RENDERED: December 31, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-3225-MR

MELISSA VERST APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD KOPOWSKI, JUDGE
ACTION NO. 92-CI-01105

JOHN VERST APPELLEE

OPINION
AFFIRMING

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BEFORE: ABRAMSON, GARDNER, and JOHNSON, Judges.

ABRAMSON, JUDGE: Melissa Verst appeals an order of the Campbell Circuit Court entered on November 14, 1996, which adopted the Domestic Relations Commissioner's (DRC) report granting John Verst's motion to modify custody and awarding him sole custody of the parties' children. Finding no error, we affirm.

The parties were married in November 1984. During the marriage, they had two children, Lindsey, born in April 1985, and Jonathan, born in October 1989. On September 29, 1992, John Verst filed a petition for divorce. After a contentious divorce proceeding, the parties submitted a Separation Agreement providing for joint legal custody with primary physical residence of the children being with Melissa who retained ownership of the marital residence. The circuit court issued a Decree of

Dissolution of Marriage on August 20, 1993, that approved and incorporated the Separation Agreement.

In March 1994, Melissa filed a motion seeking a court order requiring John to undergo counseling as a condition of continued visitation. The circuit court referred the issue to Roy Kiessling for evaluation and mediation. Kiessling prepared an evaluation report recommending that the visitation schedule be restructured, but there be no court-ordered counseling.

On February 1, 1996, John filed a motion seeking sole custody of the children. In a supporting affidavit, he alleged various deficiencies in Melissa's care. The circuit court again appointed Roy Kiessling to conduct an evaluation and make a recommendation. Kiessling submitted a custody evaluation report recommending continuation of joint custody but that the primary physical residence of the children be changed to John. In May 1996, the circuit court referred the issue of custody to the DRC for an evidentiary hearing. After conducting a three-day hearing, the DRC issued a report on October 8, 1996, recommending that the motion to modify custody be granted and that John be awarded sole custody. Melissa filed exceptions to the DRC's report, and John filed a response to the objections. On November 14, 1996, the circuit court issued an order overruling the objections and adopting the report and recommendations of the DRC. This appeal followed.

As a general rule, a trial court has broad discretion in determining the best interest of children when awarding child

custody. Squires v. Squires, Ky., 854 S.W.2d 765 (1993). In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); CR 52.01. The fact findings of the DRC, to the extent they are adopted by the trial judge, are given the same weight in applying the clearly erroneous standard. Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky., 602 S.W.2d 427, 429 (1980). In addition, a trial court's decision on modification of custody should not be disturbed absent an abuse of discretion. Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970). Abuse of discretion in relation to the exercise of judicial power implies "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214, 217 (1945).

An award of joint custody, as initially ordered by the trial court in this action, is the functional equivalent of no award at all because both parents continue to share equal decision-making authority concerning major areas of their children's upbringing, with neither parent being designated the primary custodian. Aton v. Aton, Ky. App., 911 S.W.2d 612, 615 (1995); Benassi v. Havens, Ky. App., 710 S.W.2d 867 (1986). If, in response to a request to modify joint custody, the court determines that joint custody should be reevaluated, the court must proceed pursuant to KRS 403.270(1) as though it were

determining custody for the first time. Benassi, 710 S.W.2d at 869; Erdman v. Clements, Ky. App., 780 S.W.2d 635, 637 (1989). KRS 403.270 provides that custody should be determined in accordance with the best interest of the child, and sets out several relevant factors including the wishes of the parents and the child, and the interrelationship of the child with the parents and siblings. KRS 403.270(1).

Melissa raises two issues: (1) whether the court erred by concluding that transfer of the physical residence of the children was in their best interests and, (2) whether the court erred in deciding John should have sole custody. Melissa argues the circuit court's decision to transfer residence of the children was based on its acceptance of several factual errors found in Roy Kiessling's evaluation report. First, we note that in her appellate brief Melissa, without citation to the record, refers to testimony given by two witnesses at the hearing before the DRC that allegedly conflicts with the evaluator's report. John disputes the alleged testimony. In fact, there is no transcript, audio tape, or videotape of the hearing in the record. See CR 75.01 (requiring appellant to designate untranscribed proceedings for inclusion in record on appeal). CR 76.12(4)(c)(iii) clearly requires "ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed tape-recordings, supporting each of the statements narrated in the summary." Kentucky courts have repeatedly held that the Court of Appeals should not consider

facts or matters stated in a party's brief that do not appear in the record. See, e.g., American Druggists' Ins. Co. v. Natural Resources and Environmental Protection Cabinet, Ky. App., 687 S.W.2d 555, 557 (1985). Thus, we will consider only the facts that appear in the record.

The record reveals that the trial court considered the factors listed in KRS 403.270. The DRC found that Lindsey had expressed a desire to live with her father in statements to both Kiessling and her school counselor. Both Melissa and John indicated to Kiessling that Lindsey had expressed a wish to live with her father. The evaluation report also states that the children were relaxed in both homes and that Lindsey had adjusted well to being with her stepsisters and stepmother. Both John and his new wife testified at the hearing that the children get along well with their stepmother. Meanwhile, Lindsey confided to her school counselor that she was uncomfortable around her mother's boyfriends and she was concerned about her mother's behavior with her boyfriends. The DRC found that these situations were detrimental to the children. In addition, Lindsey and Jonathan are very close and Lindsey wanted them to stay together. Both parents expressed a strong desire to have the children live with them.

