RENDERED: March 19, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001049-MR

JAMES WALTER LITTLEFIELD — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 97-CI-00041

KIMBERLY DANETTE LITTLEFIELD — APPELLEE

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

BEFORE: EMBERTON, KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: This is an appeal by James Walter Littlefield (James) from an order of the Caldwell Circuit Court granting sole custody of the parties' child to appellee Kimberly Danette Littlefield (Kimberly). The domestic relations commissioner (commissioner) recommended that the parties be awarded joint custody; however, the trial court subsequently rejected the majority of the commissioner's findings and granted sole custody to Kimberly. We affirm.

The parties were married on May 30, 1993. The marriage produced one child, Joseph Chandler Warren (Chandler), born December 28, 1993. On March 10, 1997, James filed a petition for

dissolution of the marriage which, among other things, requested custody of Chandler. Kimberly filed a response which likewise requested custody of Chandler. The final hearing in this matter, held before the commissioner, was begun on June 24, 1997, and concluded on August 13, 1997. On October 9, 1997, the commissioner filed his "Recommended Findings of Fact, Conclusions of Law, and Final Decree of Dissolution of Marriage and Orders." The commissioner's recommendation provided, among other things, that the parties be granted joint custody of Chandler with James designated as the primary physical custodian. Kimberly and James each filed timely exceptions to the commissioner's recommendations.

On December 22, 1997, a hearing on the exceptions was heard before the trial court. On February 3, 1998, the trial court issued its order and judgment substantially rejecting the recommendations of the commissioner and, inter alia, awarding Kimberly sole custody of Chandler. James timely filed a motion to alter, amend, or vacate its judgment, which was denied on April 7, 1998. This appeal followed.

James first argues that the trial court abused its discretion in rejecting the commissioner's custody recommendation in light of 56th Judicial Circuit Local Rule 9.04(c), which provides that:

> The Court will adopt the Commissioner's Report unless it is shown to be an abuse of discretion contrary to law or unsupported by substantial evidence. In this situation, the Court may modify the Report, may reject it in whole or in part, and receive other evidence, or may remand it with the proper instructions for further actions by the Commissioner.

Rule 53.06 of the Kentucky Rules of Civil Procedure (CR) provides that a trial court may adopt a commissioner's report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions. In interpreting this rule, the Supreme Court has stated, "[i]n sum, the trial court has the broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners." Eiland v. Ferrell, Ky. 937 S.W.2d 713, 716 (1997). By its clear language, CR 53.06(2) allows the trial judge complete discretion as to the use of a commissioner's report. Haley v. Haley, Ky. App., 573 S.W.2d 354, 356 (1978). The trial court can adopt, modify or reject the commissioner's recommendations. Basham v. Wilkins, Ky. App., 851 S.W.2d 491, 494 (1993). Local rules must be in accordance with SCR 1.040 and consistent with the Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of the Supreme Court. Brutley v. Commonwealth, Ky., 967 S.W.2d 20, 21 (1998). The authorization to enact local rules pursuant to SCR 1.040(3)(a) is subject to two conditions: first, that no local rule shall contradict any substantive rule of law or any rule of practice and procedure promulgated by the Supreme Court, and second, that it shall be effective only upon Supreme Court approval. Abernathy v. Nicholson, Ky., 899 S.W.2d 85, 87 (1995).

Appellant's argument that the trial court's discretion in this case was limited by Local Rule, 9.04(c) is in conflict with the foregoing authorities. To the extent that the local rule of the 56th Judicial Circuit purports to limit the trial

court's discretion in its use of a domestic relations commissioner's report, this is an improper restriction of the discretion granted to the trial court under CR 53.06. To that extent, the local rule was not binding upon the trial court, and so provides James with no ground for relief. Cf. Oppenheimer v. Smith, Ky. 512 S.W.2d 510 (1974) (local court rule providing that all depositions must be taken at least 10 days prior to the beginning of term of court in which the case is to be tried was invalid as inconsistent with state rule governing taking of depositions, and deposition should not have been excluded from evidence on the basis of such local rule); Newdigate v. Walker, Ky., 384 S.W.2d 312 (1964) (circuit judges may regulate practice in their courts by adopting local rules not inconsistent with Civil Rules); Robinson v. Robinson, Ky., 363 S.W.2d 111 (1962) (a circuit court cannot make or so construe a local rule as to be in conflict with the Civil Rules).

