

RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2196-MR

MICHAEL LITTLE

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 95-CI-000285

JEAN ANN LITTLE

APPELLEE

OPINION

AFFIRMING

*** *** *** ***

BEFORE: DYCHE, GUIDUGLI, and MILLER, Judges.

MILLER, JUDGE: Michael Little brings this appeal from a July 12, 1996 order of the Boyd Circuit Court. We affirm.

On March 29, 1995, appellant filed a petition for dissolution of marriage in the Boyd Circuit Court. On April 7, 1995, the court granted appellee, Jean Ann Little, temporary custody of the parties' minor children, Kevin and Chelsea. A decree of dissolution of marriage was entered March 28, 1996; however, child custody and support were reserved for later adjudication. A hearing upon these and other issues was held before the Domestic Relations Commissioner (Commissioner), who,

in turn, tendered his report on June 6, 1996. Therein, he recommended that appellant and appellee share joint custody of the children, with appellee having "physical custody". The parties filed exceptions to the report, and, on July 12, 1996, the circuit court adopted in part the Commissioner's report. Ky. R. Civ. P. 53.06. The circuit court's amendments to the report centered upon appellant's assumption of the parties' credit card debts. This appeal followed.

Appellant contends that the circuit court committed reversible error by "granting primary physical possession of [the] children to appellee." Specifically, he maintains that the circuit court did not consider the factors enunciated in Ky. Rev. Stat. (KRS) 403.270, and that the award of joint custody, with appellee having "physical custody," was not supported by substantial evidence of a probative value.

The court specifically found as follows:

5. The Respondent [appellee] has been and remains the primary caretaker of the minor children and it would be in the best interest of the children to be in the physical custody of the Respondent.

6. Both parties are fit and proper persons to have the joint custody of their children, although there is obviously a problem between Kevin and his father that hopefully will be addressed by the parents through counseling or any other available means.

. . . .

1. The parties be granted the joint care, custody, and control of the parties' minor children, namely, Kevin and Chelsea, and that the Respondent have the physical custody of the children.

We believe the circuit court's findings adequate to support its award of joint custody to the parties and primary physical possession of the children to appellee. Moreover, a review of the record reveals substantial evidence to support those findings. Particularly, the evidence discloses that appellee had served as primary caretaker of the children prior to separation and that the children have resided with her since April 1995. More importantly, we note Kevin's testimony as to past abuse at the hands of appellant and as to his concern for the future safety of himself and his sister.

Appellant also asserts:

. . . [A] statement of primary physical possession is violative of the statutory provisions set forth in KRS 403 since the only thing the Court could do is [sic] state where the primary physical residence of the child[ren] will be, rather than primary physical possession. Primary physical possession is a nullity and is, therefore, clearly erroneous for the Boyd Circuit Court to have made such a ruling.

We think appellant's assertion is without merit. It is well established that one parent must have "primary physical possession of the child[ren]" in a joint custody arrangement. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992). As such, we cannot say that the circuit court's award of "physical custody" to appellee was in degradation of KRS Chapter 403.

Upon the whole, we are of the opinion that the circuit court's award of joint custody and the award of physical possession of the children to appellee was not an abuse of discretion. See Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982).

For the foregoing reasons, the order of the circuit court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, KY

BRIEF FOR APPELLEE:

Roger W. Hall
Ashland, KY