

RENDERED: OCTOBER 21, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-001553-ME

JOSEPH SCOTT

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE HON. MICHAEL DEAN, JUDGE  
ACTION NO. 15-CI-00006

EMILEE MILLER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

MAZE, JUDGE: Joseph Scott appeals from a September 21, 2015, order of the Estill Circuit Court adopting the recommendations of a Domestic Relations Commissioner (DRC) concerning the parties' minor child. This order awarded Appellee, Emilee Miller, primary residential parent status and child support, and granted Joseph liberal timesharing with his child.

We observe no abuse of discretion in the trial court's adoption of the DRC's revised recommendations concerning timesharing and child support. We also hold that the trial court employed the proper procedure in reviewing the evidence and entering its order. Therefore, we affirm.<sup>1</sup>

### **Background**

The child in this case, B.J.S., was born to Joseph and Emilee on December 19, 2011. The parties were never married; however, they maintained a romantic relationship "on-and-off" until they separated permanently in October of 2014. Joseph and Emilee maintained an amicable parenting arrangement until issues arose concerning timesharing over Christmas of 2014. On January 7, 2015, Emilee filed for and received an emergency protective order against Joseph, alleging that in their disagreement over Christmas timesharing, Joseph threatened to harm her. Joseph denied this, and Emilee subsequently asked that the EPO be amended to allow her contact with Joseph concerning timesharing arrangements. The parties later entered into a mutual civil restraining order. Around the same

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<sup>1</sup> Pursuant to CR 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case.

Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision. On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record. Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

time, Joseph filed the instant action seeking establishment of custody and designation as the primary residential parent or equal timesharing.

The parties appeared before the DRC on February 6, 2015. During this hearing, Joseph testified that he lived with his parents in Scott County where B.J.S. had his own room and bathroom. Joseph also testified that his parents often cared for the child while he was attending college and working a part-time job. He expressed concern that Emilee's parents smoked and that B.J.S. did not have his own room at Emilee's home. Emilee acknowledged that she lives with her parents and two siblings in Estill County and that she shares a bedroom with B.J.S. She stated that her parents provided daytime care for B.J.S. while she was finishing high school and attending college. She asserted that she should be named primary residential parent because she had cared for the child since birth and taken him to every doctor's appointment.

Joseph's and Emilee's parents testified to the environment in their respective homes which they share with their children and B.J.S. Joseph's parents each testified that he was an attentive and appropriate parent to B.J.S. They also recounted the amicable and cooperative parenting arrangement between all parties prior to Christmas 2014. Emilee's parents' testimony conflicted somewhat with that of Joseph and his parents regarding the latter parties' level of support and care during the first two years of B.J.S.'s life; however, Emilee's mother conceded that Joseph's parents had provided care for the child.

A month after the hearing, the DRC entered his recommended findings of fact and conclusions of law which proposed that both parents enjoy joint custody and equal timesharing. The DRC also recommended that Emilee's request for temporary custody and child support be denied or reserved given the financial and living circumstances of Joseph and Emilee. These recommendations did not address an arrangement or schedule for timesharing.

Emilee filed exceptions to the DRC's recommendations with the trial court on March 11, 2015. Chief among these exceptions was her assertion that she was entitled to primary residential parent status because "the child has spent the majority of his three years on earth" with her. The trial court subsequently entered an order adopting the DRC's recommendation as to joint custody but remanding the matters of primary residential parent, visitation, and child support due primarily to the fact that the arrangement the DRC recommended would require frequent, prolonged travel between Estill and Scott Counties, and would ultimately not be in the best interest of the child. Following remand to the DRC, Joseph renewed his motion for temporary custody and primary residential parent status.

On remand, the DRC recommended that Emilee be designated B.J.S.'s primary residential parent, and that Joseph enjoy liberal timesharing and pay temporary child support. The DRC reasoned that Emilee had been the child's primary caretaker to that point, and that the best interest of the child was served by her continuing as such. Joseph filed exceptions to the revised recommendations and moved the trial court to appoint a *guardian ad litem* and afford him the

opportunity to present additional proof before the DRC. Following a brief hearing on Joseph's objections and motions, on September 21, 2015, the trial court entered an order adopting the DRC's recommendations without change. The trial court's order did not address Joseph's requests for a *guardian ad litem* and additional proof. Joseph now appeals from this order.

### **Standard of Review**

As with any matter tried without the benefit of a jury, we review the trial court's decision for clear error. *See* CR<sup>2</sup> 52.01. "The findings of a commissioner, to the extent that the trial court adopts them, shall be considered as the findings of the trial court." *Id.* Accordingly, we will affirm the trial court's factual findings unless they are unsupported by substantial evidence. However, we remember that trial courts enjoy broad discretion over matters such as custody and timesharing. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). Indeed, these are matters over which a "court is empowered to make a decision – of its choosing – that falls within a range of permissible decisions." *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004), quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168-69 (2<sup>nd</sup> Cir. 2001) (emphasis in original). Therefore, we examine the trial court's decision for an abuse of discretion.

### **Analysis**

Joseph's argument on appeal is three-fold and addresses itself to both the trial court's analysis and procedure. We address each argument in-turn.

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

## **I. Emilee's Designation as Primary Residential Parent**

Joseph first challenges the trial court's adoption of the DRC's recommendation that Emilee be designated B.J.S.'s primary residential parent. The trial court's order, including its designation of a primary residential custodian, constituted an initial determination of custody. Therefore, we apply the best interest standard of KRS 403.270. *See Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). That statute requires that all decisions concerning custody be decided solely upon the child's best interest, giving equal consideration to both parents. KRS 403.270(2). The statute also commands trial courts to consider factors such as the child's wishes; the parents' respective wishes; each parent's relationship and interaction with the child; the child's adjustment to home, school, and community; and the mental and physical health of all parties. KRS 403.270(2)(a)-(e).

