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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000456-MR

DAVID GUNN WINN, II — APPELLANT

v.

APPEAL FROM MARSHALL FAMILY COURT
HONORABLE ROBERT D. MATTINGLY, JR., JUDGE
ACTION NO. 12-CI-00314

ELLEN MARIE WINN — APPELLEE

OPINION
REVERSING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, STUMBO, AND THOMPSON, JUDGES.

LAMBERT, JUDGE: In this domestic action, David Gunn Winn II has appealed from the portions of the Marshall Family Court's February 5, 2013, judgment awarding sole custody of his minor child to Ellen Marie Winn and imputing to him a gross monthly income of $3,750.00. We have reviewed the record and the

parties' arguments in their respective briefs. Based upon our review, we reverse in part and vacate in part the judgment on appeal.

Ellen and David were married on March 14, 2010, in Marshall County, Kentucky. Ellen is a registered nurse, and David is self-employed at his business, W II Contracting. One child was born of the marriage in 2011. The parties separated on July 22, 2012, and Ellen filed a petition to dissolve the marriage on August 9, 2012. In her petition, Ellen requested sole custody of the child as well as child support and maintenance from David. In addition, Ellen requested that David be required to pay the cost of the action and her attorney fees. David filed a verified response and counter-petition for dissolution of marriage, in which he requested joint custody with a 50/50 split timesharing arrangement and that child support be set in accordance with the Child Support Guidelines. He requested that Ellen not be awarded maintenance based upon the short duration of the marriage and Ellen's employment and that Ellen be responsible for her own attorney fees. In her reply to the counter-petition, Ellen stated that a split time sharing arrangement would not be in the best interest of the child and requested child support retroactive to the filing of her motion, described below.

By separate motion, Ellen requested temporary custody, child support, and an order allocating responsibility for the payment of marital debts. In response, David requested a split timesharing arrangement, indicating that from the time of the child's birth, his mother (the child's paternal grandmother), who owns a daycare facility, had been providing care for him when Ellen was at work. David

also requested exclusive possession of the marital residence and, if granted, would assume responsibility for all debts related to that property. He stated he would assume all responsibility for expenses of W II Contracting. The parties reached an agreement on these issues, which was memorialized by an agreed order entered September 28, 2012. Pursuant to the terms of the agreement, Ellen and David were given joint custody of the child with Ellen designated as the primary residential custodian and David receiving visitation. David was ordered to pay temporary child support to Ellen in the amount of $300.00 per month and an additional $52.49 per month representing half of the child's insurance premium, all retroactive to August 7, 2012, when Ellen filed her motion. David received a credit for one-half of the child care expenses he had been paying from July 22, 2012, to the present, as he had been paying all of it. The agreement also set forth their respective responsibilities for the other expenses at issue.

On November 8, 2012, Ellen filed a notice with the family court stating that she had suspended David's visitation with the child after he was returned to her in a lethargic and seriously ill condition that required him to be hospitalized with bronchitis and pneumonia. Ellen stated that David had left the child unattended in his vehicle while he was working. Dr. Kayla Mason's discharge note indicated that the child would need constant care and observation, and that the child needed to stay with his mother because she was a registered nurse. A few days later, David filed a motion for a rule to hold Ellen in contempt for failing to comply with the agreed order. He indicated that the child had been

sick for awhile and was on medication for this condition. The court entered a show cause order on November 21, 2012, pursuant to David's motion and entered a trial order scheduling the final hearing for January 29, 2013. David later withdrew his motion for contempt.

On January 14, 2013, the family court entered an order approving and adopting the parties' partial separation and property settlement agreement. This agreement designated and assigned items of non-marital personal property to Ellen and David, as well as items related to W II Contracting to David along with any associated debts relating to the business. The agreement also distributed items of marital personal property and allocated marital debt. The issues remaining to be resolved included custody, visitation, and child support; David's non-marital claim to the Crittenden County farm; Ellen's claim to the 2012 soy bean crop; the tax exemption for their son; and Ellen's claim for delinquent temporary child support, medical expenses, and daycare expenses.

Prior to the scheduled final hearing, David filed a motion *in limine* to exclude his income tax returns for 2008 and 2009, which were for a time prior to the marriage. In response, Ellen objected to the motion and indicated that she was calling a forensic certified public accountant to examine David's tax returns and provide an analysis of his actual income, based upon his statement of his expenses. The court denied the motion *in limine* on the date of the hearing.

