

RENDERED: January 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000411-MR

BILLY WILLIAM CROWE

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 01-CI-00156

BETTY JEAN CROWE

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING
AND REMANDING IN PART
* * * * *

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

BAKER, JUDGE: Billy William Crowe brings this appeal from a December 17, 2001, order of the Ohio Circuit Court. We affirm in part, and vacate and remand in part.

Billy Crowe and Betty Jean Crowe, appellee herein, were married on June 18, 1982. A decree of dissolution was entered in Ohio Circuit Court on January 31, 2002. It appears Betty was a homemaker for most of the eighteen year marriage. Two children were born of the marriage. Heather was born April 8, 1983, and is now emancipated. Scotty was born September 18, 1987, and is a

minor child. For most of Scotty's fourteen years, he has resided in Ohio County, Kentucky, with his maternal grandparents, Samuel and Fay Embry. Samuel and Fay are not parties in the instant action.

On May 17, 2001, Billy filed a petition for dissolution of marriage in Ohio Circuit Court. With the petition, Billy tendered a settlement agreement drafted by his counsel, and signed by both parties. Betty was not represented by counsel at the time she signed the agreement. The agreement provided the following provisions: (1) a 1992 Pontiac automobile, a 1982 Chevrolet pickup, and ten acres of real property would go to Billy; (2) Betty would receive Billy's 401K account; (3) Betty would be responsible for credit card indebtedness of approximately \$7300.00; (4) no maintenance would be paid by either party; (5) Betty would be primary custodian of the parties' then two minor children; (6) no child support would be paid by either party; and (7) Billy would receive federal and state income tax deductions for the children.

The circuit court refused to incorporate the agreement into the final decree as there was no provision for child support. The parties were unable to reach another agreement.

A hearing was held before a Domestic Relations Commissioner (DRC) in November 2001. Ky. R. Civ. P. (CR) 53.03. The DRC found: the 1992 Pontiac had been destroyed by Billy; the 1982 Chevrolet pickup was free of encumbrance and in possession

of Billy; Billy had unilaterally sold the ten acres and retained some \$1400.00 profit; and the 401K program [was] valued slightly more than the credit card indebtedness.@ The DRC awarded the 1982 Chevrolet pickup truck to Billy. As Billy retained the profit from the sale of the ten acres and destroyed the Pontiac automobile, the DRC awarded Billy's 401K to Betty. The DRC further ordered the credit card indebtedness divided equally between Billy and Betty.

Concerning child custody, both Billy and Betty indicated it would be in Scotty's best interest to remain with Samuel and Fay. The DRC found that Samuel and Fay qualified as *de facto* custodians and granted custody of Scotty to Samuel and Fay with visitation to Billy and Betty. The DRC recommended that Billy pay child support of \$453.00 per month and Betty pay \$194.00 per month child support to Samuel and Fay. Samuel and Fay were not parties in the action.

Billy filed objections to the DRC's report. By order dated December 17, 2001, the circuit court denied the objections and adopted the DRC's report in its entirety. CR 53.06. This appeal follows.

Despite his prior agreement that it would be in Scotty's best interest to remain with his grandparents, Billy now contends on appeal that the circuit court improperly awarded custody of Scotty to Samuel and Fay as *de facto* custodians. Specifically, Billy asserts that custody may not be awarded to *de*

facto custodians not joined as parties to the action. We are constrained to agree.

Kentucky Revised Statutes (KRS) 403.280(4) provides:

If a court determines by clear and convincing evidence that a person is a *de facto* custodian, the court **shall** join that person in the action, as a party needed for a just adjudication under Rule 19 of the Kentucky Rules of Civil Procedure. (emphasis added).

In the case *sub judice*, Samuel and Fay were not joined as parties to the custody action. We think it axiomatic that custody cannot be properly awarded to *de facto* custodians who are not joined as parties. Indeed, KRS 403.280(4) requires *de facto* custodians be joined as parties in the custody action. As Samuel and Fay were not parties to the action, we are of the opinion that the circuit court improperly awarded custody of Scotty to Samuel and Fay as *de facto* custodians.

Billy also complains that the circuit court's finding that Samuel and Fay qualified as *de facto* custodians is unsupported by the evidence. Requirements for a determination of *de facto* custodian are set out in KRS 403.270(1)(a), which reads:

As used in this chapter and KRS 405.020, unless the context requires otherwise, *Ade facto custodian* means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age. . . .

In determining that Samuel and Fay qualified as *de facto* custodians, the court found as follows:

In the course of the hearing, both parties indicated it would be in the best interest of Scotty to remain where he has lived for fourteen (14) years with Samuel Embry and Fay Embry and the Court so finds that the Embry~~s~~ (sic) have qualified as *de facto* custodians and the wishes of the parties on record will be complied with and the Embry~~s~~ (sic) granted custody of Scotty, with the rights of the parties to visit and have him visit them.

DRC Report at 2. As we have previously determined that Samuel and Fay were improperly awarded custody as *de facto* custodians, we think the sufficiency of these findings is rendered moot. We reach such decision because Samuel and Fay were not joined as parties in these proceedings. Should they become parties to the custody proceeding by the further orders of the Ohio Circuit Court, any findings pertaining to the *de facto* custody of the minor child should properly conform to the statutory requirements of KRS 403.270(1)(a).

Billy also maintains the circuit court erred by ordering Billy and Betty to pay child support to Samuel and Fay as *de facto* custodians. As we do not believe Samuel and Fay were properly determined *de facto* custodians, we deem the assignment of error also moot.

Billy next argues the circuit court~~s~~ division of marital property and debts was unjust. In a proceeding for dissolution of marriage, the circuit court shall divide the marital assets in just proportions considering all relevant

factors. KRS 403.190(1). The decision of the circuit court will not be disturbed unless clearly erroneous or a clear abuse of discretion. See Wood v. Wood, Ky. App., 720 S.W.2d 934 (1984). It appears Billy's 401K account was the parties' only real asset. Based on Billy's testimony, the court found that he retained profits from the sale of the real property and destroyed a Pontiac automobile. The court awarded Billy the pickup truck and held him responsible for one-half of the credit card debt. The circuit court awarded Billy's 401K account to Betty, and held her responsible for the other half of the credit card debt. Under these unique circumstances, we cannot say the division of marital property and debts was in unjust proportions. As such, we are of the opinion that the circuit court did not abuse its discretion in its distribution of marital assets.

For the foregoing reasons, the order of the Ohio Circuit Court is affirmed in part and vacated in part and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David M. Taylor
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Albert W. Barber, III
Owensboro, Kentucky