RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-000430-MR

JOHN A. HUMPHRESS APPELLANT

V. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE WILLIAM M. HALL, JUDGE
ACTION NO. 96-CI-000122

MARY L. SMITH APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: BUCKINGHAM, GUDGEL and HUDDLESTON, JUDGES.

HUDDLESTON, JUDGE. John A. Humphress, III, appeals from an order of the Taylor Circuit Court granting sole custody of his son to the child's mother, Mary L. Smith, and requiring him to pay $138.50 per month in child support. Humphress argues that the trial court clearly erred by failing to grant joint custody and by imputing a minimum wage for purposes of child support. We disagree and thus affirm.

After a brief relationship between Smith and Humphress, Smith became pregnant. She gave birth to a son, Henry, on June 12, 1995. The couple parted ways months before the birth. Smith filed a paternity action in Taylor District Court in April, 1996. Humphress filed this action seeking joint custody the same month.

Taylor Circuit Court granted temporary custody to Smith, ordered Humphress to pay $60.00 per month in child support and set visitation.

The domestic relations commissioner held a hearing and found that sole custody in favor of Smith would be in the best interest of the child. He also recommended that Humphress be ordered to pay $138.50 per month in child support, by imputing a minimum wage to the self-employed Humphress. Humphress filed exceptions. In an order entered January 21, 1997, the circuit court overruled the exceptions and adopted the commissioner's report in its entirety.

On appeal, Humphress maintains that the circuit court abused its discretion by granting Smith sole custody and by imputing the minimum wage in calculating child support. Humphress argues that the evidence and the law favor joint custody. He also believes that he should have been required to pay only $60.00 per month, the minimum established by the child support guidelines, because his fledgling business was operating at a loss.

The overriding consideration in any custody determination is the best interest of the child. Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); Ky. Rev. Stat. (KRS) 403.270. This standard applies equally when the child is born out of wedlock. Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 493 (1993). Facts found by a domestic relations commissioner and adopted by the court shall not be set aside unless clearly erroneous. Ky. R. Civ. Proc. (CR) 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

The commissioner heard testimony from the parties, and, by deposition, the parties' relatives. The record reveals a tangled tapestry of fractured friendships, forbidden romance and out-of-wedlock births. Humphress and Smith are life-long acquaintances, and one-time lovers. Their fathers were once partners in a screen printing business in Campbellsville. The business partners had a falling out, and Thad Smith, Mary Smith's father, eventually started a competing company, Green River Printing. Humphress worked for his father, John Humphress, II. They, too, had a falling out, and the younger Humphress went to work for his father's rival, Thad Smith, in the fall of 1994.

Green River Printing was a family business. Thad Smith employed his wife Theresa and his daughter Mary. Humphress, who had recently learned that his former girlfriend, Melinda Bishop, was expecting his child, began a relationship with his boss's daughter. Although their romance stirred the same parental reactions as Shakespeare's tragic couple, it was not so enduring. Humphress and Smith soon parted company, and Smith learned that she, too, was pregnant by Humphress. Instead of drawing them together, the news drove them apart. Humphress and Smith, both still working for Smith's father, did not speak to one another for the duration of her pregnancy. Spurned by Smith, Humphress returned to Bishop. Humphress' and Smith's working relationship ended when Mary's mother, Theresa, asked Humphress to leave, ostensibly because he was devoting too much time to his home screen printing operation.

Humphress made some efforts to be an active participant in both his young sons' lives. He made a few voluntary child support payments to Smith, and the parties arranged for sporadic visitation. By all accounts, Humphress' and Smith's relationship was riddled with animosity, made worse, no doubt, by the fact that Humphress was living with Bishop and his other child. After leaving Green River Printing, Humphress worked in his own screen printing business full-time. He testified he was unable to work for any other local screen printing company, since one was run by his father, and the others by disgruntled former employees of his father. Humphress' business operated at a loss, both at start-up and at the time of the hearing. According to Humphress, he discontinued his child support payments after exhausting his savings from his former employment.

To determine the appropriateness of joint custody, Squires, supra, directs courts first to consider the factors under KRS 403.270(1). Additionally, a trial court should assess the likelihood of future cooperation between the parents. Emotional maturity and willingness to rationally participate in decisions affecting the upbringing of the child are relevant considerations. Id. at 769. The Squires Court specifically declined to adopt a preference for joint custody. Id.

The circuit court did not abuse its discretion when it found no future prospect for cooperation. The parties were never married, never lived together, and the birth of their child drove them further apart. Their largely hostile relationship did not

bode well for joint custody, and we do not fault the circuit court for rejecting that as a possibility.

Having ruled out joint custody, the court did not abuse its discretion in awarding sole custody to Smith. There is substantial evidence in the record to support the conclusion that this arrangement is in the best interest of the child. Humphress complains about the court's characterization of his complicated love life, his choice to start his own business and his motivations for filing this custody action. We find no clear error in any of the court's findings.

Humphress next argues that the trial court clearly erred by imputing income to him to set child support. The child support guidelines in KRS 403.212 serve as a rebuttable presumption for the establishment of the amount of child support. KRS 403.212(4)(d) permits a court to calculate child support based on potential income, if it finds a parent is voluntarily unemployed or underemployed. The final clause of that section, effective July 15, 1996, provides: "[a] court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation."

Humphress asserts that imputation of income requires a showing that "the parent purposely terminated or changed employment with intent to interfere with child support obligations and lower them," citing McKinney v. McKinney, Ky. App., 813 S.W.2d 828 (1991). In McKinney, this Court emphasized the inequity of applying KRS 403.212(2)(d) to someone whose "employment situation

changes because of circumstances beyond his control or is reasonable in light of all the circumstances," and interpreted the statute to include a bad faith requirement. Id. at 829. The circuit court inferred bad faith on Humphress' part because he found Humphress' decision to remain self-employed at a loss with two young children to support unreasonable and not due to circumstances beyond his control.

KRS 403.212(d), as amended, refutes Humphress' argument. Even if McKinney's bad faith requirement applies, substantial evidence supports the circuit court's conclusion that Humphress is voluntarily underemployed. Based upon his work history and employment potential, the court did not abuse its discretion by imputing a minimum wage to Humphress.

The circuit court committed no clear errors, and its decision is supported by the record. Reichle, supra. For the foregoing reasons, the decision of the circuit court is affirmed.

ALL CONCUR.

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