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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000399-ME

ROBERT MAZE — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NOS. 10-CI-00323 & 10-CI-00486

JESSICA DARST
AND THOMAS J. ISRAEL II — APPELLEES

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

BEFORE: ACREE, CHIEF JUDGE; JONES, and VANMETER, JUDGES.

JONES, JUDGE: Appellant Robert Maze appeals from a Grayson Circuit Court order regarding custody/visitation and child support. For the reasons more fully explained below, we affirm in part, vacate in part, and remand.

I. BACKGROUND

Maze and Appellee Jessica Darst began a sexual relationship in 1998. They lived together at Maze's residence in Grayson County until early 1999 when Darst left Maze's residence. She then began a sexual relationship with Appellee Thomas Israel. Darst lived with Israel for a few months. In November 1999, she ended her relationship with Israel, moved out of Israel's residence, resumed her relationship with Maze, and moved into Maze's residence.

Two minor children, A.R.M. and S.R.M., were born after Darst and Maze resumed living together. A.R.M. was born in 2000 and S.R.M. was born in 2002. At the time of their births, Maze and Darst signed affidavits of paternity asserting that Maze was the biological father of the children and he was listed on their birth certificates.[1]

Maze and Darst separated in early 2003. After the separation, Maze continued to provide support for the children and Darst and Maze agreed to an informal shared parenting schedule with Maze having the children roughly half of the time.[2]

In 2007, Darst applied for state medical support for the children, which triggered a paternity action. Genetic testing excluded Maze as A.R.M.'s biological father, but established his paternity of S.R.M. Nevertheless, Maze continued co-parenting both children and providing support for them. A.R.M. subsequently

[1] Maze and Darst never married.

[2] There were no court orders for child support or custody.

became aware that Maze was not her biological father; however, she voluntarily continued her relationship with him. In early 2010, with Maze's assistance, A.R.M. located Israel and began a relationship with him.

In June 2010, Maze filed a Dependency, Neglect and Abuse petition against Darst. Darst then refused to allow Maze to see the children. In response, Maze filed this action seeking sole custody of and parenting time with both children.

In November 2010, after a paternity test confirmed that Israel was A.R.M.'s biological father, an order was entered establishing his paternity. Israel then intervened in this action. Israel also filed a separate petition seeking custody of A.R.M., which was consolidated with this action.

The Domestic Relations Commissioner conducted a hearing on May 16-17, 2011, and filed a report on July 23, 2012. The report recommended that Israel and Darst be awarded joint custody of A.R.M. with Maze to have visitation time. The report also recommended that Israel pay child support to Darst for A.R.M. The report did not make any findings or recommendations with respect to S.R.M. Maze, Darst, and Israel filed separate exceptions to the Commissioner's report.

On December 14, 2012, the trial court entered its Finding of Fact, Conclusions of Law and Judgment. With respect to A.R.M., the trial court: 1) found that Maze had standing to pursue custody under the Uniform Child Custody Jurisdiction Act because Darst waived her superior custody rights by

demonstrating an intent to co-parent with Maze;[3] 2) awarded Darst and Israel joint custody with Israel to have parenting time; 3) ordered Israel to pay child support; 4) designated Darst as the primary residential parent;[4] and 5) awarded Maze visitation from Darst's time with A.R.M.

With respect to S.R.M., the trial court: 1) awarded joint custody to Maze and Darst; 2) designated Darst as the primary residential custodian;[5] 3) awarded Maze shared parenting time according to the guidelines of the 46th Judicial Circuit with some specific modifications; and 4) ordered Maze to pay child support pursuant to the guidelines.

Maze filed a timely motion to alter, amend or vacate, which the trial court denied on January 22, 2013. This appeal followed. On appeal, Maze asserts that: 1) the trial court erred in designating Darst as the primary residential parent for S.R.M. and A.R.M.; 2) in ordering him to pay child support for S.R.M. pursuant to the Kentucky Child Support Guidelines; and 3) in ordering shared parenting time under the guidelines of the 46th Judicial Circuit.[6]

[3] Kentucky first applied this rule in *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010).

