

RENDERED: September 7, 2001; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-003014-MR

JOE DONOHEW

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE WILLIAM B. MAINS, JUDGE  
ACTION NO. 92-CI-00074

SHERRY PURVIS (NOW JACKSON)

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: EMBERTON, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Joe Donohew has appealed from an order entered by the Rowan Circuit Court on October 27, 1999, which awarded sole custody of his son to the child's mother, Sherry Purvis Jackson. Having concluded that the trial court did not err in considering Sherry's objections to the Domestic Relations Commissioner's report and that the trial court's findings were not clearly erroneous and that its custody award was not an abuse of discretion, we affirm.

Joe and Sherry have one child together, a son named Joseph Warren Donohew (Joey), who was born out of wedlock on June 15, 1988. Although Joe and Sherry were never married, Joe has openly acknowledged Joey as his son and has visited Joey and paid child support for him. Prior to the present action, the custody of Joey had never been adjudicated.

On August 20, 1998, Joe filed a motion for custody of Joey. After reports were prepared by a CASA worker and a family counselor, a hearing was held before the Rowan Circuit Court's Domestic Relations Commissioner on August 18 and 19, 1999. After summarizing the testimony of some 19 witnesses, the Commissioner recommended in her report that sole custody of Joey be awarded to Joe. Notice of the filing of the Commissioner's report was filed on September 13, 1999, and the notice was mailed to the parties on that same date. The notice provided: "Within ten (10) days after being served with this notice, any party may serve written objections to the report upon the other parties. **UNLESS** written objection is served by any party on the other parties within ten (10) days after the date of service of this notice, the Court may adopt the report of the Commissioner as submitted."

Sherry's objections to the Commissioner's report were apparently received by the Rowan Circuit Court on September 28, 1999, 15 days after notice of the filing of the Commissioner's Report and Recommendations.<sup>1</sup> Joe filed a response on October 6,

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<sup>1</sup>For one reason or another, Sherry's objections were not  
(continued...)

1999, wherein he argued that Sherry's objections were not timely. The trial court considered Sherry's objections and granted sole custody of Joey to her, with standard visitation to Joe. This appeal followed.

In considering the timeliness of Sherry's objections, we note that CR<sup>2</sup> 53.06(2) seems to pronounce rigid guidelines for the filing of objections to a Commissioner's report. It states that "within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties." However, in Eiland v. Ferrell,<sup>3</sup> our Supreme Court noted that "the trial court has the broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners."<sup>4</sup> The Eiland Court noted that while a trial court is "not obligated to consider such objections, . . . in view of the broad discretion available to the trial court with respect to actions on commissioners'

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<sup>1</sup>(...continued)  
actually filed in the Rowan Circuit Court until March 17, 2000, long after this appeal was commenced. In addition to the file stamp, however, the document also bears the stamp "REC'D SEP 28", giving rise to the inference that the circuit court actually received the objections on September 28. The certificate of service stated the objections were "mailed and faxed" to the trial judge and Joe's attorney. In any event, the objections were evidently considered by the trial court prior to October 26, 1999, when the Rowan Circuit Court ordered that custody of Joey be awarded to Sherry.

<sup>2</sup>Kentucky Rules of Civil Procedure.

<sup>3</sup>Ky., 937 S.W.2d 713 (1997).

<sup>4</sup>Id. at 716 (citing Haley v. Haley, Ky.App., 573 S.W.2d 354 (1978); and Basham v. Wilkins, Ky.App., 851 S.W.2d 491 (1993)).

reports," it is not an abuse of the trial court's discretion to consider untimely objections.<sup>5</sup>

In the present action, the trial court clearly considered Sherry's objections in its order of October 27, 1999. While under Eiland, the trial court could have ignored the objections, it was not an abuse of the trial court's discretion to consider them.

We will now consider whether the trial court's findings were supported by substantial evidence and whether the award of sole custody to Sherry was an abuse of discretion. Pursuant to CR 53.06(2), a circuit court "may adopt the [Commissioner's] report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." Under CR 52.01, the trial 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." Thus, the trial court had the authority to wholly reject the Commissioner's findings and its decision can only be disturbed on appeal if it is clearly erroneous or an abuse of discretion. The findings can be held to be clearly erroneous only if they were not supported by substantial evidence.<sup>6</sup> Substantial evidence has been defined as evidence sufficient to induce conviction in the mind of a

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<sup>5</sup>Id.

<sup>6</sup>Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

reasonable person.<sup>7</sup> An abuse of discretion has been defined as "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision."<sup>8</sup>

A review of the record reveals that Joey has lived with his mother, Sherry, for his whole life and that he has lived continuously with her in Rowan County for the past ten years. Joey has expressed to the trial court, and to various witnesses, his desire to live with his mother. Joey has fostered a relationship with his younger half-sister Kirsten. Joey has attended the same school and participated in numerous activities in Rowan County for many years. According to his teachers, at school Joey is well-groomed and clean. A change in custody to his father would uproot Joey and require him to pursue his education and other activities in a different community. Lane Veltcamp, a licensed family therapist, who conducted a full custody evaluation of Joey, recommended that Joey remain with his mother. Taken together, all of these facts provide more than a sufficient evidentiary basis for the trial court's decision.

While it may be that a sufficient evidentiary basis also exists to support a custody award in Joe's favor, it is not the function of the appellate courts to make factual findings or to second guess those of the trial court. We believe the Court

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<sup>7</sup>Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972).

<sup>8</sup>Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

in Dudgeon v. Dudgeon,<sup>9</sup> clearly expressed the challenges that trial judges face with the responsibility of deciding custody cases:

[C]ourts, both trial and appellate, are presented with no problem of greater complexity than the delicate and awesome responsibility of adjudicating the custody of children.

. . .

The [custody] issue must be resolved by careful and conscientious trial judges who weigh all relevant factors; make a difficult decision; then are available and vigilant to supervise the result. This is simply the best we can do with the means available. Appellate review must confine itself in changing determination of the custody of infants in divorce cases to those situations where there is a clear and substantial showing that the manifest error was committed.<sup>10</sup>

The trial court's decision was not clearly erroneous or an abuse of discretion. Accordingly, the custody order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michelle R. Williams  
Mt. Sterling, KY

BRIEF FOR APPELLEE:

Jace Nathanson  
Morehead, KY

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<sup>9</sup>Ky., 458 S.W.2d 159 (1970).

<sup>10</sup>Id. at 162.