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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002152-ME

HITOMI STURGILL

APPELLANT

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 02-CI-00454

ZANE GARTH STURGILL

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; MILLER, SENIOR
JUDGE.¹

COMBS, CHIEF JUDGE: Hitomi Sturgill appeals from an August 19,
2003, judgment of the Greenup Circuit Court in an action for
dissolution of marriage. The court affirmed the report of the
Domestic Relations Commissioner (DRC), overruling the exceptions
filed by Hitomi. Hitomi argues that the trial court erred with

¹ Senior Judge John D. Miller, sitting as Special Judge by Assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

respect to: custody of the parties' two minor children, child support, maintenance, and division of marital property. We agree with Hitomi's contention that the trial court erred in allowing the appellee, Zane Sturgill, to retain for his own use a portion of the monthly Social Security benefits awarded to the children. We vacate as to that issue but affirm as to all the other issues.

The parties were married in 1993, and they separated in 2002. During their ten-year marriage, Hitomi was not employed. Zane worked as a nuclear power plant inspector until his retirement in 2001. At the time of the dissolution, their income consisted solely of Zane's Social Security retirement benefits (\$1,370) and the benefits awarded to the two children based on Zane's retirement (\$1,160).

During the pendency of the dissolution proceeding, the children -- Sean, then five years of age, and Shantel, one year of age -- continued to reside in the marital residence with Hitomi. In lieu of temporary maintenance, Zane was ordered to pay \$878 per month in child support and all of the expenses related to the marital home. Hitomi had alleged that Zane drank excessively and that he lacked proper parenting skills. Therefore, his visitation with the children was restricted to daytime visits only. Because of the heightened degree of hostility between the parties, the trial court ordered that

pick-up and delivery of the children for Zane's visitation take place in front of the sheriff's office.

A trial on the contested issues was heard by the DRC on May 20, 2003. Both Hitomi and Zane sought sole custody of the children. Neither party offered any expert evidence or the testimony of any other person on the issue of custody. Hitomi testified that Zane had never been involved in the day-to-day care of the children, that he was away from home much of the time, that he drank at least fifteen cans of beer daily, and that he had physically abused her. As a result, she filed a petition for dissolution and sought a restraining order. She did not believe he was fit to parent their children.

Zane denied that he had any substance abuse problem or that he drank to excess. He also denied hitting Hitomi; however, he acknowledged that he had "shoved" her during an argument concerning the children. According to Zane, a dispute arose after he learned that Hitomi had locked their son in the bathroom as a means of punishing the child. He testified that he had previously cautioned her about such methods of discipline after learning that she had locked the child out of the house. Hitomi admitted to locking her son both in the bathroom and out of the house. She testified that she believed that she was acting properly in order to "teach her son a lesson." Because he believed that Hitomi's methods of discipline constituted

abuse, Zane testified that he sought custody of the children in order to prevent the mistreatment from continuing.

In his report, the DRC made the following findings and recommendations with respect to the issues of child custody, visitation, and child support:

4. Based upon the evidence the Commissioner finds that although both parties seek to find fault with the other concerning raising the children, it appears that both [Hitomi and Zane] appear[] to be decent loving parents who earnestly care for their children. It is therefore the recommendation of the Commissioner that [they] shall have joint care, custody and control of the children with [Hitomi] to be the primary residential custodian.
5. With regard to the issue of visitation, the court has already, by previous order, found that [Zane] presents no danger to his children and directed that [he] complete a parenting skills class, which apparently he has failed to do. Therefore, with regard to visitation, the Commissioner will simply continue the court's order that until such time as [Zane] evidences proof of completing the parenting class, his visitation shall be non-overnight every other weekend. . . .
6. With regard to the issue of child support, the Commissioner finds that [Zane] receives social security checks of \$1,354 for himself and \$582.00 for purposes of each of his dependent children, for a total income of \$2,518.00. [Hitomi] is not employed, although the parties' youngest child is over 3 years of age and therefore the Commissioner will impute guideline income. When these amounts are applied

to the attached guideline worksheet,
the child support obligation to be paid
by [Zane] to [Hitomi] shall be \$542.00.

(DRC's report, at pp. 2-3.)

In her appeal, Hitomi first argues that the trial court erred in making an award of joint custody. Although she does not identify any specific errors in the court's findings of fact, she argues that the trial court should have awarded sole custody of the children to her based on the totality of the circumstances: the restrictions placed on Zane's visitation with the children, his failure to complete a parenting class, his history of drinking, and the inability of the parties to cooperate.

KRS² 403.270(2) requires the trial court to determine custody based on the best interests of the children. In reviewing a custody decision, we first examine the record to determine whether the trial court clearly erred in its findings of fact. Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986); CR³ 52.01. Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or if they are not supported by substantial evidence. Sherfrey v. Sherfrey, 74 S.W.3d 777, 782 (Ky.App. 2002). While the court's findings are somewhat sparse, specifically addressing only a few of the

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

relevant statutory criteria, they are nevertheless consistent with the testimony of the parties. They are not clearly erroneous.

We note that a trial court has broad discretion in determining the best interest of children -- particularly with respect to the type of custody (sole or joint) to be granted.

Just as it is impermissible to prefer one parent over the other based on gender, it is now impermissible to prefer sole custody over joint custody. In every case the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest. That the court possesses broad discretion in this regard cannot be gainsaid.