[4] The trial court actually used the term "primary residential custodian." The appropriate designation is "primary residential parent" not "primary residential custodian"; therefore, we will use the "primary residential parent" designation throughout our opinion. *Pennington v. Marcum*, 266 S.W.3d 759 (2008) ("[O]ne parent may be designated the “primary residential parent,” . . . This concept is frequently misnamed “primary residential custodian.").

[5] *See* Footnote 4, *supra*.

[6] Darst argues in her response brief that the trial court erred with respect to the visitation schedule and in allowing Maze to have visitation with A.R.M. She requests us to reverse and remand certain portions of the trial court's ruling. We decline to address the alleged errors urged by Darst because she did not file a separate cross-appeal. *See Brown v. Barkley*, 628 S.W.2d

II. STANDARD OF REVIEW

The standard of review for matters of child custody and support is one of clear error/abuse of discretion. "The test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005)).

A judgment is not "clearly erroneous" if it is "supported by substantial evidence." *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Id.* Our Supreme Court has defined "abuse of discretion" as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

616, 619 (Ky. 1982).

III. ANALYSIS

A. Designation of Darst as Primary Residential Parent

Maze contends that the trial court applied the wrong legal standard, improperly exercised its discretion, and made inadequate findings of fact in designating Darst as the primary residential parent of the children. We agree with Maze that the trial court did not make adequate findings of fact to support its decision to designate Darst as A.R.M. and S.R.M.'s primary residential parent. Therefore, we must vacate this portion of the order and remand this case to the trial court for additional findings of fact and conclusions of law.

Upon awarding joint or shared custody pursuant to KRS 403.270, a court may, but is not required to, designate a primary residential parent. *See Pennington v. Marcum*, 266 S.W.3d 759, 764–65 (Ky. 2008). The term "primary residential parent" is used to denote that the child primarily lives in one parent's home and identifies it as his/her home. *Id.* at 765. The designation does not vest the primary residential parent with any greater legal rights to the child. *Id.* It is more the product of tradition than necessity. *Id.*

There are no specific requirements or statutory factors for a court to consider in deciding whether to designate a primary residential parent. However, if a court decides to make the designation, it must follow the best interests of the child standard delineated in KRS 403.270 in determining which parent to designate. *See Frances v. Frances*, 266 S.W.3d 754, 759 (Ky.2008) (holding that

family court's designation of the father as primary residential parent was in the best interests of the child, and thus adhered to the mandate of KRS 403.270).

Trial courts must apply the factors of KRS 403.270(2) in writing. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). In *Anderson*, the Supreme Court of Kentucky explained that CR 52.01 creates a general duty for the trial court to make its findings in writing and that CR 52.04 provides the remedy when the court has made findings but has missed an essential issue. *Id.* at 458. "CR 52 embodies a burden on both the court (52.01) and the litigant (52.04). It is further reasonable that the broader burden be on the court whose express duty is to make necessary findings of fact and conclusions of law" *Id*. "Compliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires written findings." *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011). "The trial judge's duty is not satisfied until the findings have been reduced to writing." *Id*.

In *Keifer*, the Court explained the importance of written findings:

> [C]ompliance with CR 52.01 and the applicable sections of KRS Chapter 403 requires written findings. We do not expect the appellate courts of this state to search a video record or trial transcript to determine what findings the trial court might have made with respect to the essential facts. Moreover, the final order of the trial court, especially in family law cases, often serves as more than a vehicle for appellate review. It often becomes a necessary reference for the parents and third parties, such as school officials, medical providers, or other government agencies with responsibilities requiring knowledge of the facts determined by the trial court. The judges presiding over family law matters must be mindful of the ramifications of their written orders. A bare-bone, conclusory order such as the one entered here,

> setting forth nothing but the final outcome, is inadequate and will enjoy no presumption of validity on appeal.

Id. at 126.

In this case, the trial court rendered purported "findings of fact." The findings primarily relate to whether Maze had standing to pursue custody of or parenting time with A.R.M. There are no factual findings that suggest the trial court considered the factors in KRS 403.270(2) before deciding to designate Darst as the primary residential parent, especially with respect to S.R.M. The trial court did not reference KRS 403.270(2) or engage any factual analysis that would explain why it chose to designate Darst as the primary residential parent.[7] The written opinion/order merely states in summary fashion that Darst shall be the primary residential parent of both children.

