between the parties. We conclude that this was sufficient to preserve the issue for review. Furthermore, considering the significant disparity between the parties’ income and resources, we have no basis to determine whether the trial court equally divided the expenses between the parties or whether this division was equitable. And if the court determines that some child support is appropriate, the provisions of KRS 403.211(15) may be applicable. Under these circumstances, we must remand this matter for additional findings.

Accordingly, the judgment of the Boyd Circuit Court is affirmed in part, reversed in part, and remanded for additional findings concerning the allocation of the children’s expenses between the parties and specific conclusions as to child support.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Kevin D. Samples
Tracy D. Frye
Michael A. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Gordon J. Dill
Ashland, Kentucky