RENDERED: June 5, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0949-MR

RONALD STACY APPELLANT

V. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 95-CI-00572

DORA JEAN STACY APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

* * * * * * * *

BEFORE: GARDNER, JOHNSON and MILLER, Judges.

GARDNER, JUDGE: This is an appeal by Ronald Stacy (Ronald) from an order of the Laurel Circuit Court which, inter alia, awarded custody of the parties' two minor children to appellee, Dora Jean Stacy, and restricted his visitation with the children. We affirm in part and reverse and remand in part.

Ronald and Dora were married on December 24, 1985. The marriage produced two children, Ronald Dean, born November 30, 1987, and Anthony Wayne, born November 15, 1988. On September 1, 1995, Dora filed a petition to dissolve the marriage. Among other things, Dora requested custody of Ronald Dean and Anthony. Ronald

filed a response and likewise requested custody of the children. Hearings on the merits were held in February and July, 1996, before the Domestic Relations Commissioner (Commissioner). On October 30, 1996, the Commissioner filed his report. Following objections by Ronald, on January 10, 1996, a hearing was held before the trial court addressing Ronald's exceptions to the Commissioner's report. On January 31, 1997, the trial court entered an order, inter alia, limiting Ronald's visitation to two hours of supervised visitation per week, and ordering the Commissioner to prepare new findings of fact and conclusions of law reflecting the rulings of its order. On March 18, 1996, the trial court entered a decree of dissolution of marriage. Ronald filed a motion to alter, amend, or vacate the decree. This appeal was filed prior to the trial court's ruling on the motion, and the motion was withdrawn.

At the conclusion of the final hearing on the merits, the Commissioner and the parties engaged in a bench conference. In the course of this conference the Commissioner instructed Ronald to visit the children prior to the Commissioner's planned interview with the children. Ronald did not visit the children, nor did the Commissioner interview the children. Ronald argues that it was improper for the Commissioner to submit his recommendations prior to compliance with his instructions to the parties. The trial court may interview a child in chambers to ascertain the child's wishes regarding his custodian and visitation. Kentucky Revised Statute (KRS) 403.290. It is discretionary with the trial judge as to whether he should interview a child. Brown v. Brown, Ky., 510

S.W.2d 14 (1974). In deference to the discretion of the trial court, acting through its Commissioner on this matter, we will not disturb its rulings just because the planned interview with the children did not occur. Similarly, just because a particular visitation did not occur as planned is no basis for reversal.

Ronald contends that the trial court erred in ordering that his visitation with the children be restricted to two hours of supervised visitation per week. A non-custodial parent "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1). "[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health." KRS 403.320(3). As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation." Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995). Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both parents. Smith v. Smith, Ky.App., 869 S.W.2d 55, 56 (1994) (emphasis original). The burden of proving that visitation would harm the child is on the one who would deny visitation. Id. In the trial court's order limiting visitation, the only findings of fact relevant to this issue were as follows:

> Although there is some conflict in the testimony, it appears to the Court that

> Ronald Stacy is subject to periods when he will become very hot tempered around the children or otherwise. Although there is a dispute in the testimony it appears that Ronald Stacy has shot at Dora Stacy and/or threatened Dora Stacy in the presence of the infant children of the parties which had such a reaction upon the children that they have been required to seek counseling.

The trial court did not make the requisite findings to restrict visitation under KRS 403.320(1). The trial court's failure to make the mandatory finding under KRS 403.320(1) "that visitation would endanger seriously the child's physical, mental, moral, or emotional health" requires us to vacate the order restricting visitation and remand for additional findings on the issue of Ronald's visitation with the children. See Alexander v. Alexander, Ky. App., 900 S.W.2d 615, 616 (1995).

In his enumerated Argument III, Ronald makes several contentions. He alleges that it was not proper for the trial court to award sole custody of the children without first considering joint custody. This is incorrect. In Kentucky there is no preference for joint custody. See Squires v. Squires, Ky., 854 S.W.2d 765, 769-770 (1993). Ronald then raises the issue that there is no evidence in the record to indicate whether the trial court ever considered joint custody. Dora argues that the issue is not preserved for our review because Ronald failed to raise the issue before the trial court. No claim will be heard on appeal unless the trial court has made or been requested to make unambiguous findings on all essential issues. Eiland v. Ferrell, Ky., 937 S.W.2d 713 (1997). Ronald raised the issue in his motion

to vacate. However, this appeal was filed before the trial court ruled on the motion to vacate and Ronald withdrew his motion. Because of this, we agree that the issue is unpreserved. Nevertheless, following is an examination of joint custody issues on the merits.

