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COURTNEY R. HILL, APPELLANT AND CROSS-APPELLEE, V. TYSHA K. HILL, APPELLEE AND CROSS-APPELLANT.

827 N.W.2d 304

Filed February 12, 2013. No. A-11-1029.

1. **Modification of Decree: Divorce: Child Custody.** If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement.
2. **Child Custody.** Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time.
3. ____. The amount of time children spend with each parent is less important than how the time is allocated when determining whether joint physical custody exists.
4. **Divorce: Child Custody.** Neb. Rev. Stat. § 42-364(3)(b) (Cum. Supp. 2012) requires that in dissolution cases, if the parties do not agree to joint custody in a parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child.
5. **Child Custody.** A district court abuses its discretion in ordering joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required by Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012).
6. ____. When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
7. ____. Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
8. **Judgments.** Implicit findings cannot satisfy procedural rules requiring explicit findings.
9. **Child Support: Appeal and Error.** An appellate court reviews child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion.
10. **Child Custody: Rules of the Supreme Court.** Trial courts employ worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines, in cases of joint physical custody unless a sound reason not to do so is established by the record.
11. **Child Custody: Child Support: Rules of the Supreme Court: Time: Presumptions.** When a specific provision for joint custody is ordered and each party's parenting time exceeds 142 days per year, a rebuttable presumption exists that support shall be calculated using worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines.

12. **Child Support: Rules of the Supreme Court.** Neb. Ct. R. § 4-212 (rev. 2011) is applicable when the threshold amount of parenting time is met, even if no specific provision for joint physical custody is ordered.
13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

Christopher A. Vacanti, of Vacanti Shattuck, for appellant.

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

RIEDMANN, Judge.

I. INTRODUCTION

Courtney R. Hill appeals and Tysha K. Hill cross-appeals from the decision of the district court for Douglas County that awarded joint legal custody of the parties' children, but awarded Tysha sole physical custody and ordered Courtney to pay child support accordingly. Because we find that the trial court awarded what amounted to joint physical custody without following the statutory procedure, we conclude that the trial court abused its discretion and reverse, and remand with directions.

II. BACKGROUND

Courtney and Tysha married in 2003. Two children were born during the marriage: one born in 2006 and another born in 2008.

In 2010, Courtney filed a complaint for dissolution of marriage. Courtney sought "temporary and permanent care, custody and control" of the children and child support. Tysha filed an answer and "counter complaint." She, too, sought "temporary and permanent care, custody and control" of the children and child support. The parties continued to reside together in the marital home until December 2010.

On December 27, 2010, the trial court entered a temporary order awarding joint legal custody to the parties and awarding sole physical custody to Tysha. The court order stated that

Courtney would have parenting time "[e]very Tuesday from 5:00 p.m. until Wednesday at 8:00 a.m." and "[a]lternating weekends from Friday at 5:00 p.m. until Sunday at 5:00 p.m." The temporary order directed that Courtney pay $900 per month in child support.

On August 8, 2011, trial was held on the issues of sole physical custody and the parties' partial parenting plan. The trial court heard the parties on the above issues and received evidence pertaining to child support.

In general, both parties presented evidence that throughout the marriage, they shared day-to-day parenting responsibilities of the children, were each actively involved in the children's lives, and were each capable and affectionate parents, and that the children had thrived under each parent's care. At the time of trial, Tysha continued to reside in the family home and Courtney lived in a separate residence with similar accommodations.

Despite each party's request for sole custody, Courtney's attorney elicited testimony from Courtney regarding joint physical custody, without objection from Tysha's counsel. Courtney testified that he wanted "full custody," or if not that, then he wanted joint custody with a "50/50 even split." Courtney also offered evidence requesting sole physical custody. Courtney testified he was uncertain whether he and Tysha could communicate effectively to coparent their children. He testified, "I've tried to communicate with her on many times, including school issues, past financial issues, and they all need to seem to be resolved by [attorneys]. So I would hope that that would change in the future but I'm not confident."

In Tysha's testimony, she requested the court award the parties joint legal custody, but she wanted to retain sole physical custody. She testified that she did not think the equal division of time proposed by Courtney would be in the children's best interests, and she believed that the parenting time awarded in the temporary order was in the children's best interests. She stated:

> [The older child] in particular, I'm concerned that there's a lot of back and forth, that he will not adjust well to

> that. He's a very structured child. He likes things in order. He likes to — likes to know exactly where he's going to be, and I'm concerned that by going back and forth frequently between two houses will create some problems with him adjusting.

Tysha further testified that the children are attached to their home and that she had concerns about them being away from home for long periods of time. She foresaw the older child's having "strong adjustment issues" trying to determine "whose day it is" with longer visitation periods. She admitted that the children had not had problems adjusting to the Tuesday overnight visits with Courtney.

