

RENDERED: JANUARY 18, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001316-ME

KENDALL JOSEPH EVANS

APPELLANT

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 15-CI-00008

LORA LYNDSEY EVANS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Kendall Joseph Evans, appeals *pro se* from an order of the Lee Circuit Court awarding the parties joint custody of their minor children with Appellee, Lora Lyndsey Evans, being the primary residential custodian, as well as ordering Appellant to pay child support and health insurance for the children. Finding no error, we affirm.

The parties herein were married on June 2, 2007, and had three biological children prior to the marriage: M.J.E., born May 19, 2002; K.J.E., born August 24, 2004; and K.J.A.E., born November 8, 2006. Appellee also had sole custody of her younger brother, E.C.B., born November 2, 2003, who the parties raised along with their biological children. In December 2015, Appellant filed a petition for dissolution of marriage in the Lee Circuit Court. Filed with the petition was a separation and property agreement signed by the parties in December 2014, designating that they would have joint custody of all four children with Appellee being the primary residential custodian, and time sharing/visitation to be agreed upon between the parties. The decree of dissolution was entered on March 25, 2015, and the separation agreement was incorporated by reference therein.

On November 23, 2015, Appellant filed motions to modify timesharing,¹ to appoint a guardian ad litem for the children, to hold Appellee in contempt, and for the appointment of a special Domestic Relations Commissioner (“DRC”).² In his petition, Appellant expressed concerns regarding: (1) Appellee’s treatment of the children in providing sufficient food and maintaining a violence free home; (2) the sleeping arrangement of the children while in Appellee’s care;

¹ Appellant had previously filed a motion to modify timesharing in June 2015, but such was withdrawn by agreement of the parties.

² The then-current DRC was related to Appellee.

(3) the children's tardiness at school; and (4) the children's overall cleanliness. An agreed order appointing a special DRC and guardian ad litem was entered on March 4, 2016.

A final hearing was held on July 20, 2016, and the DRC filed his recommendations on August 25, 2016. Therein, the DRC found that the only evidence supporting Appellant's claim that Appellee was not providing sufficient food was a single incident when the oldest child contacted Appellant complaining that Appellee did not have enough money to take them out to get something to eat. The DRC stated that there was no evidence that Appellee did not have food in the house. Further, the DRC noted that there was no evidence of any sort of spanking, corporal punishment or other violence towards the children while they were in Appellee's care. With respect to the sleeping arrangements, the DRC observed that such was "unusual to say the least," but that all of the children did, in fact, have beds to sleep in when they chose to do so. The DRC did make a finding that all of the children had multiple tardies on their school records and that it was Appellee's responsibility to get them to school. The DRC further found that, contrary to Appellant's claims, there was no indication that "the children have ever been unclean or presented themselves in a manner that is inappropriate for their ages and activities." Although there was evidence that Appellee's mother had substance abuse issues, she did not live with Appellee and had very little contact

with the children. The DRC found that Appellant did have a home that was large enough to accommodate all of the children. However, the DRC observed that Appellant works in Lexington, which requires him to leave early in the morning and not return home until around 6:30 or 7:00 pm. The DRC noted that although Appellant's mother lived across the street from him and could possibly provide help with the children, her husband suffered from Alzheimer's and she stayed with him all of the time. Based upon all of the evidence and testimony presented, and noting that it was "not an easy decision to make," the DRC recommended that the parties continue to have joint custody but that Appellant be designated the primary residential custodian with Appellee having timesharing/visitation on a specific schedule.

Appellee subsequently filed objections and exceptions to the DRC's recommendations. By order entered September 20, 2016, the trial court rejected the DRC's recommendations and ruled that it was in the best interest of the children for the parties to maintain joint custody of the children with Appellee continuing to be the primary residential custodian. Therein, the trial court concluded,

Findings of the Commissioner which lean toward modification of timesharing include the fact that the children had multiple instances of tardiness at school, and that it was Respondent's obligation to get them there on time. Allegations that were unfounded include claims of uncleanliness, which the Commissioner found were not

established; and a claim that Respondent's mother who has a criminal history and drug abuse problems, had stayed with Respondent on occasion. The Commissioner found that Respondent's mother, Margaret Ashcraft, did not live with the Respondent and had minimal contact with the children.

