RENDERED: JANUARY 9, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000762-MR

JEROME E. WOOD, III — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 99-CI-01196

SONJA R. WOOD — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

KNOPF, JUDGE: Jerome Eugene Wood, III appeals from a judgment of the Hardin Circuit Court relating to the dissolution of his marriage to Sonja R. Wood. Jerome argues that the trial court erred by failing to designate him as his daughter's residential custodian and by imputing income to him for purposes of calculating child support. Finding no error, we affirm.

Jerome and Sonja were married on December 30, 1993. Sonja brought to the marriage a prior born child, Zechariah (Zech), whom Jerome subsequently adopted, and an additional

child, Sarah Marie, was born of the marriage. The parties separated in April of 1999, and shortly thereafter Jerome filed a petition for dissolution of the marriage.

Following the separation, both Zech and Sarah resided with Sonja in Hardin County. However, after an altercation between Zech and Sonja in May of 2000, the parties agreed that Zech would reside with Jerome in New Albany, Indiana. Thereafter, the trial court awarded the parties joint custody of the children, with Jerome designated as Zech's residential custodian, and Sonja as Sarah's residential custodian. By agreed order, the trial court initially directed Jerome to pay child support in the amount of $500.00 per month, and temporary maintenance in the amount of $500.00 per month. After Zech went to live with Jerome, the trial court reduced his child support obligation to $349.63 per month, and his maintenance obligation to $300.00 per month.

On March 23, 2001, the trial court entered a decree dissolving the marriage, reserving all other issues for later adjudication. These matters were referred to the domestic relations commissioner (DRC). Following a hearing and presentation of evidence, including school records of the children and a custodial evaluation, the DRC entered findings of fact, conclusions of law and a recommended order on December 6, 2001. In pertinent part, the DRC recommended that the parties

continue exercising joint custody of the children, with Zech residing with Jerome and Sarah with Sonja. The DRC found that, while Zech has exhibited significant behavioral problems, Jerome has been able to provide an environment for Zech which is conducive to dealing with those issues. On the other hand, the DRC concluded that Sarah's current living arrangement should not be changed.

On the issues of maintenance and child support, the DRC noted that Jerome had been laid off from his job and had been collecting unemployment. The DRC expressed the opinion that Jerome had been voluntarily unemployed for longer than necessary. Nevertheless, the DRC declined to impute income to Jerome based upon his prior earnings. Rather, the DRC found that Jerome is capable of earning at least as much as Sonja, and for purposes of maintenance and child support their incomes should be deemed equal. Accordingly, the DRC recommended that neither party be awarded maintenance, and that Sonja's prior award should be discontinued effective September 30, 2001.

Both parties filed objections to the DRC's report. By separate orders entered on January 29, 2002, the trial court overruled the objections and adopted the DRC's recommendations. Following an additional motion and allegations by Jerome, the trial court re-submitted the issue of custody to the DRC to consider whether an additional hearing was necessary. After

considering the facts and allegations presented by Jerome, the DRC declined to conduct an additional hearing or to reconsider her prior custody recommendations. Jerome now appeals.

As an initial matter, we note that Sonja has failed to file a brief in this case, as required by CR 76.12(1). Under CR 76.12(8), we may accept Jerome's statement of the facts and issues as correct, reverse the judgment if we believe his brief supports such a result, or treat Sonja's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case.[1] This Court is not, however, required to consider Sonja's failure to file a brief as a confession of error and to reverse the trial court for that reason.[2] Furthermore, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."[3] Because Jerome's appeal is based upon the sufficiency of factual findings made by the DRC and adopted by the trial court, we decline to view Sonja's failure to file a brief as a confession of error.

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[1] Scott v. Scott, Ky. App., 80 S.W.3d 447, 451 (2002).

[2] *See* Kupper v. Kentucky Board of Pharmacy, Ky., 666 S.W.2d 729, 730 (1983).

[3] CR 52.01. *See also* Whicker v. Whicker, Ky. App., 711 S.W.2d 857, 858-59 (1986).

