

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001304-ME

JENNIFER LEIGH SURRATT

APPELLANT

v. APPEAL FROM TRIMBLE FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 09-CI-00110

SHANE DELBERT SURRATT

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: KELLER AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Jennifer Surratt (Jennifer) appeals from a Trimble Family Court denial of her motion to alter, amend, or vacate its Findings of Facts, Conclusions of Law issued in the Jennifer and Shane Surratt's (Shane) divorce.

Jennifer bases her appeal on the following grounds: (1) the court erred by

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

delegating its responsibility to make findings and conclusions; (2) the trial court failed to make specific findings related to custody and time-sharing; (3) the trial court failed to make findings to support its child support calculations; (4) the child support award was inadequate; (5) the trial court erred in permitting the father to claim the parties' children for tax purposes for 2009; (6) the trial court erred in dividing assets and debts. Following a careful review of Jennifer's brief,² the record, and applicable caselaw, the Trimble Family Court order is reversed and remanded for additional findings as specified.

A. Factual Background

Jennifer and Shane were married on August 12, 2007. Following a tumultuous marriage, the couple separated for the final time on June 28, 2009. Following the separation, Jennifer and the couple's minor daughter moved into Jennifer's parents' Indiana home. A few months later, Jennifer and Shane's son was born in Indiana.

During the pendency of the dissolution proceedings, the parties made claims and filed charges and countercharges of domestic violence, parental neglect, sexual abuse, and threats of violence toward one another. A Domestic Violence Order (DVO) was issued against Shane. Jennifer and her mother currently face misdemeanor charges, which were based upon Shane's complaints.

Shane is employed as a registered nurse. Each week, he works three 12-hour shifts and earns \$17.85 per hour. Shane lives in a home built on land

² Shane's appellate brief was stricken from the record.

given to him by his grandmother. His parents and sister live nearby and provide needed support when Shane has the children. Shane's sister and parents have allowed the children to stay at their home during overnight visits until the mold problem in Shane's home is properly addressed. Shane's sister has acted as an intermediary between the parties during the divorce.

Jennifer is a stay-at-home mother with limited education. She has not completed her GED and has primarily worked part-time jobs that involve unskilled labor. Jennifer has had serious bouts with depression and has previously attempted suicide. At the time of the hearing, Jennifer continued to reside in her parents' Indiana home. Her parents provide her with a home and necessities.

In an order entered on May 11, 2010, the trial court granted Jennifer and Shane joint custody of their minor children, with Jennifer as the primary residential custodian. Shane was granted time-sharing on weekends. The trial court ordered Shane to pay \$512.00 per month in child support. This amount was a modification from the trial court's temporary support order, issued on December 23, 2009, in which Shane was ordered to pay \$658.00 per month.

On May 21, 2010, Jennifer moved the court to alter, amend or vacate the May 11, 2010, order and to make more specific findings as requested in an attached memorandum. On May 27, 2010, the trial court entered its final order. This appeal follows.

A. Custody and Time-sharing

First, Jennifer claims that the trial court erroneously delegated or adopted the findings and conclusions proposed by Shane. A review of the record indicates few differences between the findings submitted by Shane and the trial court's May 11, 2010 order. The trial court bears the responsibility of evaluating the evidence and making individual, specific findings. Kentucky Rules of Civil Procedure (CR) 52.01. Kentucky courts have long discouraged the practice of courts' adopting the "winning side's" findings of facts and conclusions. *Callahan v. Callahan*, 579 S.W.2d 385, 387 (Ky. 1979). This delegation impermissibly shifts the burden of weighing evidence and making findings to the parties.

It is critically important to the litigants to be assured that the decision making process is totally under the control of the trial judge. It is equally important for the appellate courts to be similarly confident if and when they become involved in the judicial process.

Id.

