

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002377-MR
AND
NO. 2002-CA-001121-MR
AND
CROSS-APPEAL NO. 2001-CA-002462-MR

JAMES G. GRZYWACZ

APPELLANT/CROSS-APPELLEE

v. APPEALS/CROSS-APPEAL FROM WARREN CIRCUIT COURT
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 00-CI-01002

DEBORAH A. GRZYWACZ

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART AS TO THE APPEALS
AND
VACATING IN PART AND REMANDING AS TO THE CROSS-APPEAL
** **

BEFORE: BUCKINGHAM, COMBS, AND TACKETT, JUDGES.

TACKETT, JUDGE: James Grzywacz appeals from an order of the Warren Circuit Court awarding child support and work-related child care costs to his former spouse, Deborah Grzywacz, and establishing a visitation schedule based on Deborah's work schedule. Deborah cross-appeals from an order changing the designation of their child custody arrangement. We affirm as to

the appeals, vacate as to the cross-appeal, and remand for further findings in accordance with this opinion.

James and Deborah were divorced on August 13, 1997, by a decree of dissolution entered in Logan Circuit Court. By agreement, they were awarded joint custody of their minor child and neither party was obligated to pay child support. James had the child at least three nights a week while Deborah worked as a nurse. However, after James remarried, the parties began experiencing difficulties maintaining a regular visitation schedule. James filed a motion in Logan Circuit Court on July 12, 2000, to enforce the child custody agreement and establish a specific visitation schedule. Since both parties were now living in Bowling Green, venue was transferred to the Warren Circuit Court. Deborah filed a motion in response requesting a custody modification and child support.

After hearings on September 6 and September 21, 2000, the trial court ordered the parties to either submit an agreement or proposed findings. James and Deborah were unable to reach an agreement; therefore, each of them submitted proposed findings in October 2000. Additional hearings were held after which the trial court issued a draft order and the parties filed written responses. On June 4, 2001, the trial court entered its findings of fact, conclusions of law, and a decree modifying custody and establishing visitation. James was

ordered to pay child support to Deborah and the parties were granted joint custody of their child with Deborah to provide the primary residence.

Both parties filed motions to alter, amend or vacate the trial court's judgment and the trial court responded, in an order dated October 1, 2001, by modifying custody to joint custody with a co-parenting arrangement with no primary residence named for the child. The visitation schedule was also amended, but the trial court refused to amend its order requiring James to pay child support. James appealed the issues of child support and the visitation schedule and Deborah appealed the issue of custody modification. Subsequently, James filed a motion to reduce his child support. The trial court denied the motion, and James also appealed that order. James' two appeals were consolidated and are decided here along with Deborah's cross-appeal.

James first argues that the trial court erred as to both the entitlement and the amount of child support awarded to Deborah. The trial court's findings of fact and conclusions of law stated two reasons for modifying the parties' agreement not to pay child support. The first reason given was that the trial court's order also modified the custody arrangement between the parties by naming Deborah as the primary residential custodian. However, in response to James' motion to alter, amend or vacate,

the trial court modified its custody award to joint custody with a co-parenting arrangement. Consequently, James contends that the trial court's initial reason for awarding Deborah child support is moot.

This argument serves to ignore the trial court's strongest reason for awarding support. In its findings of fact, the trial court stated as follows:

[T]he agreement of the parties allowed no child support to be paid to either party; however, [Kentucky Revised Statute] 403.211 requires any deviation from the child support guidelines to be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation. The Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage did not include a written finding specifying a reason for a deviation from the child support guidelines. Child support is the right and benefit of the child and not the parent. Therefore, a written finding or verbal finding on the record giving a firm and sound reason for a deviation from child support is a necessary predicate for an abrogation of child support.

Further, in light of this we have previously declined to find that the trial court abused its discretion in awarding child support where the parties have joint custody and share equal or almost equal physical possession of their child. Downey v. Rogers, Ky. App., 847 S.W.2d 63 (1993); Brown v. Brown, Ky. App., 952 S.W.2d 707 (1997). James simply has failed to show that the trial court's order for him to pay child support to

Deborah was clearly erroneous and, thus, cannot prevail on appeal.