The court proceeded with the final hearing on January 29, 2013. The court first heard testimony related to the entry of the interlocutory dissolution

decree and the partial settlement agreement. Moving to the contested issues, the parties agreed to call their financial experts first. Ellen called CPA Jason Anderson to testify on her behalf. Mr. Anderson examined David's tax returns from 2009, 2010, and 2011 to determine his gross monthly income potential. For the year of 2009, David had been engaged in excavating activities, and his tax return showed a loss of $27,000.00. For 2010, the parties' joint return showed a loss of $16,643.00 in both farming and excavating. For 2011, the tax return showed a loss of $11,399.00. Mr. Anderson explained that the IRS's §179 special tax deduction permits a taxpayer to maximize investments by taking the entire depreciation deduction in the first year through an accelerated depreciation method, subject to any carry-over, rather than through a straight-line depreciation method over seven years. He explained that the straight-line depreciation method attempts to evaluate the asset over its useful life using a matching formula. Based on his review, Mr. Anderson testified that David's economic income, as opposed to his income for tax purposes, would have been $42,715.00 for 2011; $55,554.00 for 2010; and $98,498.00 for 2009. Based upon this calculation as well as the evidence of minimal, if any, employee expenses and the equipment remaining idle at times, Mr. Anderson testified that a fair assessment David's appropriate annual economic income was $40,000.00 to $50,000.00. On cross-examination, Mr. Anderson admitted that his assessment of David's annual economic income did not account for straight-line depreciation, but included farm and excavating income. He also admitted that he was aware that straight-line depreciation was the method

to use in self-employment situations in child support calculations. However, he maintained that the residual value of asset is not accounted for with this method.

David called CPA Larry Orr, who had been his personal accountant since at least 2010. Mr. Orr had many farm clients. When David started buying equipment, specifically the three track hoes, Mr. Orr had a conversation with him regarding depreciation methods, and David chose to use the §179 accelerated depreciation method. Mr. Orr testified that he told David that he would not be able to keep purchasing equipment to avoid paying taxes. Mr. Orr prepared a document calculating the depreciation of these assets using the straight-line method for child support purposes. He determined that David's income in 2009 was $43,157.00; his income in 2010 was a loss of $3,318.00; and his income in 2011 was a loss of $22,489.00. While he had reviewed Mr. Anderson's report in which he assigned an economic income, Mr. Orr did not know how he came up with that amount because no documentation was included. He had never been asked for economic income before when testifying about child support.

Ellen then testified on her own behalf. She testified that she lived in Benton, Kentucky, and worked as a registered nurse at two area hospitals. Regarding their twenty-month-old son, Ellen testified that she had been his primary caregiver until the separation. She and the child currently lived at her parents' residence, where the child had his own room, and David had visitation. Upon questioning by the family court, Ellen indicated that she was requesting sole custody of the child, and David stated that he desired joint/split custody.

In addition to requesting sole custody, Ellen requested that the court consider several factors in deciding upon visitation, including David's anger problems and acts of domestic violence that had occurred before and during their marriage. She described an incident at the lake prior to the child's birth when she got dirt on the boat deck. David threw a cooler at her and tore her dress, after which she locked herself in the truck, terrified. David was also verbally abusive and did not want her to see her family. Ellen described another incident that happened when they brought the child home from the hospital after his birth in May 2011. They got into a dispute about a bill David thought had not been paid. Ellen began crying and went to the nursery to pick up their newborn baby. David followed her into the nursery, grabbed her shoulders, and told her he would kill her if she did not give him the child. Ellen called David's parents, who came to calm David down. Ellen related another incident when the child was six to seven months old and had been diagnosed with bilateral ear infections. Ellen became concerned that David would harm the child after she told him she was exhausted from being up with the baby. While he was holding the baby, David grabbed her by the neck and slammed her against the wall, making a hole in the wall. Ellen went on to testify that she had tried to leave David several times before her departure in the spring of 2012 after an incident during a vacation to the river with other couples. She related an incident on the bus when he splashed beer on her face, pushed her, and called her a whore. At a motel room that night, David followed her into the room and locked the door. He said, "I don't know where you

think you're going," then slammed her against the wall and yanked her when she crawled to the door to unlock it. Three witnesses at the door saw this happen.

