RENDERED: December 30, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003081-MR

SHARON SKAGGS (now Pride) APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 97-CI-000100

GREG SKAGGS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Sharon Darlene Pride (Sharon) appeals from an order of the Allen Circuit Court changing joint custody of a five-year-old male child to sole custody to the father, Gregory Skaggs (Gregory). After reviewing the record, considering the parties arguments and the applicable law, we affirm.

The parties herein were married for about two and one-half years when Gregory initiated divorce proceedings. A divorce decree was entered August 5, 1994, which granted the parties joint custody with Sharon designated primary custodian. On September 24, 1997, Gregory filed a motion for a change in custody. The Domestic Relations Commissioner (DRC) conducted a

two-day hearing wherein she heard sworn testimony from Sharon; Gregory; Gloria Hennion, a family friend of Gregory's; Tara Faulk, the child's former daycare provider; Barry Skaggs, Gregory's father; Faye Skaggs, Gregory's mother; Billy Grant Pride, Sharon's current husband's father; Gregory Grant Pride, Sharon's current husband; and Darla Erwin, social worker, Kentucky Cabinet for Families and Children/Department of Social Services (CFC/DSS). The DRC admitted into evidence certain exhibits, including a videotape made by Billy Grant of Sharon's residence on or about July 31, 1996, and home study investigations performed by CFC/DSS.

At the conclusion of the hearing, the DRC discussed the evidence, made findings, and recommended sole custody to Gregory with reasonable visitation to Sharon. Sharon filed exceptions to the DRC's report and on October 29, 1997, the circuit court confirmed the DRC's report, overruled the exceptions, and approved the change in custody.

On appeal, Sharon argues that the DRC erred in admitting the videotape; erred in allowing the cross-examination of Sharon's medical records; erred in separating the infant, David, from his half-brother, Michael; erred in the findings of fact; and erred in recommending a change in joint custody.

In the case sub judice, we agree with the trial court that the July 31, 1996 video was not that important to the DRC's findings as that was after Sharon moved out. Sharon's argument is that the video should not have been admitted into evidence because it was not authenticated under KRE 901. The trial court

heard testimony from Billy Pride, who testified at the hearing on exceptions that he did indeed take a video of the house on that date, that the tape the court had him review did contain his voice and had his reflection in the mirror, but that he didn't believe it was the same and must have been altered. The trial court disagreed and admitted the tape. Even if we believed the videotape was not admissible, the error would be harmless because the trial court reviewed the tape and findings of the DRC and decided the tape was not that valuable because Sharon had moved out before July 31, 1996. Thus the tape was not that relevant to the living conditions when Sharon lived there. Even though the DRC may have given the tape more weight, under Squires v. Squires, Ky., 854 S.W.2d 770, 765 (1993), the call is the trial court's.

Sharon argued that it was error to allow cross-examination of her regarding medical records relating to her medical malpractice case against a doctor, her former employer. In the malpractice action, Sharon alleged she became addicted to Stadol nasal spray, a narcotic, and was suing the doctor for prescribing such. Sharon argues that, "While Darlene Pride has clearly put her medical condition at issue in a medical malpractice case . . . , she has not clearly placed her medical condition in issue at this custody proceeding." We disagree. Sharon's medical condition is a relevant factor to consider in arriving at the best interest of the child. Squires, 854 S.W.2d at 768; KRE 611(a); Atwood v. Atwood, Ky., 550 S.W.2d 465 (1976); KRS 403.270(1).

Sharon states, but provides no authority for the proposition, that it would be error to separate David, the child in question, from his half-brother, Michael. Without specific authority for such a proposition, we believe under KRS 403.2270(1), the "best interest" principle, that the interrelationship of David and Michael is a relevant factor, but not a controlling one.

As to Sharon's argument that the DRC made errors in the findings of fact, we disagree. Under Squires, 854 S.W.2d at 770, the trial court reviews the DRC's findings and recommendations and draws its own conclusions. The DRC prepared her report with recommendations to the court, but the trial court has the broadest possible discretion with respect to its use. CR 53.06; Basham v. Wilkins, Ky. App., 851 S.W.2d 491 (1993). This Court will not overturn the trial court unless it is clearly erroneous. CR 52.01; Alvey v. Union Inv., Inc., Ky. App., 697 S.W.2d 145 (1985).

In order to modify joint custody, the trial court must make the two-part analysis set out in Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994):

> [T]he 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.

The issue of "inability or bad faith refusal" to cooperate is evaluated in terms of the definition of "cooperation" as a

"'willingness to rationally participate in decisions affecting the upbringing of the child.'" Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323, 324 (1996) (quoting Squires, 854 S.W.2d at 769).

The inability or bad-faith-refusal-to-cooperate-determination is merely a threshold procedural issue that must be met before a trial court may proceed to the best interest analysis on questions of physical possession or custody. Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781 (1998). After making a threshold determination on the cooperation issue, the trial court may make a de novo determination of custody, including physical possession or physical residence, according to the factors set out in KRS 403.270(1). Jacobs, 959 S.W.2d at 784.

As a general rule, the trial court has broad discretion in determining the best interests of children when awarding child custody. Krug v. Krug, Ky., 647 S.W.2d 790, 793 (1983); see generally, Squires, supra. In reviewing a child custody determination, the appellate Court reviews the trial court's factual findings for clear error. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986); Basham v. Wilkins, 851 S.W.2d at 493. A trial court's decision on an award or modification of custody or the type of custody is a legal conclusion that should not be disturbed absent an abuse of discretion. Squires, 854 S.W.2d at 770 (stating issue of whether joint custody was appropriate in the circumstances was a legal conclusion); Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982); Dudgeon v. Dudgeon, Ky., 458 S.W.2d 159, 160 (1970). The trial court is in the best position to evaluate the testimony and weigh the evidence, so an appellate

Court should not substitute its own opinion for that of the trial court. See Reichle, 719 S.W.2d at 444; Bickel v. Bickel, Ky., 442 S.W.2d 575, 576 (1969). Given all of the evidence, we cannot say that the trial court's decision to modify the joint custody arrangement was not in the best interest of the child. The evidence was sufficient to support the decision and the trial court did not abuse its discretion.

The order of the Allen Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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