

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002612-ME

TOMMY COUNTS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE MARC I. ROSEN, JUDGE  
ACTION NO. 00-CI-00610

JOYCE L. COUNTS

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

McANULTY, JUDGE: Tommy Counts appeals the order of the Boyd Circuit Court which confirmed the Report and Recommendations of the Domestic Relations Commissioner (DRC) granting Joyce L. Counts sole custody of their two children, dividing their personalty, and awarding Joyce attorney fees and hearing costs. We vacate the court's order and remand.

The original petition for dissolution of marriage was filed in 2000; however, there followed an attempt at reconciliation. Tommy filed an amended petition for dissolution in April 2002. Tommy requested joint custody of the children,

with Joyce to have physical custody. He requested visitation according to the local guidelines and a temporary order for child support.

In the DRC's Report and Recommendation of August 6, 2002, the DRC reported that the parties through their attorneys had announced that they had reached an agreement regarding custody, visitation and child support, and the selling of their vehicles. The DRC made findings regarding their income and expenses and determined that the marital residence would be sold. The DRC recommended that they share the expense of mortgage payments equally. The next month, Joyce filed a motion for contempt alleging Tommy had not been paying the mortgage or other expenses in accordance with the court's orders. The issue was set for a hearing, but there is no record of this motion being ruled on by the court.

On January 30, 2003, the DRC entered a Report and Recommendation, stating that a final hearing on the merits had been held at which the parties announced that they had reached an agreement on all issues except division of some furniture, TVs and VCR; costs of the hearing; and reimbursement to Joyce of mortgage payments. The DRC made recommendations on the division of the personal property. The DRC stated that Tommy should reimburse Joyce for mortgage payments, or the funds would come out of his share of the profits from the family residence which

was still to be sold. The court documented that Tommy's sister had alleged in a separate suit that the couple owed her money for loans she made to them. The DRC determined that the proceeds from the sale of the house would be placed in escrow pending resolution of that suit, with distribution to the parties of funds over and above what the sister might receive.

Shortly thereafter, Tommy notified the court that he had obtained new counsel. Joyce soon filed a motion requesting that the court enforce the parties' property settlement agreement because Tommy had refused to sign it once it was reduced to writing. She alleged hardship in that she was making the mortgage payments on the house and having to borrow money despite the court's order that they split this expense. Tommy responded that he did not agree to the terms of the settlement agreement, and felt that his property rights and those of his sister were not being protected. Through his new counsel, he filed exceptions to the DRC's Report and Recommendations, asserting that there was no meeting of the minds as to the agreement. He argued he should not have been responsible for half of the mortgage payments since he did not live in the residence, that he did not receive enough of the furnishings, and that the children should have been given some other TV rather than the large screen TV. He further alleged there was other property to be divided.

On May 5, 2003, an Agreed Order was entered in which the parties agreed that the house should be sold as soon as possible with the proceeds to be placed in an account. The DRC stated that prior to a final hearing, Tommy was to pay half of the mortgage expense and make up the arrearages to Joyce. On June 10, 2003, however, the court ordered the matter held in abeyance as the court had been notified that Tommy had filed a bankruptcy petition on May 23, 2003, invoking the stay provisions of the bankruptcy code.

While the case was still in abeyance, Joyce filed a motion for a decree of dissolution to be entered while reserving the remaining items of property division and custody. The court entered a decree of dissolution over Tommy's objection in February, 2004. On June 3, 2004, Joyce moved for a hearing after the order lifting the stay was entered.

On October 21, 2004, the DRC again entered a Report and Recommendations. The DRC noted that the hearing was attended by Joyce and her counsel, but that although Tommy's counsel was present, Tommy unexpectedly had not attended the hearing. The DRC found that joint custody would not be appropriate as there was a great deal of conflict in the custody arrangement. The DRC recommended sole custody to Joyce. As to the personalty, the DRC gave to each party the personal property then in their possession per Joyce's request. The DRC assigned

the residence to Joyce in exchange for her foregoing repayment of the \$24,000 in expenses which should have been paid by Tommy.

The DRC filed a supplemental Report and Recommendation ordering Tommy to pay attorney fees and costs. The DRC related the "tortured history" of the case and stated that after Tommy signed the agreed order but then declared bankruptcy, Joyce "was left to pay the majority of the marital debts in addition to incurring substantial attorney fees that would not have been necessary but for the actions of" Tommy. On November 18, 2004, the Boyd Circuit Court confirmed the DRC Report as an order of the court. Tommy appeals this order.