Ellen testified about other concerns for David's ability to care for the child. She related an incident in October or November when the child had bronchitis. David had returned him after a visitation in a lethargic state and the child was having problems breathing. Ellen took the child to the emergency room, and he was admitted to the hospital. She had asked David to keep the child inside during his visitation to recover from his sickness, but she eventually found out that David had left him to play on the floorboard of his work truck while he worked on equipment for thirty to forty-five minutes, which accounted for black marks around the child's mouth. David had not recognized that the child was lethargic and struggling to breathe when he returned the child to her. On another occasion, Ellen found rifle shells in the bottom of the diaper bag after the child returned home from visitation with David. She perceived this as a threat to her safety. She also testified that the child would scream and shake when she woke him up after visitations with David. In her opinion, it would be best for her to be awarded sole custody because she did not trust David to be with the child without supervision.

On cross-examination, Ellen testified that she never called the police or sought an emergency protective order due to domestic violence because she was embarrassed and wanted the marriage to work. She admitted that she had never seen David abuse the child and that she had not had much contact with David nor had there been any violence since their separation. Related to child support, Ellen

requested the court to impute a minimum wage to David. She knew David took out a loan every year for expenses, and they used her salary to buy groceries and to pay for other expenses.

Next, Ellen called several witnesses who observed the episodes of domestic violence she had described, as well as David's controlling behavior. These included instances in the motel room, on the boat, and on the bus during the trip to the river. None of the witnesses testified that they had seen David be abusive toward the child. Cassie Lamb testified that David appeared to have a good relationship with the child. Ellen's parents both testified that she and the child had lived with them at their house for the last six to seven months, and the child was comfortable and well bonded. Prior to the separation, David had not played an active role in everyday childcare activities. Rather, Ellen had been primarily responsible for his care. Ellen's father thought it would be best for the child to be with Ellen, citing David's need to control his temper. He was also concerned with Ellen's safety during exchanges. Ellen's mother testified similarly, and she stated that she was concerned about David's controlling behavior over Ellen. She did not believe that Ellen and David would be able to communicate regarding what was going on with the child.

David testified that he was self-employed at W II Contracting, a business he had owned since 1997. His mother had a daycare ten to fifteen minutes away, and she would watch the child while he and Ellen worked. Related to his anger issues, David testified that his marriage to Ellen was not healthy, but

he denied being violent or inappropriate with the child. There had been no outbursts with Ellen since their separation. He began going to counseling at Ellen's request. He went four times, while Ellen only went once. Regarding his ability to care for the child, David stated that he was able to give him medications as prescribed, noting that a sitter who worked at his mother's daycare had explained how to do so, and she also administered the medications. Regarding the incident in the truck, David stated that it was a warm day, and he left the child in the truck while he filled up the soybean truck. The child was not by himself for an extended period of time, and David was always watching him. David then described the conflict with Ellen relating to the child's hospitalization. Related to the bullets found in the diaper bag, David testified that they were accidentally placed in the bag while he was filling it up at the end of a visitation period. This was not intended as a threat. David also testified about his concerns that the diaper bag would smell of smoke when returned to him, and that he had found lighters in bag. He testified that he did not smoke, but Ellen did.

Regarding his interaction with the child, David testified that during visitation, he and the child would ride around in the enclosed tractor on the farm, play with toy tractors, and look at truck magazines. David requested that the court award joint custody with the child's time split equally between him and Ellen. In his opinion, this would be more beneficial to all of them, as they could spend more time with the child and spend less time on the road for exchanges. David would be able to stay home with him on days when he was not working, and he would send

him to his mother's daycare on days that he worked. David was willing to work with Ellen through text messages to make joint custody work.

On cross-examination, David admitted that his behavior was not what it should have been and he did not think he and Ellen should be in same room. However, he was fine with the parents facilitating the exchanges, and he agreed to communicate for important issues relating to the child. He stated that he had been prescribed medication for his mood issues after the separation. At this point in the hearing, the court indicated that if there was some reason to believe that the parties could not cooperate, or that it would be dangerous for them to work together, or joint custody was not going to work, it might consider sole custody. The court raised David's anger control issues, including the final incident prior to the breakup, and David stated that he had been drunk at the time. Regarding the hospital incident, which the court described as the one time they needed to work together for the sake of the child, David explained that Ellen had been screaming at him and he did not want Ellen to blame him for what happened. David agreed that they needed to grow up in order to work together, and they would be able to do so once the dissolution was completed.