While delegating this responsibility to a party can result in reversible error, reversible error is not automatic and must be determined based on the circumstances of each case. Although most of the court's order mirrored Shane's proposed findings and conclusions, Jennifer concedes that there were several major differences, including changes to time-sharing, parental conduct requirements, and attorneys' fees. Additionally, the trial court made various changes following Jennifer's May 21, 2010 motion to alter, amend, or vacate and Jennifer's request for more specific findings.

Jennifer makes a blanket argument that the court's order was too similar to Shane's proposal. Without showing that the court delegated its authority and did not individually consider the evidence submitted, the trial court's adoption of Shane's proposal was not reversible error.

Second, Jennifer claims that the trial court failed to make specific findings of fact to support its custodial determination. KRS 403.270 (2) provides,

The Court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (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 in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The trial court must make specific findings concerning its consideration of those factors. *Stafford v. Stafford*, 618 S.W.2d 578 (Ky. App. 1981), *overruled on other grounds by Largent v. Largent*, 643 S.W.2d 261 (Ky. 1982).

In response to Jennifer's motion for more specific findings, the trial court entered a final order that did not provide more specificity. Concerning its custody determination, the court stated:

Despite the animosity between the parties, the Court does not find that it is legally impossible for these parties to at least confer regarding issues of education and medical care for the children. While the marriage between the parties has been dissolved, they remain the biological parents of their two children and each has a legal right to have contact with the children and a moral duty to assist in their raising and upbringing. Like it or not, Jennifer Surratt and Shane Surratt are bound for the next seventeen years to raise their children. Each must set aside personal anger and take actions which are in the best interest of their children or each faces loss of contact with the children.

The trial court's comments were general and could be applied to many, if not all, custody disputes. Under Kentucky law, there is no presumption of joint custody. *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). The trial court did not provide additional findings to indicate that KRS 403.270, or other relevant factors, had been considered. Therefore, we reverse the custody award and remand to the trial court for further findings of fact. The trial court is instructed to examine the factors enumerated in KRS 403.270(2), and any additional relevant factors, and make findings and conclusions concerning the children's best interest.

B. Child Support

Similar to the trial court's findings of fact with regard to its custodial determination, the trial court did not provide any facts or figures concerning its child support calculation. As previously mentioned, on December 23, 2009, the trial court entered a temporary order setting child support at \$658.00 per month. Shane was assigned the full obligation since Jennifer was unemployed with little education or marketable skills. In the May 11, 2010, order, the trial court simply stated, "[Shane's] child support obligation has been calculated using his current income at the Carroll County Memorial Hospital. The Court sets child support in the amount of \$512.00." The trial court found that Shane earned \$17.58 per hour and worked 36-hour weeks. In its final order, issued on May 27, 2010, the Court simply reiterated the support obligation and altered Shane's arrearage payment schedule. The Court never explained why the obligation was lowered.

In determining child support obligations, trial courts must consider certain factors, including: the reasonable needs of the child, the financial circumstances of the parties, their station in life, their age, their physical condition, and education-related expenses. *Downing v. Downing*, 45 S.W.3d 449, 456-457 (Ky. App. 2001). However, KRS 403.212 provides guidelines to assist trial courts in this determination. The child support guidelines serve as “a rebuttable presumption for the establishment or modification of the amount of child support.” *Id.* at 454. Any deviation from the child support guidelines may only occur following the court’s specific findings that an application of the guidelines would be “unjust or inappropriate.” *Id.*

The language of the May 11, 2010 order suggests that Shane’s \$512.00 monthly child support obligation was determined using the guidelines. Further, the obligation amount matches the guideline support obligation for parties with two children and a combined monthly gross income of \$2,000. Based upon the trial court’s findings concerning work hours and hourly wage, however, Shane’s monthly gross income is \$2,784.60. This monthly gross income would result in a child support obligation of approximately \$646.00 per month. The trial court offered no findings to support its deviation from the child support guidelines. Therefore, we remand the child support award to the trial court for more specific findings of fact and further calculations.

