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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000136-ME

MEGAN GLENN

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 08-CI-01189

MATTHEW H. GLENN

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

VANMETER, JUDGE: Megan Glenn appeals from an order of the Daviess Circuit Court adopting the report of the Domestic Relations Commissioner (DRC) in its entirety after exceptions were taken and ruled upon. For the following reasons, we affirm.

This action arises out of a divorce proceeding between Matthew and Megan Glenn who were married on December 31, 2004, had a child on November 14, 2006, and separated in November 2007. Within three months of the separation, the couple arranged a shared (50/50) custody agreement whereby the parties alternated having the child three days or four days each week. In August 2008, Megan filed a petition for dissolution of marriage seeking, among other things, designation as the primary residential parent and division of marital property.

During an evidentiary hearing before the DRC, Megan testified she was concerned over the current shared custody agreement due to the long hours Matthew worked while farming, the amount of time the child spent with Matthew while he was working, and the potentially destabilizing effect the arrangement had on the child because he spent significant time with both parties as well as Megan's and Matthew's parents who provided care for the child when the parties were at work. At the conclusion of the hearing, the DRC filed a report finding the shared custody arrangement to be in the best interests of the child. Additionally, the DRC recommended that a tax refund received by Megan for the 2008 year be divided equally between the parties.

Megan filed exceptions to the report arguing the DRC erred by failing to designate her as primary residential parent, and finding Megan received a \$4,749 tax refund as a result of claiming the child as a dependent for tax purposes. The trial court denied the exceptions filed by Megan and adopted the DRC's report as its final order. This appeal followed.

First, Megan argues the trial court abused its discretion by adopting the DRC's findings that the shared custody arrangement was in the best interests of the child and failing to designate Megan as the primary residential parent. Further, Megan asserts the DRC's findings failed to consider the factors set forth in KRS¹ 403.270 relating to child custody. We disagree.

We review a trial court's findings of fact involving child custody and/or property distribution under the clearly erroneous standard of review. CR² 52.01. *See Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous if unsupported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence that when taken in light of all the evidence "has sufficient probative value to induce conviction in the minds of reasonable men." *Id.* (citation omitted).

Before designating a party as the primary residential parent, the trial court must consider the child's best interests. *Fenwick v. Fenwick*, 114 S.W.3d 767, 779 (Ky. 2003) (overruled on other grounds). KRS 403.270(2)(a-e) requires the court to

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, and any de facto custodian, as to his custody;

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

- (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;
- (e) The mental and physical health of all individuals involved[.]

In this case, the parties had been operating under the shared custody arrangement for one and a half of the child's two and a half years of age. The record reflects the child has no siblings, and other than Megan's concerns over the child's activities while on the farm with Matthew, and the potential destabilizing effect the shared custody arrangement may have on the child in the future, no evidence was presented to show that presently, the arrangement was not in the child's best interests. The DRC found,

The parties have been separated for almost two (2) years. For the majority of the child's life, the [parties] have exercised Shared Custody by agreement of the parties. The days have varied on a weekly basis with one parent having the boy for four (4) days one week followed by three days the following week. It has been a 50-50 split. Both parties have used their new boyfriend or girlfriend to assist them when they have had custody and both parties have used their parents to look after this child. Neither party expressed any problems arising out of this arrangement.

It is found that this Shared arrangement is in the best interests of the child and it shall continue.

Thus, the DRC properly considered the relevant factors under KRS 403.270(2) in making its findings. Accordingly, the trial court's determination that maintaining the shared custody arrangement was in the best interests of the child was not clearly erroneous.³

Next, Megan argues the trial court abused its discretion by adopting the DRC's findings that Megan received the tax refund due to her filing a separate tax return in 2008 and claimed the child for tax purposes and subsequently ordering the parties to equally split the \$4,749 tax refund. We disagree.

In a proceeding for dissolution of a marriage, KRS 403.190(1) requires the court to divide the marital property in "just proportions." Additionally, "[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property." KRS 403.190(3).

In this case, Megan was awarded a tax refund for the 2008 year, in part because she claimed the child as a dependent for tax purposes and filed a separate tax return even though the parties were still married. As the parties were still married in 2008, the tax refund was marital property. Matthew did not receive the benefit of the tax refund because he did not claim the child as a dependent. Since the tax refund was marital property acquired before a decree of legal

³ As the trial court noted, we reiterate that the parties and the court are not precluded from revisiting the issue of custody once the child enters school, if necessary.

separation, the trial court did not err by dividing the tax refund equally between the parties.⁴

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Albert William Barber, III
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Candy Yarbray Englebert
Owensboro, Kentucky

⁴ The parties were only legally separated by decree upon the order of dissolution of marriage. Although the parties separated in November, 2007 they did not receive a decree of legal separation at that time.