

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2352-MR

STEVENSON D. COMBS

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 95-CI-0115

TINA G. COMBS

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, GUIDUGLI, and MILLER, JUDGES.

GUIDUGLI, JUDGE. Stevenson D. Combs appeals an April 30, 1996, order of the Pulaski Circuit Court granting custody of the parties' two children to his former wife, appellee, Tina Combs. We affirm.

The parties married in February 1991 and separated in January 1995. In February 1995, Stevenson filed for divorce and requested custody of the couple's two daughters Talana, born October 5, 1991, and Siarra, born May 31, 1993. At the same time, the parties filed a Separation Agreement and Property Rights Settlement that stated, inter alia, the parties desired to share joint legal custody of the two children with actual

physical custody given to Tina and liberal visitation rights allowed for Stevenson. The children resided with Tina until April 1995, when Stevenson filed an ex parte motion for temporary physical custody of the children. This motion was initiated because of an incident that occurred on April 15, 1995. On that date, the truck driven by Stevenson, containing the two children and his present girlfriend, ran off the road after the vehicle being driven by Tina stopped in the roadway. Stevenson suffered a small cut, but no one else was hurt. On April 21, 1995, the circuit court granted the motion and awarded Stevenson temporary physical custody of the children. On May 11, 1995, Tina filed a motion seeking temporary custody and care of the children. In the interim, the Pulaski County Grand Jury indicted Tina on four counts of wanton endangerment related to the automobile accident in April 1995. In July 1995, the Domestic Relations Commissioner recommended deferring a decision on the custody of the children until the criminal charges against Tina had been resolved. In August 1995, Tina again moved for temporary custody.

On August 24, 1995, the circuit court conducted a hearing on the divorce and the issue of custody. At the hearing, both parties testified about the April 15, 1995, incident and they reached agreement on all the issues involved in the divorce except for child custody. On September 26, 1995, the circuit court entered a Decree of Dissolution adopting the February 1995 settlement agreement, but reserved ruling on custody of the children. On February 10, 1996, Tina filed another motion for

change of physical custody. On April 30, 1996, the circuit court issued an order granting custody of the children to Tina with reasonable visitation for Stevenson. The court also ordered Stevenson to pay child support. Subsequently, Stevenson filed a Motion to Alter, Amend or Vacate the custody order pursuant to Rule of Civil Procedure (CR) 59, which included a request for a specific visitation order. On May 24, 1996, the circuit court issued an order specifying extensive visitation for Stevenson. On June 11, 1996, Tina filed a Motion to Alter, Amend or Vacate the May 24th visitation order and requesting a standard visitation schedule. On August 5, 1996, the circuit court denied the CR 59 motions of both parties. This appeal followed.

Stevenson challenges the circuit court's granting of custody of the children to Tina on several grounds. First, Stevenson contends that the trial court erred by determining the custody issue before final resolution of the criminal charges against Tina. Second, he argues the circuit court's order should be overturned because the trial judge failed to make sufficient findings of fact under CR 52.01 and Kentucky Revised Statute (KRS) 403.270. Third, Stevenson claims the circuit court erred by awarding sole custody to Tina where she had not specifically requested sole custody.

As a general rule, a trial court has broad discretion in determining the best interest of children when awarding child custody. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983). In reviewing a child custody determination, the standard of review

is whether the factual findings of the trial court are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence or not supported by substantial evidence. Wells v. Wells, Ky., 412 S.W.2d 568, 571 (1967); Poe v. Poe, Ky. App., 711 S.W.2d 849, 852 (1986). In addition, a trial court's decision on an award of custody should not be disturbed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

In the case sub judice, the circuit court made the following specific factual findings: 1) the allegations in the criminal charges against Tina did not render her unfit; 2) at the time of the order, Stevenson was not employed, he was receiving AFDC benefits and he was living in public housing. Stevenson argues that the circuit court erred by rendering a decision on the custody issue prior to final resolution of the criminal charges against Tina. However, Stevenson has not cited any authority in support of this position. The circuit court conducted a hearing on this issue and heard testimony from four adult witnesses to the April 1995 incident. The circuit court noted that the settlement agreement between the parties would have allowed Tina to retain physical "custody" of the children. The court had sufficient evidence to assess whether the criminal allegations against Tina affected the best interests

consideration for determining child custody. We believe the circuit court did not err by refusing to delay the custody dispute until resolution of the criminal proceedings against Tina.

Stevenson also argues the trial court committed reversible error for failing to make sufficient specific findings of fact in accordance with CR 52.01 and KRS 403.270. Stevenson points out that CR 52.01 applies in child custody cases and requires the trial court to find facts on issues raised in the pleadings or which are mandated to be considered by statute. See Stafford v. Stafford, Ky. App., 618 S.W.2d 578, 580 (1981), overruled on other grounds by Largent v. Largent, Ky., 643 S.W.2d 261 (1982). As the court stated in McFarland v. McFarland, Ky. App., 804 S.W.2d 17, 18 (1991), "In child custody cases, the trial court must consider all relevant factors including those specifically enumerated in KRS 403.270(1) in determining the 'best interest of the child'. In doing so, it is mandatory that facts be so found specifically." (Emphasis in original).

This obligation, however, does not dictate a reversal of the trial court's order in this case. Under CR 52.04, "a final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by written request for a finding on that issue or by a motion pursuant to Rule 52.02." A review of the record shows that Stevenson did not request more specific or

additional findings of fact by the trial court on the factors enumerated in KRS 403.270. Any failure of the trial court to make adequate findings of fact was not brought to its attention as required by CR 52.04, and therefore any deficiency was waived. See Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982); Holland v. Holland, Ky. App., 679 S.W.2d 835, 836 (1984) (father waived argument on whether findings were sufficient to award custody to non-parent by failing to request findings on issue of parental fitness).

The appellate court may look to the entire record to determine whether the factual findings are clearly erroneous or the trial judge abused its discretion. Cherry, 634 S.W.2d at 425. As the trial court noted, the parties originally agreed that Tina would have physical custody of the children. In addition, the record indicates that Tina was the primary caregiver during the marriage. The trial court transferred care of the children to Stevenson after he filed an ex parte motion for temporary custody based on the April 15, 1995 vehicular incident. After hearing evidence on the incident, the trial court found that it did not render Tina unfit. Generally, joint custody is appropriate where the parents are able to cooperate, which is defined as a "willingness to rationally participate in decisions affecting the upbringing of the child." Squires, 854 S.W.2d at 769. In this case, Stevenson and Tina have heatedly disputed custody, visitation, and child support. Stevenson pursued criminal prosecution of Tina involving the vehicular

incident. As the court in Squires reaffirmed, the trial court possesses broad discretion in determining whether joint or sole custody would be in the best interest of the children. Id. at 770. The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate court should not substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d at 444. Based on the entire record, we cannot say the trial court abused its discretion in awarding sole custody to Tina.

Stevenson's final argument is that the trial court erred by awarding sole custody because Tina never specifically requested sole custody. A review of the record reveals that Tina filed two motions seeking care, custody and control of the children. Moreover, KRS 403.270(1)(a) states that the trial court should consider the wishes of the parents, but the trial judge certainly is free to choose between sole or joint custody based on the best interests of the children. There is no statutory or policy preference for joint custody. See Squires v. Squires, Ky., 854 S.W.2d 765 (1993). Thus, this challenge to the trial court's order is without merit.

For the above-stated reasons, we affirm the order of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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