David also testified about his income, explaining that he had three track hoes, but each was used for a different purpose. He stated that his loss in income for the last two years was related to the slowdown of the coal mines. He had taken out loans to supplement income, including a credit card loan from his Bass Pro Shop account. He also had a lien on his equipment.

David called several family members and friends to testify. His mother, Pat Winn, testified that David had been an active participant in the child's life. She had kept the child 40 to 50 hours per week in her licensed daycare for a six-month period while he and Ellen worked. She described David as a devoted father to the child and that he was hands-on with him. She also testified that Ellen was a good mother to the child, but that the child would often smell like smoke after being with Ellen. Mrs. Winn thought the child should be with both parents, and he would have to travel less with split custody. Mrs. Winn would be able to provide free daycare for the child when David was working. On cross-examination, she admitted that she knew David and Ellen had argued, but she was not aware of real anger issues. David's sister also testified that she had observed David's active involvement with the child during the marriage, and she stated that David loved the child and would do anything necessary for him. She helped facilitate exchanges with Ellen, and she expressed a concern when the child started crying when Ellen's parents arrived for the exchange. She also stated that she did not agree with Ellen's parenting style, including smoking around the child and not immediately coming home to see him after work. She had never seen any anger issues or violence from David. Two friends testified that they had observed David with the child and had no concerns about his parenting ability.

On February 5, 2013, the family court entered interlocutory findings of fact and conclusions of law as well as an interlocutory decree dissolving the marriage and adopting the partial separation agreement and property settlement.

By separate order entered the same day, the family court set forth its findings of fact, conclusions, and judgment ruling on the remaining issues. Specifically related to custody, the court concluded that it was in the best interest of the child to award Ellen sole custody and standard visitation to David. The family court did not identify any reason to restrict David's visitation. Regarding child support, the family court found Ellen's gross income per month totaled $3,667.00 and imputed a gross monthly income to David in the amount of $3,750.00 pursuant to Kentucky Revised Statutes (KRS) 403.212(2)(d). The court then ordered him to pay Ellen $502.27 per month in child support effective February 1, 2013, and addressed the split of medical and daycare expenses. The court awarded David the marital residence and 104.658 acre farm, with a fair market value of $182,500.00, along with its associated mortgage indebtedness, and made findings and rulings related to the equity in the farm, the reduction in the mortgages, and Ellen's claims of delinquent child support, medicals, and daycare. This appeal by David now follows.

On appeal, David disputes two of the family court's rulings: 1) the decision to award sole custody to Ellen and 2) the decision to impute income to him in the amount of $3,750.00 per month. Ellen argues that the circuit court's decision was proper.

David's first argument addresses the award of sole custody to Ellen. He contends that the family court's decision is not supported by the evidence and that the family court failed to apply the best interest of the child standard.

An appellate court may set aside a lower court's findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). In order to determine whether findings of fact are clearly erroneous, the reviewing court must decide whether the findings are supported by substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). "[W]ith regard to custody matters, 'the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion.' *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)." *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010).

KRS 403.270 provides the statutory framework a trial court must follow when it makes an initial decision related to child custody:

> (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;
> >
> > . . . .
>
> (3) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

See Rice v. Rice, 372 S.W.3d 449, 453 (Ky. App. 2012) ("Custody decisions involving two parents are governed by the best interests of the child standard and the applicable factors set forth in KRS 403.270(2)."). KRS 403.720(1) defines "domestic violence and abuse" as "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical

injury, sexual abuse, or assault between family members or members of an unmarried couple[.]"

In *Pennington v. Marcum*, 266 S.W.3d 759, 763-65 (Ky. 2008), the Supreme Court of Kentucky provided a comprehensive description of the history of child custody law in the Commonwealth, with sole custody being the rule for most of the 20th century due to the fault-based divorce scheme. Custodial preference moved from the father, to the mother (the tender years presumption), to equal consideration of both the mother and the father. In 1972, the General Assembly moved Kentucky to a no-fault divorce system with the enactment of KRS 403.110 *et seq*. "At its inception, the no-fault divorce scheme showcased the state's emerging role as maintaining the indissolubility of parenthood after the dissolution of the marital relationship by permitting joint custody of the couple's children." *Pennington*, 266 S.W.3d at 763-64. As society changed during the 1970s and 1980s, with more women joining the work force, "at the dissolution of the marriage both parties began seeking a custody arrangement that allowed them to pursue livelihoods to maintain households and provide for their families, but also permitted them to function as available, responsible decision-makers for their children." *Id*. at 764.