James next argues that the trial court improperly relied upon certain expert testimony. At the hearing before the commissioner, Kimberly called as a witness Dr. Linda Flynn, a clinical psychologist. When Kimberly asked Dr. Flynn to testify concerning which party would be the better parent, the commissioner sustained James' objection. Nonetheless, James asserts that Dr. Flynn proceeded to address that question, and that the trial court improperly relied upon this testimony.

We are not persuaded that the trial court erred in the manner which James alleges. James apparently refers to the portion of the testimony wherein Linda attempted to ask Dr.

Flynn, [w]hat do you think would be in the best interest of Chandler?" James' counsel objected, and the commissioner sustained the objection. Contrary to James' assertion, the record reveals no subsequent testimony by Dr. Flynn concerning which parent would be "better", or which should have custody. To the contrary, at the conclusion of her testimony, under questioning from the commissioner, Dr. Flynn agreed that she was "not one way or the other here to give an opinion as to who would be the most suitable custodian." We discern no reversible error associated with this argument.

James next argues that the trial court erred in allowing Dr. Flynn to testify at all. James completed his case in chief on June 24, 1997, and the matter was then continued. Dr. Flynn saw Kimberly and Chandler for the first time on July 8, 1997. James contends that Kimberly was given an unfair advantage in the commissioner's hearing in that she was allowed to hear James's evidence and then hire a psychologist to rebut it.

It is likely true, as James contends, that Kimberly benefitted from the continuation of the hearing in that it afforded her additional time to prepare and to consult with Dr. Flynn. Yet James also was given additional time to prepare. He had notice that Kimberly would call Dr. Flynn as a witness, and he had an unrestricted opportunity to cross-examine her. In these circumstances, we are not persuaded that Dr. Flynn's testimony unfairly prejudiced James' rights.

James further insists that Dr. Flynn's testimony violated the separation of witnesses rule in CR 43.09. He

maintains that Kimberly told Dr. Flynn about testimony received at the June 24 hearing. James argues that this was a violation of the separation of witnesses rule and that Dr. Flynn should not have been allowed to testify. However, trial courts have broad discretion in applying the rule respecting separation of witnesses, and appellate courts will not intervene in such matters unless that discretion has been abused. Moore v. Commonwealth, Ky., 323 S.W.2d 577, 578 (1958). Here, the long continuance gave James an adequate opportunity to prepare for Dr. Flynn's testimony, which he could anticipate would be based on the evidence already submitted. In these circumstances, we are not persuaded that the trial court abused its discretion under the rule that witnesses be separated by permitting Dr. Flynn to testify.

James next argues that the trial court considered inadmissible gender-related evidence to decide in favor of Kimberly. James bases his argument on these observations by the trial court:

> First, it appears to this Court that the Respondent/mother has been the primary caretaker for Chandler throughout most of his life; and although the statute no longer gives preference to the mother for children of tender age, there is still great weight to be given to the bonding which occurs with the parent who is the primary caretaker. The Clinical Psychologist, Dr. Linda Flynn, who testified in this case as to this very critical issue fully threw her support behind the Respondent as being the primary caretaker and the one with whom the child has bonded. The Court also finds and accepts Dr. Flynn's statements that, ". . . studies do show that at this particular age the mother is more important than the father [and] if by chance you have to remove one from the situation . .