Tysha's brother, mother, and father all testified that they had observed the children under the parenting time schedule set in place by the temporary order and that the children seemed to be doing well. Tysha's brother reiterated that the older child needed "a lot of structure." Her mother testified that the children seemed more calm and content and less anxious since December 2010. Tysha's friend and neighbor testified that the children seemed to have adjusted well since the separation and seemed happy. According to Tysha's mother and Tysha's neighbor, Tysha had been the children's primary caregiver.

Following trial, the judge met with the parties' attorneys in private, but the discussion is not part of the record. Afterward, the judge announced from the bench that it was in the children's best interests that Tysha receive sole physical custody. The trial court approved the parenting plan filed by the parties, which essentially divided holiday, summer, and school break parenting time equally between the parties, and further awarded Courtney "every other weekend from Friday evening until Monday morning and . . . every Tuesday night." Courtney's attorney pointed out, "What we had discussed was my client would have every other weekend but that it would include Mondays and Tuesdays on that weekend and then on that off week he just would have the Tuesdays." The trial judge agreed.

In the decree of dissolution, the court awarded joint legal custody to the parties, but sole physical custody to Tysha,

subject to Courtney's parenting time rights delineated in the decree and the parenting plan, which the trial court incorporated into its decree. The decree awarded Courtney the following parenting time:

> [Courtney] shall have the minor children on alternating weekends from Friday after school until Wednesday at 8:00 a.m. or return to school, if in session. In off week, [Courtney] shall have the children on Tuesday after school until Wednesday at 8:00 a.m. or return to school, if in session.

The trial court utilized "Worksheet 1," the sole physical custody worksheet of the Nebraska Child Support Guidelines, to calculate Courtney's child support obligation and ordered Courtney to pay $881 per month for the two children.

Courtney filed this appeal, and Tysha cross-appealed.

III. ASSIGNMENTS OF ERROR

On appeal, Courtney alleges, restated and renumbered, that the trial court erred (1) in not awarding the parties joint legal custody, (2) in characterizing physical custody of the children as sole physical custody when it was actually joint physical custody, and (3) in calculating child support based on the sole physical custody worksheet.

On cross-appeal, Tysha alleges that the trial court erred in determining Courtney's parenting time schedule.

IV. STANDARD OF REVIEW

Child custody determinations, and parenting time determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Rosloniec v. Rosloniec*, 18 Neb. App. 1, 773 N.W.2d 174 (2009). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

V. ANALYSIS

1. Joint Legal Custody

Courtney's first assignment of error alleges the trial court erred in failing to award joint legal custody. It is undisputed that the divorce decree awards the parties joint legal custody; therefore, there is no merit to this assignment of error.

2. Physical Custody

(a) Trial Court Awarded De Facto Joint Physical Custody

Courtney argues that the trial court awarded the parties de facto joint physical custody without the "formal proclamation" of joint physical custody. Brief for appellant at 12. He further argues that it would be in the best interests of the children to officially award the parties joint physical custody "to reflect the actual practice of the parties." *Id.* at 13. We determine that even though the trial court stated it was awarding sole physical custody to Tysha, the court awarded de facto joint physical custody.

[1,2] If trial evidence establishes a joint physical custody arrangement, courts will so construe it, regardless of how prior decrees or court orders have characterized the arrangement. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). "Joint physical custody means mutual authority and responsibility of the parents regarding the child's place of residence and the exertion of continuous blocks of parenting time by both parents over the child for significant periods of time." See Neb. Rev. Stat. § 43-2922(12) (Cum. Supp. 2012). Several cases have discussed in detail how to distinguish joint physical custody from sole physical custody with liberal parenting time.

In *Elsome, supra*, the decree provided that the parties would have joint legal custody of their children, but neither party was designated as the primary physical custodian. The parties stipulated to a shared physical custody arrangement based on 14-day cycles in which the children generally spent 4 days of the week with their mother and the following 3 days with their father. As a result of this schedule, the father physically had

the children in his care 38 to 40 percent of the time. On appeal, the court defined joint physical custody as joint responsibility for minor day-to-day decisions and the exertion of continuous physical custody by both parents for significant periods of time. Therefore, based on the custody arrangement in place, the court determined that the parties shared joint physical custody of their children.

Focusing again on the issues of which parent has responsibility for minor day-to-day decisions and continuous physical custody, we determined in *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000), that no joint physical custody existed. In *Pool*, the father had parenting time with his children every other weekend, plus one additional weekend day per month; from 4 to 8 p.m. two nights a week; on alternating holidays; and from June 1 to July 31 each year. The trial court had found that the children spent about 39 percent of the time with their father.