Also weighing against modification were the Commissioner's finding that Petitioner had to leave for work each morning to arrive in Lexington by 7:00 a.m., and usually didn't get home in the evening until 6:30-7:00 p.m. The Petitioner also often works overtime. While the Petitioner's work ethic is commendable, his schedule does not leave much time for him to attend to the children's needs, and it is their best interest which the Court must be focused on. The Respondent on the other hand is unemployed and is thus able to see the children off to school, and is there when the children get home from school. While the Petitioner's mother lives near to him and can help, she also takes care of her husband who has early Alzheimers [sic]. Moreover, the children are involved in sports and after school activities and the Respondent has been providing them transportation to these events. It is unclear with Petitioner's work schedule how he would accomplish this. Finally, although complaining about a lack of food at Respondent's house for the children, the Petitioner, despite having a good income at \$30.22 per hour, has not volunteered to pay child support, and the Commissioner did not make a finding to support the claim of a lack of food.

The trial court further ordered Appellant to pay child support in the amount of \$1,388.04, as well as provide health insurance for the children, which he was able to do at no cost to him through his employment. The trial court subsequently

denied Appellant’s motions to alter, amend or vacate, to present additional proof, and for more specific findings and citations to the record. This appeal ensued.

Trial courts are vested with broad discretion in matters concerning custody and visitation. *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 (2nd Cir. 2001)). As such, we will not disturb a trial court's decision absent an abuse of discretion. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In this Court, Appellant does not present any legal argument as to why the trial court should be reversed. He does point out that per the Lee Circuit Court Clerk, the trial court did not request the video or transcript of the hearing before the DRC, and as such, he concludes that the trial court could not have reviewed the evidence before overruling the DRC. However, the bulk of Appellant’s brief is directed at explaining why he is still concerned about the lack of food in Appellee’s home and that she no longer has a form of transportation. Appellant

also states that he now works as a teacher in the Lee County school system and thus his employment is no longer an issue.

In *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), our Supreme Court noted,

[T]he circuit court has complete discretion regarding the use of a commissioner's report. *Haley v. Haley*, 573 S.W.2d 354, 356 (Ky. App. 1978). Further, the trial court has the right to reevaluate the evidence and reach a differing conclusion from the commissioner. *Basham v. Wilkins*, 851 S.W.2d 491 (Ky. App. 1993). In *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997), this Court conclusively stated that the trial court has broad discretion in actions relying on commissioner's reports, constrained only by the pertinent Rules of Civil Procedure.

Additionally, pursuant to CR 53.06(2), “[t]he court after hearing may adopt the report, may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.” The trial commissioner acts only to further judicial economy by assisting the trial court; the commissioner's report is a recommendation and is not binding. It is the trial court itself that makes findings of fact, either by adopting those recommended by the commissioner or by acting anew. When actions are tried upon facts without a jury, the trial court's findings will not be set aside unless they are clearly erroneous and, therefore, require the support of sufficient evidence. CR 52.01.

Id. at 771. See also *Squires v. Squires*, 854 S.W.2d 765, 770 (Ky. 1993) (Trial court did not deny the appellant due process of law when it rejected the DRC's recommendation without first reviewing the videotape of the hearing).

There is nothing in our rules or case law that requires a trial court to review the entire DRC hearing proceedings prior to overruling a DRC's recommendations. Herein, the trial court's findings of fact are substantially the same as those found by the DRC. Only with respect to the legal conclusion to be drawn therefrom, *i.e.* whether a modification of timesharing/visitation was in the children's best interest, did the DRC and the trial court differ. We are of the opinion that the trial court did consider all of the evidence in concluding that Appellant's work schedule and his absence from home would interfere with his ability to care for the children. While the DRC may have been correct in noting that this is a difficult case, we conclude that the trial court properly ruled that, contrary to the DRC's recommendation, it was not in the children's best interest to live with Appellant.

Finally, we would observe that Appellant's arguments about his continuing concerns as to Appellee's ability to properly take care of the children, as well as the change in his employment situation are properly addressed to the trial court. This Court cannot consider such evidence.

For the reasons set forth herein, the order of the Lee Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Darrell A. Herald
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