

RENDERED: AUGUST 19, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001446-MR

ROSELLA HALL

APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM TRUDE, JR., JUDGE  
CIVIL ACTION NO. 02-CI-00223

BOBBY JACK HALL

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART, AND REMANDING

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BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

MINTON, JUDGE: Rosella Hall raises a host of issues on appeal from the decree that dissolved her marriage to Bobby Jack Hall.

We find merit in Rosella's argument that the circuit court failed to make the findings required by KRS<sup>2</sup> 403.270 when

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Kentucky Revised Statutes.

awarding custody and that the circuit court failed to follow Administrative Procedures of the Court of Justice when awarding a fee to the Domestic Relations Commissioner (DRC) in excess of \$600. So we must vacate and remand on those issues. We otherwise affirm on all other issues.

#### **I. FACTUAL SUMMARY.**

Rosella and Bobby Jack married on March 2, 1996. They had one child, a seven-year-old daughter, Bobbie DeLanna Hall, called "Sissy." Each party also has grown children from earlier marriages.

Bobby Jack brought into the marriage a mobile home and three lots located at 5091, 5093, and 5095 Winchester Road in Irvine, Kentucky (the "nonmarital property"). After the marriage, the couple bought a mobile home to live in (the "marital mobile home"), three more rental mobile homes and the lots upon which they sat (the "Waco mobile homes"), a tract of land that was deliberately titled in the name of Bobby Jack's daughter, Angel (the "Sunrise Valley land"), a camper, and several items of personalty. After separating, but before divorcing, Rosella bought another mobile home (the "Carhartt Avenue mobile home"), which she later sold for \$8,000.

On the night Sissy was born, the nonmarital mobile home burned. Although the insurer deemed the home and its

contents a "total loss," most of the furniture was salvaged and the mobile home was repaired. The insurer paid policy limits of \$25,000 for the mobile home and \$11,000 for the loss of the contents in the fire.

## **II. PROCEDURAL HISTORY.**

On August 28, 2002, Rosella filed a petition for dissolution of marriage. The petition requested that the court award the parties joint custody, grant Rosella child support, and divide the marital property and debt equitably.

After an initial hearing before the DRC, the parties agreed to joint custody of Sissy with Rosella serving as primary residential custodian. But in January 2003, the court entered a temporary custody order making Bobby Jack the primary residential custodian. Sissy has lived with Bobby Jack since then.

The parties engaged in protracted hearings before the DRC. The DRC, ultimately, recommended that the marital mobile home be awarded to Bobby Jack. This decision was based on the fact that Rosella had bought and sold the Carhartt Avenue mobile home during the pendency of this action and retained all of the proceeds. Because the mobile home that burned was Bobby Jack's nonmarital property, the DRC suggested that he retain all of the insurance proceeds. The DRC also proposed that the Sunrise

Valley land remain in Angel's possession, that the Waco mobile homes be sold and the proceeds used to pay any outstanding debts and taxes, that the marital camper be awarded to Bobby Jack, and that the parties divide the remaining marital personalty.

The DRC further recommended that Bobby Jack be awarded sole custody of Sissy. The DRC recommended that Rosella be awarded visitation according to the court's standard visitation order; that Rosella pay child support; and that Rosella claim Sissy as an exemption for income tax purposes, at least until such time that Bobby Jack would benefit from the exemption.

In a decree entered March 17, 2004, the circuit court dissolved the marriage and adopted all of the DRC's proposed findings and recommendations regarding property division, custody, and support. Rosella responded by filing a motion to alter or amend the court's judgment, or, in the alternative, for a new trial. The motion was denied but, on April 28, 2004, the court entered an amended order. This appeal follows.

### **III. ISSUES ON APPEAL.**

Rosella makes the following arguments: first, the court erroneously prohibited her from introducing Bobby Jack's medical records into evidence; second, the court erred by awarding all funds from the fire insurance to Bobby Jack; third, the court erroneously awarded Bobby Jack the marital mobile

home; fourth, the court failed to award Rosella one-half of the value of the Sunrise Valley land; fifth, the DRC's rulings were based on personal bias against Rosella's counsel; sixth, the court erred in ordering Rosella to pay the DRC's fees; and, seventh, the court erred in awarding Bobby Jack sole custody and refusing to adopt Rosella's suggested visitation schedule. We will address each issue separately.

**A. Standard of Review.**

The scope of our review on appeal is limited. We may only set aside the circuit court's findings of fact if they are "clearly erroneous" and if, based on those findings, the court abused its discretion.<sup>3</sup>

**B. Introduction of Bobby Jack's Medical Records.**

Rosella first argues that the court erred by refusing to allow her to introduce Bobby Jack's medical records. Rosella claims that the medical records are necessary to prove that Bobby Jack is addicted to pain medication; she further argues this evidence was pertinent to the court's determination of "the mental and physical health of all individuals involved," as required by KRS 403.270(2)(e). We disagree.