The major factor relied on by the DRC in making his recommendation involved Melissa's work schedule and her attention to the care of the children. Melissa admitted that her night-time work schedule required her to have either her boarder, a

boyfriend, a neighbor or a relative care for the children in her absence. Melissa acknowledged having had several boyfriends and babysitters since the divorce. Her work schedule further resulted in Lindsey having to wake and assist Jonathan in preparing for school. Melissa also admitted that on a few occasions, the children were at home unattended. Lindsey commented to her school counselor that she rarely saw her mother during the week and that her mother was often sleeping when they were under her care.

The DRC found that based on the testimony of all the witnesses, Melissa's work schedule was detrimental to the well-being of the children. Roy Kiessling also found that Melissa's work schedule necessitated numerous live-in baby-sitters and limited her availability to the children. Melissa argues that these findings gave undue weight to her prior work schedule which was temporary and that her new schedule allows more personal supervision and contact with the children. John asserts that Melissa's new schedule is only an attempt to influence the custody determination. The DRC found that Melissa is more concerned with arranging a schedule to fit her lifestyle than arranging a work schedule where she will be available to care for the children.

John purchased a new home after his remarriage in January 1995. He currently works a regular five-day schedule between 8:30 a.m and 4:30 p.m. while his new wife stays at home with their young son and her two children from a prior marriage.

During the hearing, John presented evidence that he had repeatedly extended his normal visitation with Lindsey and Jonathan by keeping them at his home with the approval of Melissa. In fact, in 1995, the children stayed with John approximately 219 full days and 19 half-days. Roy Kiessling opined that John's home offered a more stable environment. The DRC made factual findings that John could provide a more structured environment with a regular schedule, and he recommended that the primary physical residence of the children should be with John. The DRC's factual findings with respect to the factors identified in KRS 403.270 and the home environment of the respective parties are not clearly erroneous because they are supported by the record. Indeed the DRC actually concluded that the more stringent standard of serious endangerment as expressed in KRS 403.340 was satisfied and justified granting John's motion to modify custody. As discussed earlier, the best interest standard of KRS 403.270 is the appropriate standard because the parties had joint custody under the original arrangement. A trial court's decision as to the primary residence of the children should not be overturned where there is sufficient evidence to support the decision. See Aton v. Aton, supra. Given the DRC's factual findings, we believe the trial court did not abuse its discretion in concluding that a transfer of the physical residence of Lindsey and Jonathan would be in their best interests.

Melissa's second complaint concerns the adjustment of custody to sole custody in favor of John, rather than joint custody with the children's primary physical residence being with John. In Squires v. Squires, Ky., 854 S.W.2d 765 (1993), the Kentucky Supreme Court discussed the various factors relevant to determining sole and joint custody. The Court declined to adopt a preference for joint custody by emphasizing that the overriding factor is the best interests of the child. Our Supreme Court indicated that there was no significant difference between the analysis for granting sole or joint custody, and that the trial court must choose between the two based on a reasonable belief that the positive aspects of a given choice outweigh the negative aspects. Id. at 768. The analysis begins with the factors outlined in KRS 403.270(1).

The ability of the parties to cooperate is crucial to joint custody since it implicates a more co-equal participation between the parents than does sole custody. Nevertheless, the Squires court held that absolute cooperation and goodwill is not required for joint custody: "By cooperation we mean willingness to rationally participate in decisions affecting the upbringing of the child." Id. at 769. A trial court may not modify a joint custody arrangement absent an allegation by a party and a finding by the court that there has been an inability or bad faith refusal of one or both of the parties to cooperate. See Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994). In the case sub judice, Melissa argues the circuit court erred by

granting John sole custody based on her alleged lack of cooperation.

The DRC found that the parties' divorce was hotly contested and the relationship between them had not improved. He found the parties' interactions were argumentative, with John being verbally abusive and Melissa's attitude being "not helpful." The DRC made an explicit factual finding that Melissa had demonstrated an inability or refusal to communicate and cooperate with John. We believe these factual findings are not clearly erroneous.

As previously noted, shortly after the divorce, Melissa filed a motion seeking to require John to undergo counselling as a condition of visitation. At that time, both parties alleged that the other party was interfering with his or her relationship with the children. The evaluation report indicated that the parties exhibited an inability to communicate effectively, and Melissa frequently changed the children's visitation schedule with John, which caused problems. In addition, Melissa filed a motion for a child support increase based on additional child care expenses associated with payment of a night-time babysitter. In February 1995, John filed a motion to hold Melissa in contempt for failure to comply with the personal property division in the divorce decree. The parties also have had persistent disputes over visitation and the extent of care necessary for the children. The record does not support Melissa's allegation that

John was totally responsible for the lack of communication and cooperation between the parties.

Melissa's apparent lack of emotional maturity was an element contributing to the parties' disputes over visitation and supervision of the children. As the court in Stinnett v. Stinnett, Ky.App., 915 S.W.2d 324 (1996) recognized, the lack of cooperation factor relevant to the modification of joint custody may be met in a wide variety of ways ranging from mere visitation disputes to child neglect or abuse. Based on the record as a whole, the DRC's factual finding on the parties' inability or refusal to cooperate is not clearly erroneous. In view of the factual findings involving the factors identified in KRS 403.270, and the lack of cooperation between the parties, we cannot say the circuit court abused its discretion in concluding that sole custody, rather than joint custody was more appropriate in this instance.

For the foregoing reasons, we affirm the order of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Crestview Hills, Kentucky

BRIEF FOR APPELLEE:

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