Tommy argues that there was not sufficient evidence to support the commissioner's findings that there was "a great deal of conflict" in Tommy's relationship with his children which mandated against joint custody. Next, Tommy argues that it was an abuse of discretion for the DRC not to divide the estate of the parties, given their long term marriage, according to the factors in KRS 403.190. Finally, Tommy argues that it was improper for the court to order him to pay attorney fees because the court did not do so on the basis of the financial circumstances of the parties under KRS 403.220.

Joyce responds that Tommy's failure to file exceptions or objections to the report of the Domestic Relations Commissioner renders these arguments unpreserved. Additionally,

she contends that there was evidence adduced at the hearing to support the custody decision. She states that the division of property was fair after Tommy rejected an earlier settlement agreement which detailed the division of property, and put forth no evidence to show what he wanted at the final hearing.

Finally, Joyce argues that the DRC's Report makes clear that the financial resources of the parties were considered when making the award of attorney's fees to Joyce.

On appeal, 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 the witnesses. CR 52.01. In actions tried by the court without a jury, the sufficiency of evidence to support the findings of fact may be raised on appeal without regard to whether there was an objection to such findings or whether there was a post-judgment motion. CR 52.03; Eiland v. Ferrell, 937 S.W.2d 713, 715 (Ky. 1997). Under CR 52.03, when the only issue is whether the evidence was sufficient to support the findings of the trial court, there is no need to object or make additional motions.

Id.

First, we address the court's custody decision. The trial court is required to determine custody "in accordance with the best interests of the child" after considering the factors set out in KRS 403.270(2). The court awarded sole custody based

on Joyce's allegation of conflict between Tommy and his daughter and sporadic visitation with his son. However, there was no real testimony taken by the court at the hearing. Tommy was not present, and Joyce did not testify but merely stated, under oath, that her attorney's recitation of Joyce's offer corresponded to her understanding.

In addition, while the court stated that it was in the best interests of the children that sole custody be awarded to Joyce, the court did not examine the statutory factors of KRS 403.270 other than its finding of conflict. We believe the trial court's order does not adequately articulate findings on the factors mandated by the statute. Stafford v. Stafford, 618 S.W.2d 578 (Ky. App. 1981). As a result of these deficiencies, we find it necessary to remand for a hearing and determination of the best interests of the children, complete with specific findings as required by KRS 403.270 and CR 52.01.

Next, we consider Tommy's argument that the court abused its discretion in failing to divide the couple's property. He cites KRS 403.190 which states that the court "shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors." Tommy argues that the court did not recount the status of the marital estate and did not divide the property proportionately, instead opting to follow Joyce's counsel's

proposal that each party be given the personalty already in his or her possession. Joyce's counsel maintained at the hearing that Tommy had already obtained what he wanted.

Apparently all of the personalty at issue is marital. It is true that the trial court has an obligation to divide the property according to the statutory factors. It is mandatory that the court divide marital property in accordance with standards set out in the statute. Herron v. Herron, 573 S.W.2d 342 (Ky. 1978). We therefore agree that the court erred in dividing the property by merely assigning the parties the property in their possession. As the court made no findings of fact as to what personal property was at issue, this Court certainly has no way of ascertaining whether the division was just. We remand for a proper division of the personal property pursuant to KRS 403.190.

Next, Tommy essentially argues that the court failed to make a finding that inequity in the parties' financial circumstances was the basis for the award of attorney fees. He believes the attorney fees and costs were awarded simply to "punish" him for having filed a bankruptcy action.

We agree with Joyce that Tommy had a responsibility to object to the award of attorney fees in the commissioner's report. Furthermore, we conclude that the court's declaration that she had incurred the majority of the marital debt because

of Tommy's failure to pay according to the court's orders was a statement that Joyce's financial resources had been exhausted. Therefore, the court did base its award of attorney fees on a consideration of their financial resources according to KRS 403.220. Additionally, since the court below ordered Tommy to pay the fee amount directly to Joyce's counsel, Tommy failed to add an indispensable party to this appeal. Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001). We affirm the award to Joyce of attorney's fees and costs. That award, moreover, does not preclude the court making a similar assignment of attorney fees and costs following future hearings in the trial court.

For the foregoing reasons, we vacate the court's orders of custody and division of personal property and remand to the Boyd Circuit Court for further proceedings consistent with this opinion. We affirm the court's award of attorney fees and costs.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Hughes  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Roger W. Hall  
Ashland, Kentucky