On appeal, we distinguished the situation in *Pool, supra*, from that in *Elsome, supra*. Whereas in *Elsome*, the evidence revealed that the parents were really in a joint physical custody arrangement, the opposite was true in *Pool*, where the father had been granted "rather 'typical' weekend, holiday, and summer visitation rights." 9 Neb. App. at 458, 613 N.W.2d at 824.

In *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001), the court considered not only the day-to-day responsibility each parent had as set forth in *Pool, supra*, and *Elsome, supra*, but also factored in the expenses incurred as a result of that responsibility to conclude that the mother had sole physical custody. In *Heesacker*, the father had custody of the child on alternating weekends, one night per week, and 2 additional days each month for a total of 35 percent of the total parenting time. The trial court found there was no evidence the father was paying an equal amount of the child's day-to-day expenses, and although the father argued he incurred his own expenses when the child was with him, the Nebraska Supreme Court noted that the father did not argue he incurred more expenses than any other noncustodial parent. In addition, the court found that it was the mother who was responsible for preparing the child

for school and was the parent who dealt most with the child's needs and the physical and emotional demands of her day-to-day care. Therefore, the court determined the parties' arrangement was properly characterized as sole physical custody with a liberal visitation schedule.

Similarly, in *Drew on behalf of Reed v. Reed*, 16 Neb. App. 905, 755 N.W.2d 420 (2008), this court held that even though the father enjoyed liberal parenting time, the schedule did not constitute joint physical custody. In *Reed*, the father had parenting time on alternating weekends, one overnight visit per week, one additional overnight visit on the weekends when he did not have parenting time, spring breaks excluding the mother's Easter parenting time, two 2-week periods in the summer, and alternating holidays. This schedule resulted in the father's having the children 43 percent of the time. On appeal, we concluded that the schedule in *Reed* was similar to those in *Heesacker, supra*, and *Pool, supra*, and that such a schedule did not justify a joint custody child support calculation because the children did not live with their father day in and day out on a rotating or alternating basis.

[3] The foregoing cases establish that the *amount* of time the children spend with each parent is less important than *how* the time is allocated when determining whether joint physical custody exists. The cases distinguish a continuous alternating schedule from a more "typical" parenting time schedule, even if the amount of time the children spend with each parent is the same in each arrangement. As we stated in *Reed, supra*, "[a]lternately living with divorced parents is to be distinguished from cases in which the noncustodial parent has liberal parenting time." 16 Neb. App. at 910, 755 N.W.2d at 426.

We conclude that the present case is more like the schedule in *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), than the schedules in *Heesacker, supra*; *Pool v. Pool*, 9 Neb. App. 453, 613 N.W.2d 819 (2000); and *Reed, supra*. The trial court awarded Courtney parenting time (1) on alternating weekends from Friday after school until Wednesday at 8 a.m. and, in the off week, Tuesday after school until Wednesday at 8 a.m.; (2) two nonconsecutive 7-day periods during the

summer; and (3) alternate holidays and school breaks. As a result, Courtney has the children for a five-night stretch during every 14-day cycle, plus one additional night in the off week.

In addition, keeping in mind the court's rationale in *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001), the record contains no evidence of the expense Courtney incurs as a result of his parenting time; however, he is responsible for the children's day-to-day expenses during the five-night stretch that they are with him every other week. Courtney is also responsible for getting the children ready for school 4 days out of the 10 weekdays in every 14-day cycle. Therefore, we conclude that this is the type of situation contemplated in *Elsome, supra*, where the children live day in and day out with both parents on a rotating basis, and each parent is equally responsible for the physical and emotional demands of the children's day-to-day care. Accordingly, the arrangement in this case is correctly described as joint physical custody.

(b) Trial Court Failed to Provide Procedural Due Process in Awarding De Facto Joint Custody

We next address whether the trial court arrived at a joint physical custody arrangement using the correct procedure. Citing Neb. Rev. Stat. § 42-364(3) (Cum. Supp. 2012) and case law, Tysha contends that because neither party requested joint physical custody, an award of joint physical custody in this case would be reversible error. We agree that the trial court abused its discretion in awarding joint physical custody without fulfilling procedural due process requirements. We note, however, that Courtney's counsel elicited such testimony from Courtney without objection from opposing counsel, which may have led the trial court to believe that the parties were prepared to litigate the issue of joint physical custody. The record reveals, however, that Courtney first raised the issue of joint physical custody at trial, without any advance notice to Tysha.

[4,5] Section 42-364(3)(b) requires that in dissolution cases, if the parties do not agree to joint custody in a

parenting plan, the trial court can award joint custody if it specifically finds, after a hearing in open court, that it is in the best interests of the child. A district court abuses its discretion in ordering joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required by § 42-364. *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[6] In *Zahl*, the Nebraska Supreme Court examined the due process requirements set forth in § 42-364. In *Zahl*, both parents sought sole custody of their child. After holding a general custody hearing, the court awarded the parties joint legal and physical custody. The father appealed, arguing that the court was required to hold an evidentiary hearing directed to the issue of joint physical custody before awarding it. The Nebraska Supreme Court agreed and held that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested joint custody, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.

