

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001364-MR

THOMAS HOWARD PIKE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 00-FC-001122

SANDRA S. PIKE

APPELLEE

OPINION
REVERSING IN PART
AND AFFIRMING IN PART

** ** * * *

BEFORE: BARBER, COMBS, AND KNOPF, JUDGES.

BARBER, JUDGE: Appellant Thomas Pike appeals the trial court's reduction of his parenting time in a joint custody award, and the trial court's opinion modifying the parties' agreement regarding division of the marital property.

The parties have three minor sons. At the time of separation, Sandra Pike sought sole custody of the children, and Thomas Pike requested joint custody. One of the children has been diagnosed with ADHD, and another is autistic. In

accordance with KRS 403.290(2), the trial court appointed an expert witness to determine the best custody arrangement in light of the children's special needs.

An expert evaluation of the parties and their children was conducted by Dr. Steven Simon, Ph.D. Dr. Simon enthusiastically recommended joint custody of the children, and noted the importance of the ongoing involvement of both parties in the boys' lives. Dr. Simon recommended as close to a 50/50 shared parenting arrangement as possible. Dr. Simon stressed the need for "maximal and near equal involvement for both parents." Dr. Simon recommended that during the school year Sandra have primary physical custody with Thomas having liberal visitation of two weekends out of every three and several afternoon/evening visits during the week. Dr. Simon suggested that the primary residency be changed during the summer. Under Dr. Simon's recommendation, Thomas would have primary physical custody of the boys during the summer, with Sandra having the same type of liberal visitation as was available to Thomas during the school year. Both parties accepted Dr. Simon's report and recommendations.

During the pendency of the action, which extended over one year, Thomas had visitation with the boys on most weekends and numerous weekdays, while Sandra resided with them in the family home. Thomas was also available to care for the children

overnight when Sandra had to travel for work. The record shows that the children flourished under this arrangement, and that the minor child with autism did better during the year with this custody and visitation agreement than he ever had before. All three children showed markedly increased good behavior and a measurable level of comfort with the visitation and custody schedule.

During pendency of the action, Sandra stated that while she wanted the boys on occasional weekends during the year, she would permit Thomas to have the children three weekends a month. This suggestion was substantially similar to Dr. Simon's recommendation that two out of every three weekends the children be permitted to stay with Thomas. The suggested visitation schedule also took into account the testimony of the minor children, who repeatedly stated that they wanted the occasional weekend with their mother, while spending the majority of their free time with their father.

Despite the clear evidence in the record, the trial court disregarded Dr. Simon's recommendation, the children's expressed desires, the testimony of the parents and the witnesses, and the visitation schedule previously followed by the parties. The trial court awarded Thomas only minimal alternate weekend visitation. The trial court also failed to provide for Sandra to have regular visitation during the summer,

awarding Thomas four weeks with the children, rather than the schedule proposed by the expert witness and adopted by the parents.

In making the custody award, the trial court disregarded the extensive expert testimony found in the record indicating that a non-standard custody and visitation arrangement was necessary in this case due to the special needs of the children. The trial court stated that the children's "living arrangements must be as stable as possible" but neglected to conform its ruling to the routine already well established in the children's lives. The trial court's ruling destabilized the children's routine, and significantly decreased the time spent with their father, which was contrary to the children's needs.

There is no evidence in the record suggesting that decreased contact with the father would be beneficial to the children, or that the visitation arrangement in use by the parties was not routine and stable so as to benefit the children. As the children involved have clear and measurable medical, emotional and social needs, the unwarranted alteration of the schedule in place was in error and must be reversed.

The trial court determined, contrary to expert opinion and the testimony of the witnesses, that a standard visitation schedule provided more stability and routine than the visitation

schedule that had been used by the parties for over a year. In fact, the record shows that the extensive paternal involvement stabilized the children's lives, and caused the autistic son to "blossom" and to do better than he ever had before. The parties had achieved a stable routine, and the evidence shows that this routine was beneficial to all of the children. The trial court's alteration of this stable routine was in error, and the opinion must be reversed.

Kentucky law requires that a trial court grant reasonable visitation to a non-primary residential parent. See KRS 403.320(1). Reasonable visitation must be determined based on the circumstances of each parent and child. Drury v. Drury, Ky. App., 32 S.W.3d 521, 524 (2000). This Court has expressly stated that a trial court "should not give undue weight to the terms of a 'standard visitation order.'" Id., 32 S.W.3d at 524-525. In the present case, the requirement that the parties conform to a "standard visitation schedule" was in error. The record shows that the adoption of the non-standard visitation schedule already in place, or one markedly similar to that was appropriate.