Jerome does not object to the trial court's award of joint custody, but he argues that the trial court erred by failing to designate him as Sarah's residential custodian. In a joint custody arrangement, parents do not share actual physical possession of the children, but both parents have equal rights and responsibilities for major decisions, and the parents will consult with each other on these major decisions.[4] However, as a matter of necessity, the parent with whom the child is residing at the time will be responsible for making day-to-day decisions concerning the child.

Recently, in Fenwick v. Fenwick,[5] the Kentucky Supreme Court addressed the standards for determining which parent should be designated as the child's primary residential custodian.

> A child cannot simultaneously reside with both parents, and in most cases, the child will spend more time with one parent than the other--a fact that, in many cases, mirrors the family's situation prior to the parents' separation. Accordingly, in joint custody arrangements, the parties will often agree, or the court will designate, that one of the parents will act as the "primary residential custodian." Although this term--like "joint custody" itself--has not been statutorily defined in Kentucky, it is generally employed by attorneys and courts alike to refer to the party with whom the child will primarily reside. In such situations, the other parent is awarded what

[4] Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993).

[5] Ky., 114 S.W.3d 767 (2003).

> is referred to as "visitation," "time-sharing," or "parenting time" with the child. However, even when joint custody involves essentially equal physical custody … one party may nevertheless be designated the primary residential custodian for other purposes.
>
> While joint custodians, as previously stated, share major decision-making on all child-rearing decisions unless the parties or the court elect otherwise, designating a party as the primary residential custodian logically confers on that party: (1) the primary role in minor day-to-day decisions concerning the child; (2) the responsibility for providing a residence, i.e., a "home base," for the child, and (3) the normal routine care and control of the child. Such designation may also carry with it additional legal significance, e.g., a dependency tax deduction, residency for school purposes, and child support. As such, a trial court must again consider the child's best interests in connection with its decision to designate one of the parties as the primary residential custodian.[6]

Jerome argues that the trial court erred in finding that Sarah's best interests would be served by her continuing to reside with Sonja. Jerome contends that the DRC and the trial court failed to give sufficient weight to the factors which show him as the more suitable residential custodian for Sarah. However, as an appellate court, we are not authorized to substitute our own judgment for that of the trial court on the weight of the evidence where the trial court's decision is

[6] Id at 778-79 (*footnotes omitted*).

supported by substantial evidence.[7] In her February 28, 2002, report, the DRC thoroughly addressed each of Jerome's allegations and arguments regarding Sarah's residential custody. The DRC specifically found that the May 2000 incident when Sonja slapped Zech has not happened again, that Sonja has made efforts to avoid smoking around the children, and that Sonja is able to provide a supportive home for Sarah. The DRC noted that Sarah has significant bonds with both Zech and Jerome, and was reluctant to separate the siblings. Nonetheless, the DRC found that "Sarah is a happy, well adjusted child whose needs are being met in her present environment." Based on the record, we cannot find that the trial court failed to consider Sarah's best interests when it designated Sonja as her primary residential custodian.

Jerome next argues that the trial court erred by imputing income to him for purposes of determining child support. He asserts that he would have been entitled to an award of child support under a proper application of the child-support guidelines. We disagree. KRS 403.212(2)(d) provides that "[i]f a parent is voluntarily unemployed or underemployed, child support shall be based on a determination of potential income, ..." Furthermore, "[a] court may find a parent to be voluntarily unemployed or underemployed without finding that the

[7] Leveridge v. Leveridge, Ky., 997 S.W.2d 1, 2 (1999).

parent intended to avoid or reduce the child support obligation."[8] As previously noted, the DRC did not impute income to Jerome based upon his recent work history, as the statute allows. Rather, the DRC simply found that Jerome is capable of earning at least as much as Sonja. Based upon their essentially equal incomes and time with the children, the trial court did not order either party to pay child support. At most, the DRC gave Jerome the benefit of the doubt on this question. Consequently, we find no error.

Accordingly, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jerome E. Wood, III, *pro se*
New Albany, Indiana

No brief for appellee:

[8] KRS 403.212(2); *See also* Commonwealth, ex rel. Marshall v. Marshall, Ky. App., 15 S.W.3d 396, 401-02 (2000).