James next claims that the trial court erred in awarding work-related childcare costs to Deborah alone. The trial court ordered Deborah to submit written documentation of her work-related childcare costs to James' attorney on a quarterly basis. James is only required to reimburse her for 55% of those costs which is in proportion to the amount of the parties' income which he earns. Moreover, since the child would normally be with James when Deborah is at work (in accordance with the trial court's visitation order), she would only accrue childcare expenses when James is unavailable to exercise his scheduled visitation. James has failed to demonstrate how the trial court's decision abuses its discretion in this matter.

With regard to the parties' visitation schedule, James contends that the trial court erred in tailoring it to fit Deborah's work schedule. In fact, the trial court granted James standard visitation with his child and **in addition** allowed him to have the five year-old child in his home overnight the nights Deborah works. On the one hand, James does not wish to pay childcare costs associated with Deborah's schedule working as a nurse; however, he also complains about the visitation schedule which allows him to have the child at his home when Deborah is working, thus alleviating the need to pay for such childcare.

Further, to facilitate matters, the trial court's order requires Deborah to furnish her work schedule, in six-week increments, to James within two days of receiving it. This arrangement negates his argument that the trial court's order improperly allows Deborah to manipulate James' scheduled visitation with the child by providing him with her schedule in an untimely manner.

Lastly, James appeals from the trial court's order denying his motion to modify his child support obligation. Prior to the trial court's June 1, 2001 order modifying custody and awarding Deborah child support, James testified that he earned approximately \$1,000.00 per week from his employment at Don Tequila's Mexican Food Distributors, Inc. He testified that his duties included flying the corporate plane and assisting with translating and contracts. While he did not have a specific job title, James testified that he ran the business and described a position similar to that of an operations manager. Moreover, James had a small ownership interest in the company. Consequently, because of the disparity between James' income and Deborah's, the trial court ordered him to pay approximately \$500.00 per month in support for their child.

After the trial court denied James' motion to alter, amend, or vacate its original findings and order regarding child support, James filed a motion to reduce his support obligation in October of 2001. In this motion, James stated that he no

longer accepted commercial piloting jobs outside his company and that he in fact only made \$400.00 per week from his job at Don Tequila's. The trial court conducted a hearing and entered extensive findings of fact related to James' ability to substantiate his diminished income. Specifically, the trial court addressed his mortgage, his vehicle loan payments and his lack of credit card debt in concluding that his standard of living required a higher income than what James now claimed to have. The trial court also found it dubious that James' salary from his job was allegedly no larger than the salary earned by his current wife who worked for the same company in a secretarial capacity. We are unable to substitute our judgment or conclude that the trial court, which had the advantage of hearing the testimony and evaluating all of the evidence presented, erred in determining that James was not entitled to a reduction in his child support obligation.

For her part, Deborah cross-appeals from the trial court's order which amended the original June 1, 2001 order awarding the parties joint custody, and designating Deborah as the primary residential custodian. She argues that the trial court erroneously failed to make any findings supporting its decision to withdraw the designation of a primary residential custodian in favor of joint custody with a co-parenting arrangement. In its original order, the trial court thoroughly

analyzed the parties' agreed custody arrangement prior to ordering a modification. The trial court stated, in part, as follows:

. . . The testimony of the parties presented to this Court reveals the parties have intermingled the separate concepts of joint custody and split custody. The Kentucky Court of Appeals has defined joint custody as an arrangement in which both parents share decision-making authority concerning major areas of their child's upbringing. Aton v. Aton, Ky. App., 911 S.W.2d 612 (1995). However, joint custody does not require an equal division of physical residence between the parents. Id. at 615. Joint custody recognizes that, although one parent may have primary physical possession of the child, both parents share the decision making in major areas concerning the child's upbringing, such as which school to attend, etc., a role traditionally enjoyed by both parents during the marriage. Burchell v. Burchell, Ky. App., 684 S.W.2d 296 (1984). Conversely, split custody means a situation where each parent is the residential custodian for one (1) or more children for whom the parents share a joint legal responsibility. KRS 403.212(2)(h). Split custody does not allow a child to have a fixed or permanent home which becomes especially important when a child reaches school age which has occurred in this matter.