[7] In determining that the trial court in *Zahl* did not provide adequate due process, the Nebraska Supreme Court noted that

> joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.

273 Neb. at 1053, 736 N.W.2d at 373. Therefore, because the factual inquiry for awarding joint custody was substantially different from that for an award of sole custody, the trial court in *Zahl* did not provide adequate due process and the parties were entitled to a new hearing with notice on the issue of joint custody. See, also, *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (in paternity case where neither party has requested joint custody, if court determines that joint custody is, or may be, in best interests of child, court

shall give parties notice and opportunity to be heard by holding evidentiary hearing on issue of joint custody).

[8] The Supreme Court in *Zahl, supra*, further held that the trial court had abused its discretion in failing to specifically find that joint physical custody was in the child's best interests, as required by § 42-364. Although the mother contended that the court implicitly made the finding, "implicit findings cannot satisfy procedural rules requiring explicit findings." *Zahl*, 273 Neb. at 1054, 736 N.W.2d at 373.

In the present case, neither party requested joint physical custody prior to trial. In fact, each party presented evidence that sole physical custody was the preferred arrangement, although as noted above, Courtney's counsel elicited testimony from Courtney regarding joint physical custody. The trial court did not conduct a special hearing as required by *Zahl*, and the evidence the parties presented, or were prepared to present, at trial was different from the evidence that would be used to advocate or contest a ruling of joint custody.

The trial court apparently determined that joint physical custody is, or may be, in the children's best interests, as evidenced by its award of de facto joint physical custody. The trial court made an explicit finding that joint legal custody was in the children's best interests, but made no explicit finding that joint physical custody was in the children's best interests as required by § 42-364(3).

We therefore conclude that the trial court abused its discretion in not giving the parties an opportunity to present evidence on the issue before imposing joint physical custody and in failing to make the explicit finding that an award of joint physical custody was in the children's best interests. Therefore, we reverse, and remand on this issue. On remand, the court is directed to conduct the required evidentiary hearing on the issue of joint physical custody.

3. Child Support

[9] An appellate court reviews child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion. *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

[10] Courtney asserts that the trial court erred in calculating child support based on sole physical custody rather than joint physical custody. In *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999), the court determined that the father had proved he shared joint physical custody. Based on this finding, the court held that the trial court erred in failing to use the joint custody worksheet to calculate child support. *Id.* The court explicitly directed that trial courts employ worksheet 3, the joint custody worksheet of the Nebraska Child Support Guidelines, in cases of joint physical custody unless a sound reason not to do so was established by the record. *Elsome, supra.*

[11] Since *Elsome* was decided, the Nebraska Child Support Guidelines have been revised. The guidelines now provide that "[w]hen a specific provision for joint custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3." Neb. Ct. R. § 4-212 (rev. 2011).

[12] In *Patton v. Patton, ante* p. 51, 818 N.W.2d 624 (2012), we concluded that § 4-212 was applicable when the threshold amount of parenting time is met, even if no specific provision for joint physical custody is ordered. Despite an award of physical custody to the mother, we determined that because the father had the children at least 160 days per year, it was not error for the court to use the joint custody worksheet.

In the present case, according to our calculations, Courtney's alternating weekends and one overnight in the off week alone provide him 156 days of parenting time. Thus, his parenting time, not including summer time and holidays, exceeds the 142-day threshold described in § 4-212 and created a rebuttable presumption that support should be calculated based on joint physical custody. Therefore, given our finding above and § 4-212, we find that the court abused its discretion in calculating child support based on the sole physical custody worksheet.

4. Tysha's Cross-Appeal

[13] On cross-appeal, Tysha argues that the evidence adduced at trial does not support the increase in parenting time

awarded to Courtney in the decree. Having concluded that the trial court failed to follow the proper procedure in awarding the parties joint physical custody and failed to make the requisite findings, we need not separately address this issue. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

VI. CONCLUSION

Because the trial court awarded joint physical custody without following the procedural due process requirements and without making explicit findings as to the children's best interests, we reverse, and remand this matter to the trial court with directions.

On remand, if the court intends to award sole physical custody to Tysha, it is directed to alter Courtney's parenting time schedule to reflect a sole physical custody arrangement.

If the court is considering a joint physical custody award, the court is directed to provide notice to the parties and to conduct a hearing on the issue of joint physical custody. The parties shall be allowed to present new evidence on that issue not previously offered. The court shall make its determination in accordance with the procedures set forth in § 42-364.

After a determination on the issue of physical custody, the court shall determine child support accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.