In 1992, this Court included an "open endorsement of joint custody over sole custody[,]" *id*., in *Chalupa v. Chalupa*, 830 S.W.2d 391 (Ky. App. 1992), in which we noted that "[j]oint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's

upbringing." *Id*. at 393. While it had previously declined to adopt a preference for joint custody over sole custody, *see Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993), the Supreme Court recognized that "joint custody has emerged as the most prevalent custodial arrangement." *Pennington*, 266 S.W.3d at 764. The Court noted that "[a] significant and unique aspect of full joint custody is that both parents possess the rights, privileges, and responsibilities associated with parenting and are expected to consult and participate equally in the child's upbringing." *Id*.

Addressing the parents' ability to cooperate, the *Squires* Court stated,

> While we have no doubt of the greater likelihood of successful joint custody when a cooperative spirit prevails, 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. Moreover, the underlying circumstance, the parties' divorce, is attended by conflict in virtually every case. To require goodwill between the parties prior to an award of joint custody would have the effect of virtually writing it out of the law.

Squires, 854 S.W.2d at 768-69. The Court went on to describe how a trial court should determine whether to grant sole or joint custody:

> Initially, the court must consider those factors set forth in KRS 403.270(1). By application of these, the child whose custody is being litigated is individualized and his or her unique circumstances accounted for. In many cases, appropriate consideration of KRS 403.270(1) may reveal the result which would be in the child's best interest. Thereafter, we believe a trial court should look beyond the present and assess the likelihood of future cooperation between the parents. It would be shortsighted to conclude that because parties are antagonistic at the time of their divorce, such antagonism

> will continue indefinitely. Emotional maturity would appear to be a dependable guide in predicting future behavior. By cooperation we mean willingness to rationally participate in decisions affecting the upbringing of the child. It should not be overlooked that to achieve such cooperation, the trial court may assist the parties by means of its contempt power and its power to modify custody in the event of a bad faith refusal of cooperation. *Benassi v. Havens*, Ky.App., 710 S.W.2d 867 (1986); *Erdman v. Clements*, Ky.App., 780 S.W.2d 635 (1989).

Squires, 854 S.W.2d at 769. The Court concluded that "[i]n every case the parties are entitled to an individualized determination of whether joint custody or sole custody serves the child's best interest. That the court possesses broad discretion in this regard cannot be gainsaid." *Id*. at 770, citing *McNamee v. McNamee*, 432 S.W.2d 816 (Ky. 1968).

David contends that in deciding to award sole custody to Ellen, the family court did not properly consider the statutory factors included in KRS 403.270. Rather, he asserts that the findings the family court relied upon did not correlate to the factors listed in KRS 403.270. The family court's ruling on custody is as follows:

> Upon consideration of the factors set forth in KRS 403.270(2), the foregoing facts and conclusions set forth below, it is concluded that it would be in the best interest of the parties' son to award Ellen sole custody and to grant David standard visitation customarily awarded by this court. It is so ordered. David is awarded visitation pursuant to the visitation schedule set forth on Exhibit A attached herein as if set forth verbatim.

> The following conclusions and factors were considered by the court in rendering a judgment on custody and visitation:
>
> 1. Ellen has been their son's primary physical custodian since his birth. Prior to separation, she customarily provided the majority of his routine care. David works long hours, including weekends, even though he shows a loss of income for the last few tax years.
>
> 2. David has a volatile temper toward Ellen that includes verbal attacks and physical altercations. Even after being separated since June of 2012, David testified that it would not be a good idea for the two of them to be in the same room.
>
> 3. The parties live approximately thirty-five (35) miles away from each other.
>
> 4. Neither Ellen nor her parents are comfortable for Ellen to meet David to exchange visitation.
>
> 5. The evidence was insufficient for the court to conclude that David presents any serious risk of physical, emotional, or moral harm to the child. The evidence supports the conclusion that he loves and is protective of his son and that the majority of his hostility was directed at Ellen.