> . it would be better . . . to have the father removed." Here the Court need not adopt the gender references of Dr. Flynn to accept fully the testimony as to the Respondent's bonding. (emphasis added)

KRS 403.270(1) provides that "[t]he court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent." In light of the comments just quoted, James maintains that the trial court violated the statutory mandate by resurrecting the discredited presumption that mothers are better able than fathers to care for children of "tender age." We do not agree that the trial court made this presumption.

The trial court clearly acknowledged KRS 403.270. We interpret the trial court's "acceptance" of Dr. Flynn's statements to be limited to acceptance of the notion that for a young child, the parent who has been the child's primary caretaker and with whom the child has bonded is especially important. The trial court explicitly acknowledged that Kentucky law "no longer gives preference to the mother for children of tender age" and rejected the "gender references" of Dr. Flynn. Moreover, elsewhere in its order the trial court states "[c]hildren of tender age are inclined to develop a strong psychological bond with their primary caregiver--be it the mother or the father. In this instance, it happens to be the mother."

The tender years presumption, which dictated that children of tender years be placed in maternal custody unless the mother was found to be unfit, was legislatively abolished with the 1978 amendments to KRS 403.270(1). See Graham and Keller,

16 Kentucky Practice § 21.11 Domestic Relations Law, (2nd ed. 1997). KRS 403.270(1) now proscribes a preference for either parent. Reading it in context, we do not believe the trial court's "accept[ance] [of] Dr. Flynn's statements" was a violation of KRS 403.270(1). Nor do we believe that the trial court in fact applied the tender years doctrine.

James next argues that Kimberly should not have been permitted to call witnesses who had not been present at the June 24, 1997, portion of the hearing. James contends that these witnesses were unfairly recruited following his case-in-chief to rebut his evidence. James does not cite any authority for this position, no does he explain how he was prejudiced by any of these witnesses. He was apparantly given adequate notice that they would testify and was afforded an opportunity to cross examine them.

> The ultimate end of all litigation is the ascertainment and rendition of the truth. The truth can be determined only through the sworn testimony of witnesses. Thus, any person not privileged having knowledge of issues being tried should be made available to the parties as witnesses.

Urban Renewal and Community Development Agency of Louisville v. Fledderman, Ky., 419 S.W.2d 741, 744 (1967) quoting Logan v. Chatham County, 113 Ga.App. 491, 148 S.E.2d 471 (1966).

We discern no reversible error as a result of these witnesses being permitted to testify.

Finally, James argues that the trial court abused its discretion by awarding Kimberly sole custody even though Kimberly and Dr. Flynn testified that joint custody was appropriate. Again, we disagree.

As is well known, the overriding consideration in any custody determination is the best interest of the child. KRS 403.270(4) recognizes that the child's best interest may sometimes be furthered by joint custody and so authorizes that custody arrangement, but joint custody is not appropriate unless the parents demonstrate a sufficient degree of maturity and cooperation. Squires v. Squires, Ky., 854 S.W.2d 765 (1993). Here the trial court found as follows:

> In reviewing the evidence, it is also very obvious that joint custody is a pipedream. The parties have even been unable to exchange visitation custody of this little boy without verbal abuse and physical violence and disruption. Much of the time, the exchange has been made through a third party intermediary. It is unrealistic and totally unsupported by the evidence that these two parents are likely to cooperate in making the major decisions regarding the child's upbringing.

Given these findings, which are supported by substantial evidence and are not clearly erroneous, we can not say that the trial court abused its discretion by deeming joint custody inappropriate and awarding sole custody of Chandler to Kimberly. This is in no way meant to suggest that we doubt James's sincere desire to have as close a relationship as possible with Chandler, nor to suggest that he is not entitled to such a relationship. As sole custodian, Kimberly must take this to heart. With her authority comes the responsibility to see to it that James is afforded a full opportunity to develop his relationship with his son.

For the foregoing reasons, we affirm the February 3, 1998, order and judgment of the Caldwell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sarah Perry McGee
Smithland, Kentucky

BRIEF FOR APPELLEE:

Rebecca J. Johnson
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