As Rosella notes, child custody cases present an exception to the psychotherapist-patient privilege found in

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<sup>3</sup> Kentucky Rules of Civil Procedure (CR) 52.01.

KRE<sup>4</sup> 507.<sup>5</sup> The reason for the exception is that custody cases are "civil proceedings in which the patient introduce[s] his or her mental condition as a critical factor in a best interest determination."<sup>6</sup>

Under the KRE, however, evidence introduced at trial must also be relevant.<sup>7</sup> "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."<sup>8</sup>

The court refused to consider Bobby Jack's medical records because they were "over one (1) year old" and had "no bearing on the parties' current situation." Rosella's intention in introducing Bobby Jack's medical records was to prove that he was currently addicted to pain medication and, therefore, an inappropriate custodian for Sissy. But the only records Rosella sought to introduce were from evaluations made before the parties' separation. Moreover, from what we can glean from Rosella's own argument, it does not appear that the records

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<sup>4</sup> Kentucky Rules of Evidence.

<sup>5</sup> LOUISE E. GRAHAM & HON. JAMES E. KELLER, 16 KENTUCKY PRACTICE, DOMESTIC RELATIONS LAW, §21.16 (2d ed. 1996).

<sup>6</sup> *Id.*

<sup>7</sup> KRE 402.

<sup>8</sup> KRE 401.

offered any probative value as to whether Bobby Jack was, in fact, addicted to pain medication. Although the medical records indicate Bobby Jack was taking medication for a back injury, there is no evidence of addiction.

The records Rosella offered for introduction did not contain contemporaneous evaluations, nor were they relevant to the parties' current situation. They did not tend to make the likelihood of Bobby Jack's current addiction any more or less probable; therefore, we conclude that the circuit court did not abuse its discretion in excluding this evidence from the record.

#### **C. Fire Insurance Proceeds.**

Second, Rosella argues that the court erroneously awarded Bobby Jack the proceeds of the insurance from the fire that destroyed the nonmarital mobile home. The insurance company paid \$25,000 for damage to the mobile home and \$11,000 for the damage to the contents. Rosella does not contest the award of \$25,000 to Bobby Jack for his nonmarital mobile home; she does, however, contend that the \$11,000 should have been divided between the parties because the home contained both marital and nonmarital personalty when it burned.

The basic "rules for classification of property as marital and nonmarital relate to the time or manner in which

property is acquired.”<sup>9</sup> Property acquired after the date of marriage and before the date of divorce is considered marital, whereas, property acquired before the marriage or after divorce is nonmarital.<sup>10</sup>

We believe it is clear that the \$25,000 is Bobby Jack’s nonmarital property. That amount was paid by the insurer for Bobby Jack’s “total loss” of his interest in the mobile home. There is no question that Bobby Jack owned the mobile home before the parties’ marriage and that the mobile home was, in fact, nonmarital property. Therefore, we find no fault with the court’s decision to award Bobby Jack the \$25,000 in insurance proceeds for the mobile home.

We also believe the court properly awarded \$11,000 in insurance proceeds to Bobby Jack for the loss of the contents of the mobile home. As the court noted, there is no evidence that the insurance policy was adjusted after the marriage to cover the loss of any of Rosella’s personalty which might have been inside the trailer. Without such evidence, we must assume that the \$11,000 was paid by the insurance company solely to cover the loss of Bobby Jack’s personalty. Moreover, there is insufficient proof in the record of the value or contents of Rosella’s nonmarital property allegedly destroyed in the fire;

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<sup>9</sup> GRAHAM, *supra*, §15.5.

<sup>10</sup> *Id.*; see KRS 403.190(2).

so we will not disturb the circuit court's decision to award the proceeds of the fire insurance to Bobby Jack.

**D. The Marital Mobile Home.**

Rosella's third argument is that the court erroneously awarded Bobby Jack the marital mobile home. We disagree.

The court's decision to award Bobby Jack the marital mobile home was based on the fact that while this action was pending, but before the divorce, Rosella bought and sold the Carhartt Avenue mobile home. Rosella claims that she bought the mobile home "using her tax refund money and money saved from her employment." She later sold the home for \$8,000; moved into one of the Waco mobile homes; and used the proceeds from the sale "to pay marital debt and living expenses for herself and the parties' child." Because the parties' marital mobile home had an approximate value of \$10,500, the court determined that Rosella and Bobby Jack were "more or less even regarding the \$8,000 which Rosella kept for herself and spent during the pendency of this action."

