

RENDERED: December 24, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-0662-MR

STEVEN BRIGGS

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 94-FD-1805

VALERIE CLEMONS WILLHITE

APPELLEE

OPINION

AFFIRMING

* * * * *

BEFORE: KNOPF, MILLER and SCHRODER, JUDGES.

MILLER, JUDGE. Steven Briggs brings this appeal from an order of the Family Court Division of Jefferson Circuit Court granting Valerie Clemons Willhite's motion to remove the parties' minor son to Georgia. After reviewing the arguments and applicable authorities, we affirm.

Steven and Valerie were never married. Their child, Alec Matthew Clemons, was born on October 15, 1993. Blood tests performed in May 1994 revealed that Steven was, indeed, the child's father. After paternity was established, the parties litigated visitation and child support. On December 4, 1995, the

trial court entered an order (1) awarding joint custody and (2) providing an equal division of time with the child.

In March 1996, Valerie remarried her former husband, Gerald Willhite, a resident of Georgia. Thereafter, she filed a motion seeking to remove Alec to Georgia. Steven sought a restraining order to prevent the move. On February 13, 1997, the trial court entered an order granting Valerie's motion to remove Alec to Georgia. This appeal followed.

Steven first argues that, in light of the evidence, the trial court abused its discretion in allowing Alec to be removed to Georgia. Since the circumstances involved modification of a joint custody decree (as to equal division of time), the trial court was obligated to (1) determine whether there had been inability or bad faith refusal by one or both parties to cooperate, (2) conduct a de novo hearing regarding the nonconsensual modification of joint custody, and (3) justify any modification based upon the child's best interest by utilizing the factors enumerated in KRS 403.270. See Mennemeyer v. Mennemeyer, Ky. App. 887 S.W.2d 555 (1994). Steven does not contest either the trial court's finding that the parties had been unable to cooperate or that a de novo hearing on modification held. Thus, the sole issue on this appeal is the best interest of the child.

Steven alleges that the trial court failed to take into account the statutory best interest factors enumerated in KRS 403.270. Specifically, he alleges that the court (1) allowed

Alec to leave a stable home environment with all of his significant relatives; (2) ignored Alec's minimal contact with his new stepfather; (3) erred when it relied solely upon the testimony of the court's psychologist; (4) "erred and abused its discretion in analyzing the child's siblings and any other person who may significantly affect the child's best interests;" and (5) did not adequately consider the mental and physical health of all relevant individuals.

In support of its best interest determination, the trial court made the following findings: (1) that the court psychologist had determined that Alec has some preferential feelings regarding his mother; (2) that Valerie appears to be more sensitive to Alec's needs; (3) that Valerie tends to be more attentive to Alec and to take the lead with regard to his day-care participation; and (4) that Valerie generally takes the lead with regard to Alec's medical care.

As to Steven, the court noted concern that he suffered "unacknowledged and untreated anger," that he "is especially very bitter and vengeful toward Valerie and that this anger interferes with parenting Alec to the best of his capability." The court also noted that on one occasion when Alec was injured, Steven had acted irresponsibly merely to avoid communication with Valerie.

The trial court has broad discretion in determining what is in the best interest of the child. See Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986), and Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). We will not substitute findings of fact

for those of the trial court where they are not clearly erroneous. See Reichle v. Reichle, supra, and Bennett v. Horton, Ky., 592 S.W.2d 460 (1979). Not infrequently, a trial judge may draw upon common sense and personal life experiences, as well as those of mankind, to determine that certain conduct or environment will adversely affect children. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983). Great weight must be given to the court's findings concerning child custody; its conclusions will not be disturbed except where there exists an abuse of discretion. Watson v. Watson, Ky., 434 S.W.2d 33 (1968).

We do not find Steven's enumerated complaints persuasive. We are of the opinion that the court did, in fact, consider elements of which he complains.

Steven alleges that the court failed to consider the psychological factors of the move upon the child. He cites various law review articles and out-of-state authorities. This is not a specifically enumerated factor under 403.270. Nevertheless, we think it a valid consideration. We find no reversible error, however, inasmuch as this was a consideration underlying the entire proceeding.

Finally, Steven argues that the trial court erred in failing to fully consider Valerie's psychiatric records. Specifically, he alleges that the court failed to consider those aspects of the records relating to Valerie's sexual abuse as a child and her use of marijuana and cocaine during her first marriage to Gerald Willhite. Steven fails, however, to identify

how these events, which occurred prior to Alec's birth, would affect Valerie and Alec's relationship.

KRS 403.270(2) provides that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." While the trial court's Findings of Fact and Conclusions of Law do not specifically address these issues, absent a showing that Valerie's past experience of child abuse and/or drug use between 1984 and 1987 affects her relationship with Alec, it was not an abuse of discretion for the court to omit this issue from its discussion in reaching its judgment.

Upon the whole of the record herein, we cannot say that the court abused its discretion when it concluded that it was in Alec's best interest to remain with his mother and that she be permitted to remove him to Georgia.

For the foregoing reasons, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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