David has not argued that the findings of fact are not supported by the record; rather, he contends that the findings made by the family court do not support its award of sole custody. We agree.

Our review of the record leads us to conclude that the family court based its decision to award sole custody upon David's "volatile temper" and the parties' inability to cooperate, not on the findings regarding the factors listed in KRS 402.270(2). The court certainly considered the parties' wishes as to custody

pursuant to KRS 403.270(2)(a), but we agree with David that Ellen's reasons for wanting sole custody were unfounded by the family court; it did not find sufficient evidence to conclude that David presented any risk of harm to the child while in his possession. Because the child was only 20 months old at the time of the hearing, he was too young to provide any information as to his wishes pursuant to KRS 403.270(2)(b). The court did not make any findings related to the child's interaction and interrelationship with his parents or any other person who might have a significant effect on the child's best interests pursuant to KRS 270(2)(c), although the evidence established that the child had a good relationship with both parents and the court found that David loves and is protective of the child. The court did not address the child's relationship with any of his grandparents or other family members. There was no evidence to suggest that the child was not adjusted to his home with either Ellen or David pursuant to KRS 403.270(2)(d). Neither parent introduced evidence related to the mental or physical health of the other party pursuant to KRS 403.270(2)(e).

Finally, the family court considered evidence of domestic violence pursuant to KRS 403.270(2)(f), and the court made a finding that David had been verbally and physically violent against Ellen. But for any such conduct to be considered, it must be found to affect that parent's relationship to the child. KRS 403.270(3). In the present case, the family court did not find that David posed any risk to the child and found that "the majority of his hostility was directed at Ellen." Of the two incidents that occurred after the child was born, the child was only present at the

first incident, which was a few days after his birth. He was not present during the second incident, which led to the breakup of the parties' marriage. Therefore, the court should not have considered David's temper in relation to whether to grant sole or joint custody.

As to Ellen's and David's ability to cooperate, the court merely pointed to David's testimony that he and Ellen should not be in the same room together and that neither Ellen nor her parents were comfortable with her meeting alone with David for exchanges. The court did not make any other findings, although there was evidence introduced during the hearing that the parties' failed to cooperate and communicate effectively when the child was admitted to the hospital after a visitation with David. However, the dissolution proceedings were on-going at that point. The court did not indicate in its findings that it had looked "beyond the present and assess the likelihood of future cooperation between the parents." *Squires*, 854 S.W.2d at 769. Furthermore, if the parents were not willing "to rationally participate in decisions affecting the upbringing of the child[,]" the court would have its contempt power and its ability to modify custody "in the event of a bad faith refusal of cooperation." *Id*.

In light of the family court's failure to base its decision on findings related to all of the applicable factors in KRS 403.270(2) or express why its conclusion to award sole custody was in the child's best interest, we must find that the family court abused its discretion in awarding sole custody to Ellen, thereby taking away

David's right to participate in or make decisions about the child's upbringing other than through visitation.

For his second argument, David contends that the family court improperly calculated child support by imputing income to him pursuant to KRS 403.212(2)(d) rather than applying KRS 403.212(2)(c) to determine his income on a self-employed basis. Ellen argues that the family court was not precluded from carefully reviewing David's income and expenses in calculating an appropriate level of self-employment income. We agree with David that the family court improperly calculated child support in this matter by applying the incorrect statute.

Our standard of review in an award of child support is well-settled:

> Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Downing v. Downing, 45 S.W.3d 449, 454 (Ky. App. 2001) (footnotes omitted).

KRS 403.211 provides for the establishment of child support, and through this statute the General Assembly provided for both a rebuttable presumption in KRS 403.212 to establish the amount as well as the court's ability to deviate from

those guidelines in certain circumstances. KRS 403.211 states in relevant part as follows:

> (2) At the time of initial establishment of a child support order, whether temporary or permanent, or in any proceeding to modify a support order, the child support guidelines in KRS 403.212 shall serve as a rebuttable presumption for the establishment or modification of the amount of child support. Courts may deviate from the guidelines where their application would be unjust or inappropriate. Any deviation shall be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation.
>
> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
>
> > (a) A child's extraordinary medical or dental needs;
> >
> > (b) A child's extraordinary educational, job training, or special needs;
> >
> > (c) Either parent's own extraordinary needs, such as medical expenses;
> >
> > (d) The independent financial resources, if any, of the child or children;
> >
> > (e) Combined monthly adjusted parental gross income in excess of the Kentucky child support guidelines;
> >
> > (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if

> public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act1; and
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
>
> (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

KRS 403.212(2), in turn, provides the guidelines that trial courts must follow in calculating child support pursuant to KR 403.211. To determine the income for a self-employed party, the statute dictates:

> (c) For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. Income and expenses from self-employment or operation of a business shall be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes. Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues.

