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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002687-ME

DAVID ALAN HARNISH — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 02-CI-00302

BARBARA KAY HARNISH — APPELLEE

OPINION
AFFIRMING IN PART
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: SCHRODER, TAYLOR, AND VANMETER; JUDGES.

TAYLOR, JUDGE: David Alan Harnish appeals from a September 24, 2003, judgment of the Mason Circuit Court dissolving their sixteen-year marriage and awarding sole custody of the parties' children to Barbara Kay Harnish. We affirm in part, vacate and remand in part.

David and Barbara were married May 2, 1987. Three children were subsequently born of the marriage. Barbara initiated the underlying action by filing a petition for legal

separation in the Mason Circuit Court. The petition was later amended to one for a decree of dissolution of marriage. On September 24, 2003, the circuit court entered "Findings of Fact, Conclusions of Law, and Judgment of Dissolution and Award of Child Custody, Division of Property." Relevant to this appeal, sole custody of the parties' three children was awarded to Barbara and visitation was granted to David.

David and Barbara subsequently filed motions to alter, amend or vacate the judgment and David filed a motion for a new trial. Ky. R. Civ. P. (CR) 59.05 and CR 59.01. David argued the judgment was insufficient as it failed to make findings of fact as required by CR 52.01. By order entered November 24, 2003, the circuit court denied David's motions. This appeal follows.

David first contends the circuit court erred by failing to make findings of fact pursuant to CR 52.01 to support its conclusion that an award of sole custody by Barbara was in the best interest of the children. Specifically, David argues that the Court made no findings of fact regarding the best interest of the children.

The standard of review applied by this Court when reviewing a child custody determination is whether the circuit court's findings of fact are clearly erroneous. CR 52.01; Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). CR 52.01

provides, in relevant part, that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law. . . ." The language of CR 52.01 is mandatory. Standard Farm Stores v. Dixon, 339 S.W.2d 440 (Ky. 1960); Brown v. Shelton, _____ S.W.3d _____ (Ky.App. 2005). The reason for requiring the facts to be found specifically is to provide the reviewing court with a basis for understanding the circuit court's "view of the controversy." Richle, 719 S.W.2d at 444. Furthermore, CR 52.01 clearly applies to child custody cases as findings of fact are particularly important in custody determinations. Id.

In the case sub judice, the circuit court made no findings of fact to support the conclusion that it was "in the best interest of the children" to award sole custody to Barbara. Thus, we have no findings of fact to review. As the circuit court made no findings of fact to support its award of custody, we vacate the award of sole custody to Barbara and remand for the court to make specific findings of fact regarding the best interest of the children in its awarding of custody consistent with CR 52.01.[1]

David's second contention is that the circuit court abused its discretion by ordering that he have "standard

[1] A review of the record reveals that the parties submitted a joint trial memorandum wherein both requested an award of joint custody. We do not reach the merits of the circuit court's underlying custody determination.

visitation." As we have vacated and remanded the circuit court's custody determination, we believe any issue as to visitation is moot as the circuit court will necessarily have to revisit the issue upon remand.

David's third contention is that "awarding sole custody of a child to one parent based upon the 'best interest of the child' violates the disenfranchised parents' constitutionally protected fundamental liberty interest in the care, custody and control of their child." Appellant's Brief p. 16. David asserts that pursuant to Troxel V. Granville, 530 U.S. 57, 147 L. Ed. 49, 120 S. Ct. 2054 (2000), sole custody cannot be awarded to a parent unless the other parent is unfit.

We believe Troxel is distinguishable. The issue in Troxel was whether a grandparent could be granted visitation with a grandchild over the objection of a parent. The facts of Troxel are obviously distinguishable from the case sub judice where parents are involved in a dissolution proceeding and an award of sole custody is made. We, thus, believe David's argument is without merit.

David's fourth contention is that the circuit court erred when it overruled his objection to hearsay testimony. David asserts that Barbara testified to what the parties' counselor had said to her. Specifically, Barbara testified that the counselor "basically informed me that she didn't think she

could counsel us." David contends that the statement was offered for the truth of the matter asserted and that the counselor was not called to testify.

Ky. R. Evid. (KRE) 801(c), states as follows:

> 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

We believe Barbara's testimony constituted hearsay under KRE 801. Barbara failed to respond to this issue in her brief, and we have not been cited to an applicable exception to the hearsay rule. Thus, we can only conclude the circuit court erred by overruling David's objection. Upon remand, the circuit court should not consider this hearsay testimony in rendering its ruling.

David's final contention is that the circuit court erred by denying his motion to amend the judgment to include a statement that Barbara was not pregnant. David asserts that such a statement is required under Kentucky Revised Statutes 403.150. While David is technically correct, we note the petition for a decree of dissolution was filed in January 2003 and the judgment was not entered until September 2003. Neither party has alleged that Barbara was pregnant when the petition was filed or at any other time during the pendency of the action, and the record has not been supplemented to reflect

same. Accordingly, we do not believe the circuit court committed reversible error in failing to indicate whether Barbara was pregnant. See CR 61.01.

For the foregoing reasons, the judgment of the Mason Circuit Court is affirmed in part, vacated in part and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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