The Kentucky Supreme Court has held that "property acquired after physical separation but before a decree of divorce or legal separation [is] marital property."<sup>11</sup> Although Rosella and Bobby Jack were separated at the time Rosella bought

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<sup>11</sup> *Id.* at §15.8; see also, Stallings v. Stallings, 606 S.W.2d 163 (Ky. 1980); Culver v. Culver, 572 S.W.2d 617 (Ky.App. 1978).

the Carhartt Avenue home, there had been no divorce decree. So even though Rosella may have purchased the property with "her" money, the Carhartt Avenue mobile home was marital property. Because Rosella dissipated marital property by purchasing the home and using the proceeds from the sale, we find no fault with the court's decision to make the parties "more or less even" by awarding Bobby Jack the marital mobile home.

**E. The Sunrise Valley Mobile Home.**

Fourth, Rosella claims that the court failed to award her one-half of the interest in the Sunrise Valley mobile home. Again, we must disagree.

It is undisputed that while the parties were married, they bought the Sunrise Valley mobile home and lot and, then, had the title documents made to Bobby Jack's daughter, Angel Hall, as the record owner. Rosella claims she objected to putting the title to the property in Angel's name, but Bobby insisted upon it so he would not risk losing his Social Security benefits by having ownership of too much property attributed to him.

Regardless of the motivation behind placing title to the Sunrise Valley mobile home in Angel's name, the deed clearly states that Angel is the owner of the property. Rosella fails to state a legally sound reason why the language of the deed should not control. Therefore, we will not disturb the circuit

court's finding that neither Rosella nor Bobby Jack has any interest in the property.

**F. Evidence of the DRC's Personal Bias.**

Rosella's fifth argument is that the DRC exhibited personal bias against her counsel resulting in unfair rulings. Rosella claims the "antagonistic hostility is obvious on the audio tapes" and that the DRC "chastised" and "screamed" at counsel.

Unfortunately for Rosella's reliance on the audiotapes to prove her point, the appellate record does not contain the audiotapes from the DRC hearings. But we do have over 600 pages of transcript from the 19.5 hours of hearings that were held before the DRC. And upon review of the entire transcript, we fail to see sufficient evidence of the DRC's "antagonistic hostility." We agree there are occasions in the record that the DRC appears exasperated, but we do not believe that her reaction was necessarily aimed at counsel for Rosella.

Moreover, although it may have been lost in translation between the audiotapes and the written transcript, we do not find any evidence that the DRC chastised or screamed at Rosella's counsel. Again, although the DRC may have gotten frustrated during the unusually long hearings in this case, we do not believe her irritation rose to the level of personal bias affecting the outcome of these proceedings.

**G. Payment of the DRC's Fees.**

Sixth, Rosella claims that the court erroneously ordered her to pay \$1,170 for the DRC's fees. Specifically, Rosella argues that the DRC's fees may not exceed \$600.

The Administrative Procedures of the Court of Justice state that "[f]or any hearing, the domestic relations commissioner . . . shall receive a fee of \$60 per hour, assessed at a rate of \$15.00 for each quarter hour or part thereof."<sup>12</sup> With regard to the total fees that may be levied, the procedures dictate that "[n]o more than \$600 shall be assessed in any case regardless of the number and length of hearings unless recommended by the circuit judge and approved by the Chief Justice for extraordinary circumstances."<sup>13</sup>

In her initial findings and recommendations, the DRC stated that the hearings for this case lasted 19.5 hours. At \$60 per hour, the total cost for the hearings was \$1,170. Because the DRC found that "[t]he great majority of this time was used by petitioner's counsel" and that "[a]t the very most, this entire hearing should have taken no more than 4 to 5 hours," the DRC determined that Rosella should pay the whole fee.

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<sup>12</sup> Administrative Procedures of the Court of Justice, AP IV, Sec. 15 (2005).

<sup>13</sup> *Id.*

We find no fault with the DRC's request for a fee in excess of \$600 or with the requirement that Rosella or her lawyer pay all of it. But the circuit court did not follow the administrative procedures required when awarding a DRC fee in excess of \$600. The circuit judge must first approve and then recommend the fee to the Chief Justice who must approve it as an extraordinary expense before a party may be charged a DRC fee in excess of \$600. Therefore, we must vacate on this issue and remand it; on remand, the circuit court is instructed to follow the Administrative Procedures of the Court of Justice to set a DRC fee in excess of \$600.

#### **H. Custody of Sissy and Visitation.**

Finally, Rosella argues that the court erred in awarding sole custody of Sissy to Bobby Jack and in limiting Rosella's visitation to the "standard visitation schedule." She claims that the DRC based her decision regarding temporary custody on "bald, unsubstantiated allegations against Rosella"; that the DRC failed to make adequate findings in granting sole custody to Bobby Jack; and that the court erred in rejecting Rosella's requested visitation schedule.

