RENDERED: March 12, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003315-MR

RHONDA MART LIVINGOOD — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY BARTLETT, JUDGE
ACTION NO. 92-CI-00013

MARK CARTER LIVINGOOD — APPELLEE

OPINION
AFFIRMING
* * * * * * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND KNOX, JUDGES.

KNOX, JUDGE. Appellant Rhonda M. Livingood (Rhonda) appeals from the Kenton Circuit Court order of November 25, 1997, which denied her motion for sole custody of the two (2) children of the parties.[1] We affirm.

In February 1992, pursuant to an agreed order, Rhonda and Mark were awarded joint custody of their children and Rhonda was named the primary custodial parent. In March 1992, the dissolution agreement between the parties was entered and incorporated the agreed order on joint custody. The parties

[1]The parties have two children, a son and a daughter. For purposes of this opinion, we will refer to the children as "son" and "daughter."

agreed to seek a court order or consent of the other parent if either decided to move from the Northern Kentucky area.

In May 1995, Rhonda took daughter to a physician after Mark told her that he had bruised her buttocks during a spanking. Daughter's torso had circles drawn around her nipples, a circle around her navel, and a curving line below her navel. There were also slash marks drawn on her back. Mark admitting drawing on daughter. An emergency protective order and a domestic violence order were entered against Mark. In July 1995, an agreed order was entered continuing visitation as specified in the separation agreement, but requiring Mark to have supervision while the children were in his custody. In August 1995, Mark was ordered by the court to submit to drug and alcohol counseling, to attend parenting classes, to refrain from the use of corporal punishment, and to avoid having sexually explicit material around when the children were present.

In July 1996, Rhonda accepted a job in Knoxville, Tennessee, and informed Mark that she would be moving with the children. In August 1996, Mark obtained emergency temporary physical custody of the children. In September 1996, Rhonda moved the circuit court for sole custody of the children. The motion was overruled because Rhonda was residing in Tennessee.

In May 1997, Rhonda moved back to Northern Kentucky and again sought sole custody. In November 1997, the circuit court continued the joint custody agreement incorporated into the parties' dissolution agreement after conducting an evidentiary hearing. This appeal followed.

Rhonda argues that the circuit court erred in continuing joint custody for two reasons: (1) there was an inability or bad faith refusal of the parties to cooperate with a joint custody arrangement; and (2) the evidence was clear that sole custody with her was in the best interests of the children.

A circuit court has discretion in determining whether parents will be granted sole or joint custody. See KRS 403.270. The trial court may modify a joint custody decree if the court finds upon a motion of one of the parties that there has been an inability or bad faith refusal to cooperate by one or both of the parties. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555 (1994). "Cooperation" constitutes a "willingness to rationally participate in decisions affecting the upbringing of the child." Id. At 557. If this threshold requirement is met, then the trial court reconsiders the custody issue de novo pursuant to KRS 403.270. Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323, 324 (1996); Mennemeyer, supra at 558. A subsequent award of joint custody is not prohibited merely because there is a failure of the parties to cooperate. Jacobs v. Edelstein, Ky. App., 959 S.W.2d 781, 784 (1998). While cooperation between the parties is crucial for joint custody awards as more parental participation is required, a cooperative spirit between the parents is not a condition precedent to awarding joint custody, as joint custody may encourage the parties to cooperate and stay on good behavior. See Squires v. Squires, Ky., 854 S.W.2d 765, 768-69 (1993).

Rhonda argues that the trial court's failure to find a lack of cooperation between the parties was in error. Kentucky

law affords circuit courts great discretion in matters pertaining to child custody. KRS 403.270; Squires at 765. A reviewing court may not overturn a trial court's custody decision unless that decision is based upon a clearly erroneous finding of fact or otherwise constitutes an abuse of discretion. Reichle v. Reichle, Ky., 719 S.W.2d 442 (1986).

The trial court order continuing the award of joint custody did not make any finding concerning cooperation between the parties. However, there is sufficient evidence in the record to support a finding of cooperation between the parties. Mark cooperated with all court orders requiring his attendance at parenting classes, his participation in counseling, restricting the use of corporal punishment, and limiting the children's exposure to sexually explicit material. Furthermore, Mark and Rhonda have modified the various custody arrangements entered by the court without resorting to court intervention or mediation. The trial court did not abuse its discretion in finding the parties could continue to cooperate.

If this Court were to find that there was a lack of cooperation between the parties, then the threshold Mennemeyer requirement would be met, and this Court would review whether the circuit court's determination considering the best interests of the children in awarding joint custody was an abuse of discretion. Rhonda's second argument is that the trial court erred in finding that it was in the best interests of the children to be placed in joint custody. Again, this Court finds no abuse of discretion.

In determining joint custody, the trial judge must consider several factors: the wishes of the children and their parents; the interaction between the children and the parents, siblings, and others; the children's adjustment to their home, school, and community; the mental and physical health of all involved; and any record of domestic violence. See KRS 403.270. Rhonda alone wants sole custody of the children; Mark and the children wanted joint custody. Psychological reports and testimony at the evidentiary hearing show that the children interact well with both parents and each other; that the children are attached to their home and community; and that the children should remain in the Northern Kentucky area. All parties are physically fit. Mark has received psychological counseling and parenting classes in compliance with all court orders. Though an emergency protective order was entered against Mark in 1995, he complied with all court orders subsequent to that order for counseling.

Rhonda argues that the psychological reports all recommend that she receive sole custody of the children and show that Mark has endangered the children physically, mentally and morally. Three clinical psychologists recommended that Rhonda receive sole custody only if she returned to the Northern Kentucky area because cooperation between the parties was no longer feasible. All recommended that Mark receive extensive visitation.

A fourth clinical psychologist recommended that Rhonda and Mark receive joint custody, as both parents were concerned

and cared for the children. He testified that a lack of cooperation between the parties should not be a bar to joint custody because joint custody would promote communication between the parties. He further stated that the other psychologists' recommendations that Mark receive sole custody if Rhonda were not in Northern Kentucky supports a recommendation for joint, rather than sole custody if the parties live in the same area. The trial judge did not abuse his discretion in finding joint custody was in the best interests of the children.

For the foregoing reasons, this Court affirms the circuit court order continuing the joint custody arrangement between Rhonda and Mark.

ALL CONCUR.

BRIEF FOR APPELLANT:

John A. Berger
Florence, Kentucky

BRIEF FOR APPELLEE:

J. David Bender
Covington, Kentucky