Furthermore, as Maze points out, the trial court's remarks at the January 22, 2012, exceptions hearing suggest that it may have incorrectly believed that it had to designate a primary residential parent. During the exceptions hearing,

[7]In relevant part, KRS 403.270(2) provides:

> (2) 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 . . .

the court questioned the parties on a hypothetical medical emergency. The court asked how, without the designation of a primary residential parent, a hospital would decide which parent's wishes to follow in the event of a disagreement between the parties in a life-threatening situation concerning the child. This tends to suggest that the trial court incorrectly believed that the designation carried some legal distinction regarding decision making. As noted, the designation is not required and in joint custody situations the residential parent does not have any additional or superior decision-making authority or rights.

Standing alone, the trial court's possible confusion would not warrant reversal or remand. However, coupled with the trial court's failure to make written findings under KRS 430.270(2), the statement is further indication that the trial court may not have engaged in the proper analysis before deciding to make Darst the primary residential parent.

Finally, we observe that while the record may contain evidence that would support the trial court's ultimate conclusion, we do not have the authority to make supportive findings where there is no indication that the trial court actually considered or relied on the evidence. *See Transportation Cabinet v. Caudill*, 278 S.W.3d 643, 648 (Ky. App. 2009). Since we cannot discern the basis of the trial court's decision, we cannot conduct a meaningful appellate review of this issue. *McKinney v. McKinney*, 257 S.W.3d 130, 134 (Ky. App. 2008).

Therefore, we must vacate the portion of the trial court's order designating Darst as the primary residential parent of A.R.M. and S.R.M. and

remand the issue for further proceedings consistent with this opinion. Should the trial court decide to designate a primary residential parent, it must consider all relevant factors, including those set forth in KRS 403.270(2). It must then render written findings of fact to support its ultimate conclusion. While the findings need not be overly detailed, they must be sufficient for any later reviewing court to determine that the trial court engaged in the proper analysis and to identify the evidence the trial court relied upon in reaching its ultimate conclusions.

B. Child Support for S.R.M.

Using the Kentucky Child Support Guidelines, the trial court ordered Maze to pay $119.29 per week or $517.00 per month in child support for S.R.M. Maze argues that the trial court erred in computing his child support obligation because it strictly adhered to the guidelines and did not account for the near proportionate time S.R.M. is with each parent.

Kentucky has adopted guidelines for the calculation of child support. KRS 403.212. These guidelines are to be followed unless "application would be unjust or inappropriate." KRS 403.211(2). Any deviation from the guidelines must be "accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation." *Id.* The Supreme Court of Kentucky recently held that while a trial court *may* consider equal parenting time in deciding whether to deviate from the guidelines, it is not required to do so. *McFelia v. McFelia*, 406 S.W.3d 838, 841 (Ky. 2013).

While the trial court could have taken into account the near-equal time Maze and Darst have S.R.M. before assessing child support under the guidelines, it was plainly not required to do so. We find no error in the trial court's decision not to deviate from the guidelines with respect to child support for S.R.M. and affirm this portion of its order.

C. Inclusion of the 46th Judicial Circuit's Guidelines

Maze's final assignment of error deals with the trial court's inclusion of the 46th Judicial Circuit's guidelines in its order. Maze asserts that it was reversible error for the trial court to reference the guidelines because it had already ordered a specific parenting time/visitation schedule. We disagree.

Trial courts have considerable latitude in determining the living arrangements and schedules necessary to accommodate the child in a shared parenting situation. Trial courts often begin with a standardized schedule and then deviate from or modify that schedule as necessary. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

Upon review of the record, we conclude that the trial court intended the more specific provisions of its order to control first and for the guidelines to be used to fill any gaps not addressed by the specific schedule (holidays, birthdays, etc.). We find no abuse of discretion or other reversible error in the trial court's inclusion of both a specific schedule and the judicial circuit's guidelines in its order. We affirm this portion of the order.

IV. CONCLUSION

Based on the foregoing, we affirm, in part, and vacate and remand, in part, this case to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

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