Thomas's second claim of error is that the trial court entered inconsistent orders with regard to the division of the parties' debts. The parties entered into a Partial Agreement regarding division of marital real estate and automobiles. This

Agreement called for Thomas to pay the first mortgage on the property in which Sandra resided with the children, and Sandra to be responsible for the second mortgage on that property.

The trial court did not follow the parties' Agreement when rendering its decision. The trial court required Thomas to pay both mortgages. In response to motions to alter, amend or vacate the judgment, the trial court noted that it recognized the validity of the Partial Agreement dividing debts and real property between the parties, but that in light of the overall division of property, Thomas should be responsible for all mortgage debts. The trial court's opinion adopted the Domestic Relations Commissioners Pendente Lite Report with regard to the allocation of debt.

The trial court noted that the Property Settlement Agreement was based on division of real estate alone, and did not address division of debt. Based on the trial court's opinion, Thomas has a duty to contribute to payment of the second mortgage on the property. The trial court has discretion to allow an appropriate division of property and debt. Mudd v. Mudd, Ky. App., 903 S.W.2d 533, 534 (1997). The determination of the trial court must be affirmed in absence of a showing of an abuse of discretion. CR 52; Barnes v. Barnes, Ky. App., 772 S.W.2d 636, 637 (1989). We find no reversible error with regard to the allocation of debt. The trial court's opinion regarding

Thomas's duties to contribute to the payment of the second mortgage is affirmed.

COMBS, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART:

Respectfully, I must dissent from the portion of the majority opinion which sets aside the trial court's visitation order. In Drury v. Drury, Ky. App., 32 S.W.3d 521 (2000), this Court addressed a situation where local rules of procedure required a trial court to give presumptive weight to the terms of a "standard" visitation order. This Court held that such rules impermissibly conflict with KRS 403.320(1). Consequently, a trial court may not give presumptive weight to the terms of a standard visitation schedule. Rather, KRS 403.320(1) requires a court to make visitation determinations based upon the individual needs of the parents and the children. Id. at 524.

However, this Court also emphasized that, in the absence of an agreement between the parties, the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children. Id. at 525. Thus, a trial court's use of a standardized visitation schedule is not automatically grounds for reversal, even in a case involving an award of joint custody. Rather, this Court

will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case. Id.

The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). Matters involving the exercise of discretion presuppose that a court could reach a range of conclusions based upon the evidence and a proper application of legal principles. City of Louisville v. Allen, Ky., 385 S.W.2d 179, 182 (1964). As long as the trial court's conclusion is within that range and applies the correct rule of law, generally an appellate court must defer to the trial court's determination. Although I agree with the majority that the evidence more strongly supports the visitation schedule recommended by Dr. Simon, I cannot conclude that the trial court's decision to reject his recommendation constituted clear error or an abuse of discretion. See Poe v. Poe, Ky. App., 711 S.W.2d 849, 852 (1986).

The trial court's orders reflect that it carefully considered the evidence before it reached a decision regarding visitation. Indeed, the trial court specifically stated:

The Court made very specific findings supporting its decision regarding the parenting schedule. There was much evidence presented at trial that the two older children of the parties were in need of structure and routine in light of their special needs. Even Dr. Simon acknowledged that the special needs of the children precluded him from recommending some form of a [*sic*] equal time sharing of the children. Dr. Simon reported that "[b]ecause of the idiosyncratic and complex issues that Alex and Landon present ... [t]hese boys need absolute routine, consistency and predictability in their lives, especially during the academic year." **Dr. Simon Evaluation, pg. 17.**

In reaching its conclusions, the Court strongly considered the continued reference to the complex issues presented by Alex and Landon, and found that, pursuant to the directives of KRS 403.270, the best interests of the children would best be served by the visitation schedule ordered by the Court. However, by implementing such a schedule, the Court in no way intended to limit Respondent's contact or participation with his children. Both parties testified that Respondent is active in coaching the children's athletic teams, etc. On the contrary, both parties are encouraged to continue to act in a reasonable manner, as noted by Dr. Simon, in coordinating things for the boys, transporting them for visitation, and meeting their general needs.

Opinion and Order denying Motion to Alter, Amend or Vacate, May 17, 2002, pp. 5-6.

The trial court's order does not show any impermissible presumption in favor of the standard visitation order. Rather, in the course of weighing the evidence, the trial court chose to disregard Dr. Simon's recommendations

concerning visitation. The court instead found that the standard visitation schedule was the most appropriate level of visitation for the parents and the children. While a different court could have decided otherwise, the court was well within its discretion in considering the weight to be given to Dr. Simon's report. Consequently, I believe that the majority simply substitutes its judgment for that of the trial court on the visitation issue. Therefore, I would affirm the trial court's judgment in its entirety.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Bryan Gowin
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