The court's decision regarding the award of temporary custody is irrelevant at this juncture. The final, permanent order awarding Bobby Jack custody supersedes any previous

temporary orders. Therefore, the issue is moot and we need not address Rosella's argument on the matter.

With regard to the permanent award of custody, KRS 403.270 sets forth the specific factors the court must take into consideration. The factors relevant to this case are as follows:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined by KRS 403.720;

No single statutory factor is dispositive. And although the court must initially consider the factors set forth in KRS 403.270, the overriding standard is the best interest of

the child.<sup>14</sup> This test looks only at the "best interest of the child, and not the most suitable person to have custody."<sup>15</sup>

Although our courts have "declined to enunciate a preference for joint custody," we have held "that 'joint custody must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child.'"<sup>16</sup> While there is no doubt that a "cooperative spirit" between the parents creates a "greater likelihood of successful joint custody . . . we do not regard it as a condition precedent. To so hold would permit a party who opposes joint custody to dictate the result by his or her own belligerence and would invite contemptuous conduct."<sup>17</sup> In making a determination regarding joint custody, the trial court must "look beyond the present and assess the likelihood of future cooperation between the parents."<sup>18</sup>

In her recommendations, the DRC stated that both parties loved Sissy very much; that each parent wished to be primary residential custodian; that Sissy was a "happy, well-adjusted" child; that Sissy makes good grades and appears neatly

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<sup>14</sup> GRAHAM, *supra*, §21.5; see also, Squires v. Squires, 854 S.W.2d 765, 769 (Ky. 1993).

<sup>15</sup> Davis v. Davis, 619 S.W.2d 727, 730 (Ky.App. 1981).

<sup>16</sup> Fenwick v. Fenwick, 114 S.W.3d 767, 775 (Ky. 2003).

<sup>17</sup> Squires, 854 S.W.2d at 768.

<sup>18</sup> *Id.* at 769.

dressed and clean at school; that the school bus driver noted Bobby Jack's presence in the doorway of the house or outside when Sissy boarded the bus each morning; that Sissy had lived with Bobby Jack for ten months; that "[m]ovement from one residence to another without any good reason is not in any child's best interest"; and that Rosella and Bobby Jack had difficulties communicating.

Based on the DRC's recommendations, the circuit court concluded:

That Respondent shall be awarded sole custody of the parties' daughter, Bobbie [DeLanna] Hall[,] and that Petitioner shall be awarded visitation every other weekend from 6:00 p.m. on Friday until 6:00 [p.m.] on Sunday, unless Bobbie's school is in session the next day and Bobbie is going, in which case Petitioner shall keep the child Sunday night and take her to school the next morning; Petitioner shall also have visitation with Bobbie each Tuesday for [sic] 5:30 p.m. to 7:30 p.m. instead of the standard Wednesday evening visitation, and otherwise as prescribed by the Court's standard visitation order, a copy of which is attached hereto and incorporated herein by reference[.]

Upon review of the record and the standards for awarding child custody, we do not believe there was a sufficient factual basis for the court to award sole custody to Bobby Jack. Other than noting that both parents wished to retain custody of Sissy, there was no mention of the factors listed in KRS 403.270. The court failed to note Sissy's wishes, Sissy's

adjustment to her home and community, her interaction with her other relatives, the physical and mental health of all individuals involved, or any evidence of domestic violence. Moreover, the only reference to Sissy's best interest was the DRC's reference to her own conviction that it was not in "any child's best interest" to move from "one residence to another."

The DRC did state that Bobby Jack and Rosella "do not communicate." While we concede that the transcripts give us at least a fair appreciation of the degree of hostility between these parents, we do not believe there was sufficient evidence to substantiate the DRC's recommended finding that the parties "are unable to work together to jointly raise Bobbie." It is clear that Bobby Jack and Rosella do currently lack a "cooperative spirit" with regard to Sissy's upbringing, but we think the court should have looked "beyond the present" to "assess the likelihood of future cooperation between the parents."<sup>19</sup>

We appreciate that the difficult task of adjudicating custody disputes is made more difficult when, as here, there are deficiencies militating against custody by either parent. But we do not believe that the court made sufficient findings to justify an award of sole custody to Bobby Jack. Therefore, we must vacate the court's custody order and remand for further

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<sup>19</sup> *Id.*

findings in accordance with KRS 403.270 and the best interest of the child standard. Despite the parties' current inability to cooperate, on remand, the court is to take into consideration the possibility of joint custody.

Finally, Rosella argues the court erroneously rejected her proposed visitation schedule. Because we are vacating and remanding the circuit court's decision for further findings regarding custody, we will not analyze the visitation argument further in this opinion. The visitation schedule could change depending upon further findings regarding custody.

#### **IV. Conclusion**

For these reasons, we affirm the decree on all issues except custody and visitation and the DRC's fee, which are vacated and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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