RENDERED: November 22, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-000490-MR

CHRISTOPHER D. YORK APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 93-CI-00100

MELISSA CREW YORK APPELLEE

OPINION
AFFIRMING

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BEFORE: WILHOIT, Chief Judge; EMBERTON and JOHNSTONE, Judges.

EMBERTON, JUDGE. The appellant, Christopher D. York, appeals from an order of the trial court wherein it refused to modify a prior custody award. Appellant alleges that he demonstrated the parties' inability to cooperate and that a de novo hearing on the issue of custody is warranted.

Appellant and the appellee, Melissa Crew York, were divorced on August 13, 1993, at which time they agreed to share

joint custody of the parties' two children. A motion for change of custody was filed in September 1994; on October 17, 1994, however, the parties executed an agreement stating that they shall continue to have the joint and legal physical custody of the children. The current motion was filed by the appellant on October 23, 1995, alleging that the parties are unable to cooperate and requesting sole custody of the children.

The record reveals there are instances where the parties have not been cooperative. Appellee has moved the children to a different school without approval of the appellant, and there have been difficulties transporting the children from appellant's residence to the appellee's. Additionally, appellant produced evidence that appellee has, on occasion, refused to see the children and on occasion was late picking them up. The parties have disagreed over child care arrangements and appellee has objected to the appellant's mother's assumption of the duty of seeking medical treatment for the children.

Despite the apparent disagreements of the parties, the Domestic Relations Commissioner, after hearing the evidence, and in a well-reasoned report, found there was not sufficient conflict between the parties to mandate a de novo hearing for a change of custody. His findings were based, in part, on the relative young age of the parties, both in their early twenties, their mutual love for their children, and their statements that

they will work with each other concerning the well-being of the children.

In Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994), the court established a threshold which must be met prior to a de novo hearing on a modification of a joint custody arrangement.

> As we view the matter, in nonconsensual modification situations involving joint custody, such as the situation here, the trial court may intervene to modify a previous joint custody award only if the court first finds that there has been an inability or bad faith refusal of one or both parties to cooperate. Any court-ordered modification must then be made in light of the best interest of the children and based upon the factors which are enumerated in KRS 403.270. (Citation omitted).

Id. at 558.

The court could not and did not propose to state the degree of non-cooperation or bad faith necessary to meet the threshold. Later in Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996), the court discussed the factual scenarios which may justify court intervention but ultimately admitted that a concise definition is impossible. Instead, the finding is discretionary with the trial court and must be on a case-by-case basis. Intervention is permissible when:

> . . . the situation presented to the court evidences an inability or bad faith refusal by one or both parties to rationally participate in decisions concerning their child's upbringing. Although obviously many disagreements between joint custodians do not reach this level of noncooperation, certainly

> this threshold requirement may be met in a wide variety of situations ranging from those involving matters such as mere visitation disputes to those involving matters such as child neglect or abuse.

Id. at 324.

The trial court is the appropriate fact finder as to the ability of the parties to cooperate in the future. We will not disturb that finding unless it is found clearly erroneous. Squires v. Squires, Ky., 854 S.W.2d 765 (1993). In making that determination the trial court should consider the nature of the parties' disputes, their ability to reconcile those disputes in a rational manner, and their emotional maturity in working together for the children's best interest. Id. at 769, 770. The court's determination cannot be made without furthering the statutory preference for stability in custodial arrangements. KRS 403.340.

The appellant and the appellee have had disputes since the entry of the decree in 1993. It is the rare and admirable set of parents, divorced or married, who can set aside their differences and reach agreement on all child rearing issues. The trial court found that these two young people have the potential to cooperate to a degree that the children will benefit by continued joint custody and we will not reverse that finding. Should the trial court's assessment of the parties prove wrong and the custodial arrangement deteriorate, the door for future modification has not been closed.

The judgment of the Russell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Laura Henry Harris
Columbia, Kentucky

BRIEF FOR APPELLEE:

Robert Hanson
Columbia, Kentucky