

RENDERED: August 22, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-003275-MR

JAMES DONALD WEBB, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 95-CI-3365

PAMELA ROBERTSON WEBB

APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING AND REMANDING IN PART

* * * * *

BEFORE: EMBERTON, GUDGEL and JOHNSON, Judges.

JOHNSON, JUDGE: James Donald Webb (James) appeals from the Fayette Circuit Court's decree of dissolution of marriage entered on December 3, 1996, that awarded his ex-wife sole custody of his daughter and restricted his visitation rights. We affirm in part and vacate and remand in part.

On May 27, 1989, James and the appellee, Pamela Robertson Webb (Pamela), were married. On January 17, 1992, the couple's only child, Katherine, was born. On October 18, 1995, Pamela filed a petition for dissolution of marriage. On November 20, 1995, an agreed order was entered granting Pamela temporary custody of Katherine and granting James reasonable visitation. After some delay, on November 15, 1996, a bench trial was held. On December

3, 1996, the trial court entered a decree of dissolution of marriage wherein it, inter alia, granted sole custody of Katherine to Pamela and restricted James' visitation. This appeal followed.

James first argues that the trial court abused its discretion in denying him joint custody of Katherine based solely upon the finding that the parties could not cooperate. Kentucky Revised Statutes (KRS) 403.270 states that the court shall determine custody in accordance with the best interests of the child, and equal consideration shall be given to each parent. "The court may grant joint custody to the child's parents if it is in the best interest of the child." KRS 403.270(4). James cites Chalupa v. Chalupa, Ky.App., 830 S.W.2d 391 (1992), and its statement that a trial court should "consider joint custody first." Id. at 393 (emphasis original). However, this aspect of this Court's decision in Chalupa was rejected by the Supreme Court in Squires v. Squires, Ky., 854 S.W.2d 765, 769-770 (1993).

Squires held that the best interests of the child is controlling over all other considerations. Id. at 768; McNamee v. McNamee, Ky., 432 S.W.2d 816, 817 (1968). The factors considered in KRS 403.270 must be considered prior to the determination of joint custody or sole custody. Implicit in the Legislature's authorization to award joint custody is that a court do so after becoming reasonably satisfied that for the child, the positive aspects outweigh the negative. Id. There is no significant difference between the analysis required with respect to joint or sole custody. In each case, the parties are entitled to an individual determination of whether joint custody or sole custody

serves the child's best interests. Id. at 770. The trial court possesses broad discretion in making this determination. Id. Custody determinations should not be set aside unless determined to be clearly erroneous or an abuse of discretion. McNamee, supra at 817. See generally Bealert v. Mitchell, Ky.App., 585 S.W.2d 417, 418 (1979); Kentucky Rules of Civil Procedure (CR) 52.01.

We cannot conclude that the trial court was clearly erroneous or abused its discretion in deciding to grant Pamela sole custody of Katherine. The trial court considered the best interests of the child, the parties' past lack of cooperation, and their future likelihood of cooperation.¹ Accordingly, the award of sole custody of Katherine to Pamela is affirmed.

James also appeals the visitation schedule established by the trial court. The divorce decree provided that James

shall have visitation with the minor child from 10:00 a.m. through 8:00 p.m. on two Saturdays out of every three beginning on November 23, 1996. The Respondent/Father is to have two consecutive Saturdays and then the third Saturday will be spent with the Mother and this will proceed in this manner until further Orders of the Court. There will currently be no overnight visitation.

James argues that to deny him unrestricted visitation "based solely upon one DUI conviction is . . . an abuse of discretion by the Fayette Circuit Court."

KRS 403.320(1) provides that the non-custodial parent "is entitled to reasonable visitation rights unless the court finds,

¹ The note in Pamela's brief that James allegedly "lost his job and residence subsequent to [the] hearing" was properly objected to by James in his reply brief. Counsel is cautioned against making allegations outside the record.

after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." Further, the statute provides at (3): "[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health." As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation." Kulas v. Kulas, Ky.App., 898 S.W.2d 529, 530 (1995).

Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both [her] parents. The burden of proving that visitation would harm the child is on the one who would deny visitation.

Smith v. Smith, Ky.App., 869 S.W.2d 55, 56 (1994) (emphasis original).

In the decree, the trial court refers to "having made findings of facts and conclusions of law on the video record of this case, as well as the printed form of findings of facts and conclusions of law which are filed and noted of record." However, there is no "printed form of findings of facts and conclusions of law" in the record, and the findings of facts on the videotape are limited to a finding that because of James' recent DUI conviction James "may have a drinking problem" and at least has shown that his "judgment is not good" or is "impaired." The trial court's failure to make a finding under KRS 403.320(1) "that visitation would

endanger seriously the child's physical, mental, moral, or emotional health" requires us to vacate the order restricting visitation and remand for additional findings. Alexander v. Alexander, Ky.App., 900 S.W.2d 615, 616 (1995).

The decree of dissolution entered on December 3, 1996, by the Fayette Circuit Court is affirmed in part as to the issue of Pamela having sole custody of Katherine, and vacated and remanded in part as to the issue of James' restricted visitation for the trial court to make additional findings as required by KRS 403.320(1).

ALL CONCUR.

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