

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000714-ME

JONATHAN SCOTT SIMON

APPELLANT

v. APPEAL FROM EDMONSON CIRCUIT COURT
HONORABLE MICHAEL L. MCKOWN, JUDGE
ACTION NO. 05-CI-00041

MICHELLE ANN SIMON

APPELLEE

OPINION
AFFIRMING IN PART,
AND VACATING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Jonathan Scott Simon appeals from an order entered by the Edmonson Circuit Court, Family Division, addressing issues of child custody and parenting time. For the reasons stated hereafter, we affirm in part, and vacate and remand in part.

Jonathan and appellee Michelle Ann Simon married in 1999 and separated in 2005. Their only child was born in 2000. Initially, the parties agreed to temporary

joint custody, with each parent having the child for a substantial period each week. They subsequently made various oral modifications of their parenting time arrangements.

The Domestic Relations Commissioner (DRC) conducted a hearing in August 2006 before recommending to the trial court an order dissolving the marriage, and naming Michelle as the child's primary residential custodian except to the extent that Jonathan was designated as the “primary custodian with regard to extracurricular activities.” The trial court adopted but subsequently amended the DRC's order. The final findings of fact, conclusions of law and decree of dissolution continued to provide that Michelle would be the primary residential custodian except as to extracurricular activities. Although the DRC had recommended that the parents should continue their agreed parenting time arrangements absent further conflict, the court found that because of the parties' history of conflict and deviations from the agreement, parenting time instead should be governed by the family court's standard guidelines, with certain modifications. This appeal followed.

First, Jonathan asserts that the trial court erred by failing to state sufficient reasons for awarding primary residential custody to Michelle rather than to him. We agree.

KRS¹ 403.270(2) requires the trial court to determine custody in accordance with the child's best interest, giving equal consideration to each parent. The court must consider all relevant factors, including in these circumstances:

(a) The wishes of the child's . . . parents . . . as to his custody;

¹ Kentucky Revised Statutes.

- (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; [and]
- (e) The mental and physical health of all individuals involved[.]

KRS 403.270(2). KRS 403.270(5) permits the trial court to grant joint custody if doing so is in the child's best interest.

Here, the court directed Jonathan to pay child support, ordered the parties to share the dependent tax exemption, and established parenting time arrangements.

However, the court failed to discuss the statutory factors set out in KRS 403.270(2) or to provide any reasons for the custody award, instead merely directing that Michelle “shall have primary residential custody” and that Jonathan “shall be the primary custodian with regard to extracurricular activities.” The court denied Jonathan's timely exceptions and request for additional findings of fact, stating only that the DRC

conducted a day long hearing with several witnesses for both parties. There was much discussion of the best interests of the child as to custody with several witnesses from both sides. Enough information was provided to enable the [DRC] to reach his decision. He stated that both were fit parents but he used his discretion to appoint [Michelle] as primary residential custodial parent. It is not required that he include in his order all of his reasoning in reaching his decision. The Court sees no error in the [DRC's] appointment of [Michelle] as primary residential custodial parent.

It is not argued that the evidence adduced below was insufficient as to the issue of child custody. However, in the absence of specific findings of fact, we are unable to conduct a

review of the trial court's action pursuant to the clear error standard of CR² 52.01. As in *McFarland v. McFarland*, 804 S.W.2d 17, 18 (Ky.App. 1991), where this court rejected as insufficient the trial court's cursory finding that one parent was “the fit and proper person to have custody of the three minor children[,]” here the DRC's and the court's statements were inadequate to demonstrate specific consideration of the statutory factors. Thus, as in *McFarland*, the court's ruling must be vacated in part and remanded for more specific findings and conclusions as to the issue of child custody.

Next, Jonathan asserts that the trial court erred by failing to interview the parties' child. We disagree.

KRS 403.290(1) permits a trial court to exercise its discretion to “interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation.” *See Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004); *Brown v. Brown*, 510 S.W.2d 14 (Ky. 1974). However, as noted in 16 Louise E. Graham and James E. Keller, *Kentucky Practice*, 21.13 (1997),

[y]ounger children should not be questioned regarding their wishes for two reasons. First, asking young children which parent they prefer reinforces a child's view that the parents' divorce is a result of the child's behavior. Second, a child's preference may not be rationally connected to his or her best interest.

(Footnote omitted.) Here, given the fact that the child was only six years old at the time of the hearing, we cannot say that the failure to interview her constituted an abuse of discretion. Moreover, given the discussion of the interview issue during the hearing and

² Kentucky Rules of Civil Procedure.

the DRC's obvious deliberate decision not to interview the child, any failure by the DRC to more specifically rule on Jonathan's request amounted to harmless error.

Next, Jonathan asserts that the trial court abused its discretion by imposing parenting time guidelines which reduced the amount of time which he previously had been able to spend with the child, thereby violating the child's best interest. We disagree.

KRS 403.320(1) provides that a parent who is not granted primary child custody generally is “entitled to reasonable visitation rights[.]” Here, the parties initially agreed to a temporary schedule for sharing time with their child. Eventually the court implemented the parenting time guidelines of the 38th Judicial Circuit, Family Division, after both changing the midweek visitation schedule to better accommodate Jonathan's schedule, and allowing the modifications related to Jonathan's status as primary custodian for extracurricular activities. Thus, the guidelines were modified to fit the parties' situation. *Cf. Drury v. Drury*, 32 S.W.3d 521 (Ky.App. 2000) (cautioning against any presumption in favor of using a standard, unmodified visitation schedule). Although Jonathan complains that the final parenting time schedule provides him with less time with the child than he received under the temporary agreement, we cannot say that the trial court abused its considerable discretion when setting the terms of that schedule. Jonathan therefore is not entitled to relief in this regard.

Finally, we note that although Jonathan argues that an ambiguity exists in the terminology used in the parenting time guidelines below, our review of the record confirms that although he is the “primary custodian with regard to extracurricular

activities,” only Michelle is named as a primary custodian for residential purposes. Thus, Jonathan obviously is the parent to whom the guidelines’ “non-primary residential parent” provisions refer.

The court’s order is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

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