Joseph points to facts in the record which he argues compelled his designation as B.J.S.'s primary residential parent. These include the relationship which exists between Joseph and his son, the care he and his family has and will continue to provide, and the child's links and adjustment to Joseph's home in Scott County. Likewise, Emilee points to testimony that she provided significant care for her child since his birth, especially during the first eighteen months of his life, including taking him to all of his medical appointments in Estill County. Emilee also contends that B.J.S. is well-adjusted in Estill County in the home Emilee shares with her family, and where the child is enrolled in school.

There is substantial evidence to support all of these assertions.

Therefore, it could well be said that the designation of either parent would serve the best interest of the child. The DRC, and ultimately the trial court, decided that Emilee's history of caretaking with B.J.S. in Estill County, attendance at his doctor's appointments, and B.J.S.'s enrollment in an Estill County pre-school combined to make Emilee's designation as primary residential parent in the best interest of B.J.S. Given the testimony which exists to support that decision, and notwithstanding Joseph's suspicion concerning the timing of Emilee's decision to enroll B.J.S. in school, we cannot disagree. There is substantial evidence in the record to support the trial court's designation.

This Court would be remiss if it did not comment on the evidence in this case and the difficult decision the DRC and trial court had to make in light of that evidence. It is abundantly clear from the record that the two young parents in this case have only the best interest of their child in mind. They are to be commended for the amicable relationship they have maintained with each other for the sake of their son. Too often, this Court reviews a trial court's choice between two unfortunate options. That is not the case here. We reiterate what the record already establishes: that Joseph and Emilee, with the support of their respective parents, have both proven themselves to be exemplary parents. Regrettably, due to the distance between them, the trial court held that a designation of primary residential parent had to be made, and we affirm the trial court's designation.

## **II. Joseph's Motion for a Guardian *Ad Litem***

Joseph next argues that the trial court abused its discretion in neither addressing nor granting his request for appointment of a *guardian ad litem* after the DRC submitted his revised recommendations. We disagree.

FCRPP 6(1) and 2(e) provide that in “all actions in which there are disputes regarding custody, shared parenting, visitation[,] or support[,] ... [a] parents or custodian may move for, or the court may order” the appointment of a *guardian ad litem*. However, the language of this rule places the decision to address or grant such a motion squarely within the discretion of the trial court.

In this case, Joseph made his motion for a *guardian ad litem* along with a motion for leave to present further evidence before the DRC. This was after Joseph received the DRC’s revised recommendations – which he reasonably viewed as adverse to him – but before the trial court issued its order adopting those recommendations. Joseph now argues that the trial court’s failure to grant his motion deprived him of a reasonable opportunity to be heard. In light of the fact that the DRC developed a robust record of testimony and documentation during the two-hour hearing on February 6, 2015, we must disagree that the trial court abused its discretion in this manner.

### **III. The Trial Court’s Review and Adoption of Recommendations**

Finally, Joseph takes exception to the trial court’s entry of a “final and appealable” order in response to his initial motion for a determination of temporary custody and primary residential parent. He points out that the DRC’s original and revised recommendations referred to these “temporary motions,” ultimately



arguing that FCRPP 4 required the trial court to conduct a final hearing on these issues before entering a final order and that the trial court's failure to do so constituted an abuse of discretion. We disagree.

FCRPP 4(4) states that DRCs have the authority "to make recommendations to the judge regarding motions for temporary orders of custody, support and maintenance. All temporary and final decrees and orders shall be entered by the court upon review of the recommendations...." FCRPP 4(4). The Rule goes on to state that the trial court must conduct a hearing concerning a party's objections, after which the trial court may adopt the DRC's recommendations, modify them, reject them in whole or in part, receive further evidence, or remand to the DRC for further hearing. FCRPP 4(4)(a). Additionally,

[t]he circuit court shall sign any recommended temporary or post-decree order within 10 days after the time for filing exceptions [ten days after a party receives the DRC's recommendations] has run unless a motion for a hearing on the exceptions has been filed. All temporary recommendations of the [DRC] which become orders of the court shall be without prejudice and subject to the court's de novo review on final hearing.

FCRPP 4(4)(b). Finally, where a party has filed exceptions to a DRC's recommendations, the trial court must enter a final decree within ten days of disposition of the exceptions. FCRPP(4)(d).

Nothing in the record indicates that the trial court failed to conduct a review of the recommendations, evidence, or arguments prior to entering its order. Joseph filed his exceptions to the DRC's revised recommendations, along with two

motions, on July 10, 2015. On September 2, 2015, at its regular motion hour, the trial court recognized that the DRC's recommendations and Joseph's exceptions were before it for review, and the court heard brief argument from Joseph's attorney after the court inquired whether there was "[a]ny reason this just can't be submitted on the record?" Among other arguments, counsel had the opportunity to assert that the "status quo" of equal timesharing should be maintained. The trial court responded that it would take the matters before it, including Joseph's exceptions, under submission; and the court entered its order nineteen days later. This was consistent with the procedure outlined in FCRPP 4. No further hearing was required.

### **Conclusion**

We hold that the trial court acted within its discretion when it designated Emilee primary residential parent. Furthermore, we hold that the trial court employed the proper procedure in arriving at its decision and entering its final and appealable order. Therefore, the Estill Circuit Court's Order of September 21, 2015 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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