

RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000397-ME

THOMAS D. RIFFE

APPELLANT

APPEAL FROM GREENUP CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 10-CI-00550

MELISSA L. RIFFE

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: Thomas D. Riffe brings this appeal from a January 12, 2011, decree of dissolution of marriage entered by the Greenup Circuit Court, Family Court Division, setting monthly child support and awarding the parties

joint custody of their minor children. We affirm in part, reverse in part and remand.

Thomas and Melissa were married in January 1994, and four children were born of the marriage. Melissa filed a petition for dissolution of marriage in August 2010. Among the disputed issues were maintenance, child support, child custody, and time-sharing. By decree of dissolution, the court ordered Thomas to pay \$1,087 per month in child support for the parties' three minor children¹ and \$600 per month maintenance to Melissa. Also, the court awarded the parties' joint custody of the three minor children and designated Melissa as "primary parent." This appeal follows.

Thomas contends that the family court erred in its award of child support. Specifically, Thomas argues that the court's calculation of the amount of child support was erroneous as it failed to deduct his maintenance payment from the parties' total adjusted gross income as required by KRS 403.212(2)(g)1.

Kentucky Revised Statutes (KRS) 403.212 (2)(g)1. provides:

(g) "Combined monthly adjusted parental gross income" means the combined monthly gross incomes of both parents, less any of the following payments made by the parent:

1. The amount of pre-existing orders for current maintenance for prior spouses to the extent payment is actually made and the amount of current maintenance, if any, ordered paid in the proceeding before the court[.]

¹ At the time of entry of the decree of dissolution, one of the parties' four children had reached the age of majority.

KRS 403.212(2)(g) mandates that the amount of a parent's current monthly maintenance obligation is to be deducted from that parent's gross income when determining the "combined monthly adjusted parental gross income." This deduction would, of course, lower the parties' combined adjusted parental gross income, which would also lower the resulting child support obligation. Here, the family court failed to follow the mandate of KRS 403.212(2)(g) and deduct Thomas' monthly maintenance payment of \$600 from his gross income to arrive at the parties' monthly adjusted parental gross income. Such failure was clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01.

Upon remand, the family court shall recalculate child support in consideration of KRS 403.212(2)(g)1. After the family court properly calculates a monthly child support obligation, the court may then exercise its discretion to deviate from the child support guidelines under KRS 403.211.² However, to do so, the family court must find that the guidelines' application would be "unjust or inappropriate" and thereafter specify the reasons for the deviation.

Next, Thomas alleges that the family court erred in its award of joint custody and in its designation of Melissa as primary residential parent. He argues that such a determination was not in the best interests of the parties' three minor children. In support thereof, Thomas points out that the three minor children expressed a desire to live with him. He believes the family court failed to fully

² In its order denying Thomas' Kentucky Rules of Civil Procedure 59 motion to vacate, the circuit court stated that it awarded child support in "the amount of money the Court deemed necessary to meet [Melissa]'s and the children's needs."

appreciate his involvement and relationship with the children. Additionally, Thomas maintains that Melissa spends considerable time away from her children with her boyfriend.

KRS 403.270 governs the determinations of child custody. It provides, in part:

- (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. 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;
 - (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;
 - (f) Information, records, and evidence of domestic violence as defined in [KRS 403.720](#);
 - (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
 - (h) The intent of the parent or parents in placing the child with a de facto custodian; and
 - (i) The circumstances under which the child was placed or allowed to remain in the custody of a de

facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in [KRS 403.720](#) and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

- (3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

Thereunder, the court is mandated to award custody in the best interests of the child. KRS 403.270(3). When so doing, the court should “consider all relevant factors” and specifically consider the factors set forth in subsections (a) – (i), if applicable. KRS 403.270(3). Also, an act of domestic violence by a parent may be considered to the extent it impacted the child. KRS 403.270(3).

Generally, the family court possesses broad discretion in determining the best interests of the child. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983). And, the family court’s findings of fact will not be set aside on appeal unless clearly erroneous. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). A finding of fact is viewed as clearly erroneous if not supported by substantial evidence of a probative value. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964).

In its findings of fact, the family court outlined the evidence and juxtaposed the applicable factors in KRS 403.270 to determine best interests:

Both parties want custody of the three children under age 18. Both parties readily admit that it was the

Petitioner who took care of the children on a day-to-day basis. The Petitioner did not work but very little outside the home and depended on the Respondent to be the breadwinner. The Respondent would help with the children's sporting events, but everything else was left up to the Petitioner to take care of. The Court finds that the Respondent at one time had a drinking problem and was prone to physical violence. It was testified to and the Respondent admitted to violence against two of the children, one of which occurrences resulted in one of the children having a busted eardrum. There has also been a finding of domestic violence against the Petitioner wherein weapons were involved.

The Respondent wants the children. The Court has interviewed all three of the children and all three want to live with their father. The Petitioner has taken on a part-time job and now has a boyfriend which is occupying her time she used to spend with the children. In fact the Court finds that the Petitioner took her teenage boys to the home of boyfriend's son so as to show them where he lives so the boys could engage him in a fight. The Petitioner's new boyfriend has a criminal record and has a history of violence and substance abuse.

The Court has utilized the factors set forth in KRS 403.270 in arriving at the best interest of the children. Said statute dictates that the Court must take into account domestic violence issues as well as the wishes of the child, the children's current living environment, etc. The Court believes that the children's desire to live with their father is persuaded not only by the absence of their father, but is also persuaded by the fact that their mother has substituted a boyfriend for her children. The Court cannot ignore the fact that the Petitioner has practically raised the children on a day-to-day basis with very little input from the Respondent, albeit the Respondent has been the financial provider for the family. The Court finds it would be in the best interest of the children to grant the parties joint custody with the Petitioner being designated as the primary parent of the children and the Respondent as the secondary parent. The Court further finds it would be in the best interest of the children to

allow the Respondent's time be pursuant to Appendix A of the new Family Court Rules of Procedure & Practice. Under no circumstances shall the Petitioner allow her current boyfriend to be around the parties' children.

From the above findings, it is evident that the family court weighed heavily Thomas' acts of violence against the children and his past alcohol abuse. In fact, the family court specifically pointed out that one child suffered physical injury as a result of such violence. The family court also considered that Melissa had been the children's primary caregiver during the marriage. This fact was supported by Melissa's testimony.

Having reviewed the record, we cannot say that the family court's findings of fact were clearly erroneous or that it was an abuse of discretion to award joint custody of the minor children to the parties. Moreover, we also believe that the parties time-sharing arrangement and designation of Melissa as primary residential parent was well within the family court's discretion.

In sum, we reverse the family court's award of child support and remand for reconsideration per KRS 403.212(2)(g)1. In all other respects, the family court's Decree of Dissolution is affirmed.

For the foregoing reasons, the Decree of Dissolution of Marriage of the Greenup Circuit Court, Family Court Division, is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Damian Gallaher
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BRIEF FOR APPELLEE:

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ORAL ARGUMENT FOR
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