Jennifer also claims that “it is only equitable for this Court to order that the child support obligation be paid in a time period no less than which the

father failed and/or refused to pay child support.” In this case, Shane did not pay child support for 6 months. Although the trial court did not make specific findings concerning whether interest should be added to the arrearage, Jennifer does not claim that the court’s failure to award interest was inequitable. Instead, Jennifer solely claims that arrears must be paid within the same amount of time that they accrued. There is no legal basis for this claim. The court’s decision to allow Shane to pay his arrearage over one year is not an abuse of discretion.

Next, Jennifer claims that the trial court abused its discretion by allowing Shane to claim the children on his 2009 income taxes based upon his failure to pay child support. In custody cases, a trial court may allocate the tax exemption between the parties. *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky. App. 1989). “The allocation of the exemption has, or at least should have, a bearing on the amount of money available as child support. A trial court should allocate the exemption so as to maximize the amount available for the care of the children.” *Id.* Shane’s claim of exemption maximizes the amount available for the care of the children. Shane must eventually pay the arrears from 2009. His 2009 tax exemption does not violate the purpose of the exemption.

C. Division of Marital Property and Debts

Jennifer claims that the trial court erred by classifying the following gifts as marital property: a washer and dryer set, BBQ grill, and an electric horse. Jennifer claims that each of these items was purchased by the maternal grandparents as gifts to her rather than to her and Shane.

The party claiming that an item is nonmarital property because it was a gift to an individual spouse has the burden to prove this claim. *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). KRS 403.190 (2) provides, in part, that marital property is:

all property acquired by either spouse subsequent to the marriage except: (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom. . . .

In determining whether the items were gifts to the spouses collectively or to an individual spouse, courts must examine the donor's intent. *Sexton*, 125 S.W.3d at 268-269. Although Jennifer presented evidence that the items were gifts to her alone, the trial court did not make findings concerning the donor's intent. Because the court failed to make specific findings of fact concerning its designation of the items as marital property, we remand the issue to the trial court for additional findings concerning the nature of the items in question.

Similarly, Jennifer claims that an SUV assigned by the court as marital property was a nonmarital gift from her parents. Jennifer's father testified that they purchased the SUV and paid \$2,537.15 on repairs to the vehicle. Jennifer's father admitted that the Surratt family made payments on the SUV totaling \$738.00. However, the Surratts did not make payments after March 2008. Shane also testified that the couple made payments to Jennifer's parents for the car.

He claimed that the payments totaled \$2,238.00 and ceased following the parties' separation.

A trial court's findings of fact concerning property division are reviewed only to determine whether the findings are clearly erroneous. CR 52.01; *Kleet v. Kleet*, 264 S.W.3d 610, 613 (Ky. App. 2007). The trial court bears the responsibility to observe the evidence and evaluate the credibility of the witnesses. CR 52.01. Our review will not usurp that responsibility.

The testimonies of Shane and Jennifer's father both indicate that the Surratts repaid at least a portion of the money that Jennifer's parents spent on the SUV. Rather than an outright gift, the money spent by Jennifer's parents on the car appears to have been more of a loan or investment. In light of the testimonies, ample evidence was presented to support the trial court's conclusion that the SUV was a marital asset subject to division.

Jennifer also claims that the trial court erred in assigning the \$4,000 debt on a repossessed truck to the party who took the SUV. It is well settled that trial courts must first determine whether the debt was marital or nonmarital before assigning it to a party. *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001). There is no presumption that debts incurred during the marriage are marital debts. Instead, the designation is based upon a variety of factors, including the receipt of benefits and participation and whether the debt was necessary to provide for marital support and maintenance. *Id.* Based upon the court's failure to make

specific findings of fact of whether the truck debt constituted marital or nonmarital debt, we remand this issue to the trial court for additional findings.

Accordingly, we reverse and remand these issues to the Trimble Family Court for more specific findings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jonathan O. Wells
LaGrange, Kentucky

BRIEF FOR APPELLEE:

NONE