KRS 403.270(4) provides that the court may grant joint custody to the children's parents if it is in the best interest of the children. There is no preference in favor of either joint custody or sole custody. Squires v. Squires, supra. The parties are entitled to an individualized determination of whether joint custody or sole custody serves the best interest of the children. Squires v. Squires, 854 S.W.2d at 770. In determining whether joint custody is appropriate, the trial court must initially consider the factors set forth in KRS 403.270(1). Squires v. Squires, 854 S.W.2d at 769. Thereafter, the court should assess the likelihood of future cooperation between the parents and their respective levels of emotional maturity. Id. In deciding whether joint custody is appropriate, the trial court must weigh the positive and negative aspects and determine whether joint custody is in the best interest of the child. Squires v. Squires, 854 S.W.2d at 768. The trial court possesses broad discretion in determining whether joint custody serves the child's best interest. Squires v. Squires, 854 S.W.2d at 770; McNamee v. McNamee, Ky., 432 S.W.2d 816 (1968). While the decree does not specifically refer to the issue of joint custody, a great deal of evidence was adduced on the issue of child custody. We have reviewed this evidence and,

regardless of whether we might have reached a different conclusion if sitting as the triers of fact, we cannot say that the trial court abused its broad discretion by determining that it was in the children's best interest to award sole custody to appellee.

Ronald next argues that the trial court applied the wrong test to the issue of custody. He alleges that the trial court applied the "primary caretaker test" rather than the "best interest of the child" test as set forth in KRS 403.270. In rendering child custody decisions the trial court is bound by the "best interests" standard set out in KRS 403.270:

> (1) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent. The court shall 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 child custody cases, the trial court must consider all relevant factors including those specifically enumerated in KRS 403.270(1) in determining the best 'interests of the child.' In so doing, it is mandatory under CR 52.01 that the facts be so found specifically." McFarland v. McFarland, Ky. App., 804 S.W.2d 17 (1991) (emphasis original). However, the appellate court may look to the entire record to determine whether the factual findings are

clearly erroneous or the trial judge abused its discretion. Cherry v. Cherry, 634 S.W.2d at 425. While the trial court could, in drafting its rulings regarding child custody, have better observed the elements of KRS 403.270, nevertheless, the findings the trial court did make were of the type, under the statute, relevant to the best interests of Ronald Dean and Anthony Wayne. Among other things, the trial court found that Dora was the parent who took the children to the doctor and dentist, enrolled the children in school, attended PTA meetings, was responsible for the children's social activities, and was the one who cooked, bathed, and attended to the other personal needs of the children. On the other hand, the trial court found that Ronald was very hot tempered around the children and had threatened Dora in the presence of the children. The trial court concluded that Dora "is most definitely the person who has accepted the role of parenting and care taking for the children and should continue in this role." The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court should not substitute its own opinion for that of the trial court. Reichle v. Reichle, Ky., 719 S.W.2d at 442, 444 (1986). Considering the entire record, even though the trial court could have better observed the elements of KRS 403.270, we cannot say the trial court abused its discretion in awarding sole custody of the children to Dora.

Finally, Ronald argues that it was not proper for the trial court to sign and enter the dissolution decree prepared by the Commissioner prior to the running of the ten day objection

period prescribed by CR 53.06. We disagree. As evidenced by the sequence of events, the March 17, 1997 filing was not a "commissioners report" within the meaning of CR 53.06. Following a hearing on the merits, on October 31, 1996, the Commissioner entered his report.[1] On November 8, pursuant to CR 53.06, Ronald filed objections to the Commissioner's report. On December 13, a hearing was held on these exceptions. On January 31, 1997, the trial court issued an order ruling on Ronald's exceptions and ordering the Commissioner to prepare new findings of fact and conclusions of law for the court's signature, reflecting its rulings, and otherwise overruling any other exceptions by Ronald. Pursuant to the trial court's instructions, on March 17 the Commissioner filed a document identical to its October 31 report with the exception that three paragraphs were added to reflect the trial court's January 31 rulings. The trial court signed this document on March 18, 1997.

The March 17 filing of the Commissioner was drafted at the trial court's direction for the purpose of implementing the rulings made in its January 31 order. These modifications to the original report were not the commissioner's recommendations. The Commissioner's recommendations remained unchanged from the October 31 report, and in preparing the final draft of the decree the Commissioner was merely acting as a scrivener under the trial court's direction. Under these circumstances, Ronald was not

[1] Rather than a "report", this document was a recommended findings of fact, conclusions of law, and decree of dissolution of marriage, ready for the trial court's signature.

entitled to file a second round of exceptions. The proper means to challenge the trial court's final decree is by means of a CR 60.02 motion to vacate.[2]

The order of the trial court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

[2] We note that appellant did file a CR 60.02 motion raising this issue. However, prior to the trial court's ruling, appellant filed this appeal and withdrew the motion. In view of this, this issue is not properly preserved for our review. The trial court should first be given the opportunity to rule on questions before they are available for appellate review. Massie v. Persson, Ky. App., 729 S.W.2d 448, 452 (1987). However, appellee did not raise this argument and we have accordingly addressed the issue on the merits.

BRIEF FOR APPELLANT:

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