Squires v. Squires, 854 S.W.2d 765, 770 (Ky. 1993). Although Hitomi has cited circumstances that could have appropriately supported an award of sole custody, she has not demonstrated that the award of joint custody was either arbitrary or unreasonable. See, Sherfrey, supra at 782-783. Since we are unable to conclude that the trial court abused its discretion, we will not disturb its award of joint custody.

Hitomi also argues that the trial court erred in its award of child support. She contends that the court erred in failing to require Zane to deliver to her both of the checks that he receives each month from the Social Security Administration (SSA) for the children. We believe that the

trial court misperceived the nature and purpose of the Social Security benefits at issue, and we conclude that it erred in allowing Zane to utilize \$618 of the children's monthly benefits for his own needs.

Although the children's two checks are sent to Zane, he receives them in his capacity as their "representative payee." 42 U.S.C. 402(d)(1). In that capacity, Zane is required to use the payments **only** for the benefit of the children. 20 C.F.R. § 404.2035. SSA considers payments to be appropriately spent if they are used for the children's "current maintenance," a designation that includes costs for food, shelter, clothing, medical care, and personal items. 20 C.F.R. §§ 404.2040(a)(1) and (b). Any sums remaining after paying for these basic items must be invested on behalf of the children. 20 C.F.R. § 404.2045(a).

Although the parties share custody of the children, there is no dispute that Hitomi provides all of the children's needs: shelter, food, clothing, and medical bills. Because Zane does not exercise overnight visitation, he does not provide even occasional shelter for the children. Under these circumstances, the trial court could not have correctly permitted Zane to keep any portion of the children's benefits for his own upkeep. As the residential custodial parent, Hitomi would be deemed to be the children's preferred payee if she were

to petition the SSA for a change in Zane's status. 20 C.F.R. § 404.2021. The record does not disclose why she has not already taken that action. Nevertheless, her failure to petition the SSA directly does not legitimize Zane's personal use of his children's benefits for himself. Such a diverting of these funds is a violation of the pertinent federal statutes and regulations. Thus, on remand, the trial court is directed to require Zane to reimburse Hitomi for all sums paid by the SSA on the children's behalf since the dissolution, to forward to her all future sums, and to consent to a change of the representative payee in favor of Hitomi if she decides to seek that status.

Zane's child support obligation does not equal \$1,160 -- the amount of the children's SSA benefits. The trial court must calculate his support pursuant to this court's holding in Miller v. Miller, 929 S.W.2d 202 (Ky.App. 1996). Miller holds that when calculating child support in situations where the child has his own Social Security benefits, the child's award is treated as income to the custodial parent. A child support obligor receives a credit of the amount of the child's benefits against his or her own child support obligation. See also Van Meter v. Smith, 14 S.W.3d 569 (Ky.App. 2000). We note that KRS 403.211(14) was enacted after the Miller and Van Meter decisions, requiring the trial court to exclude Social Security

benefits received by a child due to a parent's **disability** in calculating child support. However, that statute does not address the issue of Social Security **retirement** benefits. Thus, the approach outlined in the Miller and Van Meter cases remains applicable to the circumstances in this case.

Hitomi also contends that the trial court erred in its award of maintenance. Hitomi was twenty-nine years of age at the time of the dissolution; she has a high school education. She had only limited work experience at a convenient-type store prior to her marriage, and she was not employed during the marriage. Due to her lack of employment skills and the amount of property awarded to her (roughly \$56,000 -- mostly in non-liquid assets), the DRC found that Hitomi lacked sufficient property to meet her needs and that she could not currently support herself. The trial court agreed and awarded her the sum of \$510 per month for a period of two years or until she might sell the marital residence -- whichever occurs first.

Without citing any authority, Hitomi argues that the trial court abused its discretion as to both the amount and the duration of its award. She contends that she is entitled to the sum of \$964 per month. When added to the children's Social Security benefits, that amount will allow her to meet her expenses. She seeks that sum until she is able to complete a college education.

Although such an award would leave Zane with only \$400 per month to support himself, Hitomi nonetheless believes that he has income not revealed to the DRC and that "he could work any time he wanted to." (Appellant's brief, p. 11.) Hitomi has presented no evidence of record to support her assertion that Zane has income in addition to his Social Security retirement benefits. Our independent review of the record uncovered no such evidence.

A trial court is required to assess the circumstances of both parties in fashioning a proper maintenance award. KRS 403.200. The evidence reveals that Zane is retired, that his health is deteriorating, and that his sole source of income is \$1,370 per month in Social Security benefits. Hitomi's argument would subject Zane to a poverty-level subsistence in order to enable her to pursue her education while remaining unemployed. The court did not find that argument to be; nor do we. We perceive no abuse in the trial court's exercise of its discretion as to either the amount or the duration of its award of maintenance. Weldon v. Weldon, 957 S.W.2d 283, 285-286 (Ky.App. 1997); Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992).

Hitomi last argues that the trial court abused its discretion in its division of the marital property. Once again, she has not cited any authority to support her contention that

the trial court's equal division of property constituted an abuse of discretion. She has not stated in her brief where she asked the trial court for a greater portion of the marital estate. Therefore, we are not at liberty to review this unpreserved issue.

The judgment of the Greenup Circuit Court is vacated only with respect to its treatment of the children's Social Security retirement benefits and the calculation of Zane's child support obligation. The judgment is affirmed in all other respects.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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