Although the parties have intermingled the split custody and joint custody concepts in their testimony, the fact remains that the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage of the parties specifically granted joint custody to the parties. Although the parties agreed that the child would live with the parties an equal amount of time, joint custody does not require an equal division of the physical possession of the child. The equal

time provision of the agreement of the parties closely resembles split custody which is disfavored by the courts. Most importantly, the parties failed to designate who would maintain the primary residence for the child. Additionally, the Court finds that the child has now reached school age which will only exacerbate the problems evident in the child living with each party an equal amount of time.

Although there was disagreement concerning whether a naming of a primary residential custodian would be a modification of custody, the Court finds a naming of a specific party as the primary residential custodian would be a modification of custody. Hence, the Court will now consider whether a modification of custody is warranted under the applicable statute. . . .

The trial court went on to conduct an analysis, under KRS 402.340, of the factors governing modification of child custody arrangements.

Specifically, the trial court focused on subsections (c), which requires it to determine the child's best interest according to the factors set forth in KRS 403.270(2), and (e) which requires an analysis of whether the advantages of a change in environment outweigh the harms caused by modification. The trial court conducted an in-depth analysis of the statutory factors and determined that, while the child had a healthy relationship with both parents, it was in his best interests for Deborah to be named as primary residential custodian. Among the facts which influenced the court were the child's relationship

with his maternal grandmother and half-sister, the fact that Deborah had physical possession of the child a majority of the time, and that a split custody arrangement would adversely affect the child when he began school. Consequently, the trial court ordered Deborah and James to share joint custody of their child, with Deborah as the primary residential custodian, and awarded James liberal visitation. Moreover, the parties were still expected to share in the major decisions of their child's life, such as school, daycare, religion, and medical care.

In response to the parties' motions to alter, amend, or vacate its previous order, the trial court's October 1, 2001 order amended the designation of child custody to joint custody with a co-parenting arrangement. Deborah argues that the trial court abused its discretion in amending its original order, which designated her as primary residential custodian, without making additional findings of fact. Our prior decision in Scheer v. Zeigler, Ky. App., 21 S.W.3d 807 (2000), established that modification of joint custody is subject to the applicable statutory requirements. KRS 403,340(3), which the trial court complied with in its June 1, 2001, order states as follows:

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at

the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. . . .

The trial court's failure to hold a hearing prior to ordering a second modification in the parties' custody arrangements, requires that we vacate this portion of its October 1, 2001 order for further proceedings consistent with the statutory requirements.

For the foregoing reasons, the trial court's order is affirmed with regard to the issues of child support and visitation and vacated with regard to the modification substituting joint custody, with a co-parenting arrangement, for joint custody, with Deborah as the primary residential custodian. This case is remanded with directions for the trial court to hold a hearing, as required by KRS 403.340(3), prior to modifying its June 1, 2001 order concerning child custody.

COMBS, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

BUCKINGHAM, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority's opinion in part, but I respectfully dissent in part. I agree with the majority in the disposition of James's appeals. However, I respectfully disagree with the majority in the disposition of Deborah's

appeal. In short, I would totally affirm the circuit court's judgment.

As the majority noted, the trial court entered a judgment on June 4, 2001, modifying child custody. Pursuant to James's motion to alter, amend, or vacate, the court amended its judgment. The majority holds that the failure of the circuit court to hold a hearing prior to changing its custody modification decision requires that a portion of the October 1, 2001 order be vacated. I disagree.

In granting James's motion to alter, amend, or vacate, the court was not rendering a new custody modification decision. Rather, it was merely changing the decision it had made when it initially modified custody and made Deborah the primary residential custodian. Therefore, since the judgment merely returned the parties to their prior status where they had joint custody with no primary residential custodian, I see no reason why additional findings of fact should have been made. Further, I see no need why another hearing had to be held since this was not a modification of a custody decree but was only an amending of a custody modification that had been rendered. In fact, Deborah did not request another hearing.

In short, I would affirm.

BRIEF FOR APPELLANT/CROSS-
APPELLEE JAMES G. GRZYWACZ:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT DEBORAH A. GRZYWACZ:

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