In *Snow v. Snow*, 24 S.W.3d 668, 672-73 (Ky. App. 2000), this Court addressed the application of KRS 403.212(2)(c):

> This statute [KRS 403.212(2)(c)] confronts trial courts with the unenviable task of distinguishing between a self-employed child-support obligor's taxable income and what may be called his or her disposable income. Taxable income commonly serves as the starting point for determining "gross income" for child support purposes, and because taxable income frequently provides a good measure of the income left to a business after the deduction of ordinary and necessary expenses, deviation from it should not be undertaken lightly. Nevertheless, as the statute recognizes, taxation and child support serve different purposes. Trial courts establishing child support thus have the discretion and the duty to scrutinize taxable income and to deviate from it whenever it seems to have been manipulated for the sake of avoiding or minimizing a child support obligation or when deviating from it is clearly in the best interest of the child. [Citations and footnote omitted].

For a voluntarily unemployed or underemployed party, KRS 403.212(2)(d) provides:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

In the present case, the parties introduced testimony related to David's decision to use an accelerated depreciation method to depreciate three track hoes purchased for his business and the effect his tax treatment had on his income for child support purposes. There was much testimony concerning the calculation of the depreciation of this equipment using the straight-line method, as provided for in the statute, as well as David's actual economic income. The family court found as follows:

> For the last several years, David has reflected a loss of income for his self-employment as a farmer and excavator. His loss of income for tax purposes is the result of his election to use the accelerated depreciation method for his equipment, which is allowed under Section 179 of the Internal Revenue Code. He elected to use the accelerated depreciated [sic] method despite repeated warnings from his accountant of the financial consequences in subsequent tax years. David's accountant, Larry Orr, testified that even if David elected to use the straight line method for depreciation, David would still show a loss of income for the 2010 and 2011 tax years.
>
> CPA, Jason Anderson, reviewed David's tax records for the last three (3) years. Mr. Anderson would estimate that David had an economic income of $42,715.00, $55,554.00 and $98,498.00 for the tax years of 2011, 2010 and 2009 respectively. Mr. Anderson's testimony is supported by the testimony that David was financially able to place a large down payment from his business account on the farm the parties purchased after marriage. The parties' life style did not reflect the life style of a couple who were experiencing a great loss in income over the years. The couple was able to go on vacation, go boating and there was no indication from the testimony that the couple was experiencing financial difficulties.

The court ultimately imputed a gross income to David of $3,750.00 per month (or $45,000.00 per year) pursuant to KRS 403.212(2)(d), finding that he was "a hard working individual who is physically and mentally able to work."

As David argues, neither party argued that he was unemployed or underemployed. Therefore, the family court improperly imputed income to David pursuant to KRS 403.212(2)(d), and we must vacate the family court's calculation of child support and remand for an appropriate calculation applying KRS 403.212(2)(c). This statute requires a trial court to carefully review "[i]ncome and expenses from self-employment or operation of a business . . . to determine an appropriate level of gross income available to the parent to satisfy a child support obligation" and to use the straight-line depreciation method to calculate depreciation expenses to determine gross income. On remand, the family court shall adhere to this subsection of the statute, but it may also deviate from the guidelines with sufficient written findings supporting such deviation if it determines that the application of the guidelines "would be unjust or inappropriate." KRS 403.211(2).

For the foregoing reasons, the portion of the Marshall Family Court's judgment awarding sole custody to Ellen is reversed, the portion of the judgment imputing income to David is vacated, and both matters are remanded for further proceedings in accordance with this opinion.

THOMPSON, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS IN PART AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING IN PART: Respectfully, I dissent as to the majority's decision to vacate the family court's calculation of child support. The calculation was not clearly erroneous because it was based on the testimony and evidence presented by CPA Anderson.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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