RENDERED: February 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002749-MR

JOSEPH CANE HERBST — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 94-CI-806

CAROL ANNETT HALL HERBST — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Joseph Herbst (Joseph) appeals from an order of the Campbell Circuit Court entered on October 16, 1997, regarding child custody and child support. After reviewing the record, the applicable law, and the arguments of counsel, we affirm.

While Casey, the parties' minor child, was born on May 29, 1984, the parties did not marry until 1991. Their marriage was dissolved in 1994. Initially, they agreed that Casey would reside with each parent on a nearly equal basis and

that neither party would pay child support. However, in June 1997, the appellee, Carol Hall Herbst (Carol), moved the trial court to modify the parties' joint custody arrangement and to grant her sole custody of Casey and child support.

The Domestic Relations Commissioner held a hearing in August 1997. According to his report, the Commissioner heard testimony from the parties and interviewed the child. The parties both lived in Campbell County shortly after they divorced. Casey attended school in Campbell County and spent approximately equal time at each of the parties' homes. At the time of the hearing, Joseph lived in Campbell County and Carol lived in Kenton County. The parties became concerned about Casey's performance in school, but could not agree on what steps to take in addressing this problem. Joseph wanted Casey to reside with him during the week and to attend school in Campbell County, while Carol wanted Casey to reside with her during the week and to attend school in Kenton County.

Citing Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996) and Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), the Commissioner concluded that Carol had failed to meet her burden of showing that the joint custody should be modified. In his report, he stated as follows:

> The court may not modify a joint custody award without first finding an inability or bad faith refusal of one or both parties to rationally participate in decisions concerning their child's upbringing. . . . In Stinnett, the Court of Appeals noted that ". . . obviously many disagreements between joint custodians do not reach this level of

> non cooperation [sic] . . .” Stinnett at 324. The Master Commissioner believes this disagreement about which school Casey should attend for the 1997/1998 school year is just such a disagreement.

Accordingly, he recommended that Carol’s motion to modify custody be denied.

However, the Commissioner then recommended that Casey reside with Carol on Monday through Friday during the upcoming school year, attend school in Kenton County, reside with Joseph on alternating weekends, and that the parties split summer vacation and holiday time. The Commissioner further recommended that Joseph pay Carol child support in the amount of $95.00 per week. The trial court adopted all of the Commissioner’s recommendations.

Joseph filed objections, which the trial court denied in an order entered on September 11, 1997. Joseph then filed a motion to reconsider, which the trial court denied by order entered on October 6, 1997. This appeal followed.

On appeal, Joseph argues that the trial court erred by ordering that Casey’s primary physical residence be with Carol and by awarding child support to Carol. Joseph claims that the trial court did not properly apply the factors set out in Kentucky Revised Statutes (KRS) 403.270.

In order to modify an award of joint custody, the trial court must first find that there has been “an inability or bad faith refusal of one or both parties to cooperate.” Mennemeyer, 887 S.W.2d at 557-558.

> If joint custody is awarded and subsequently becomes unworkable, a nonconsensual modification of the original joint custody decree should be made only after the court conducts a de novo hearing pursuant to KRS 403.270 as if there had been no prior custody determination. . . . Any court-ordered modification must then be made in light of the best interest of the child[] and based upon the factors which are enumerated in KRS 403.270.

Id. The trial court's findings of fact in a domestic relations case shall not be set aside unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

There is no transcript, audio tape, or videotape in the record of the August 1997 custody hearing. Joseph, as the appellant, had the responsibility of ensuring that any untranscribed proceedings were transcribed and that the record was properly prepared by the circuit court clerk. See CR 75.01; Seale v. Riley, Ky. App., 602 S.W.2d 441, 442-443 (1980); and Ventors v. Watts, Ky. App., 686 S.W.2d 833, 834-835 (1985). In the absence of a record of the hearing, "we must assume the record supports the factual determinations of the trial court." Dillard v. Dillard, Ky. App., 859 S.W.2d 134, 137 (1993).

In the case sub judice, the trial court found that the parties could not reach an agreement about where Casey should attend school. However, the trial court did not find that this disagreement reached the threshold requirement to allow modification of the joint custody award.

In an attempt to clarify some confusion concerning the Mennemeyer threshold requirement, this Court in Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781 (1998), recently stated as follows:

> Mennemeyer does not hold, and should not be interpreted as holding, that the threshold procedural requirement must be met before a trial court may address issues, other than those involving the nonvoluntary modification of custody or primary physical possession arrangements, which may arise in the context of joint custody, such as disagreements concerning a child's educational or religious upbringing. Similarly, Mennemeyer does not hold, and should not be interpreted as holding, that whenever it is shown that joint custodians cannot or in bad faith will not cooperate in regard to some particular issue, joint custody cannot continue regardless of whether it would be in the child's best interest. Just as a trial court clearly need not modify a sole custody decree whenever the KRS 403.340(1) threshold requirement is met, a trial court need not modify a joint custody decree whenever the Mennemeyer threshold procedural requirement is met if, after a hearing, the court determines that continuation of the joint custody decree would be in the child's best interest.

Id. at 784 (emphases added).

The trial court held that Carol had not met the Mennemeyer threshold requirement to modify the parties' joint custody to an award of sole custody to her. Jacobs supports the trial court's determination that it was empowered to address the parties' concerns about the child's educational well-being. Given the fact that the parties now live in different counties, and disagree as to the school situation, the trial court's decision on the educational issue would be proper and necessarily

impacts the issue of Casey's primary residence. Accordingly, the trial court had the authority to settle disagreements even though it does not modify joint custody. Therefore, the trial court's order of October 16, 1997 is affirmed.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. I respectfully dissent. The Majority has misapplied Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781 (1998). As quoted by the Majority, Jacobs states as follows:

> Mennemeyer does not hold, and should not be interpreted as holding, that the threshold procedural requirement must be met before a trial court may address issues, other than those involving the nonvoluntary modification of custody or primary physical possession arrangements, which may arise in the context of joint custody, such as disagreements concerning a child's educational or religious upbringing.

Id. at 784.

The Majority has ignored the language in Jacobs that states "other than those involving the nonvoluntary modification of custody or primary physical possession arrangements" (emphasis added). In the case sub judice, the trial court changed the primary physical possession arrangements relating to Casey without making the required findings concerning whether the child's best interests would be served by this change. KRS 403.270. I would vacate the order and remand with directions to make a determination as to the child's best interests pursuant to the factors set forth in KRS 403.270.

BRIEF FOR APPELLANT:

Hon. Darrell A. Cox
Covington, KY

BRIEF FOR APPELLEE:

Hon. Suzanne Cassidy
Covington, KY