RENDERED: September 3, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001610-MR

WILLIAM DAVID RUTLEDGE — APPELLANT

v.

APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM HARRIS, JUDGE
ACTION NO. 96-CI-00115

SANDRA LEE RUTLEDGE — APPELLEE

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

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. William David Rutledge (William) appeals from a judgment of the Allen Circuit Court entered June 2, 1998, awarding Sandra Lee Rutledge (Sandra) sole custody of the parties' two minor children. We affirm.

The parties were married on August 11, 1990, in Allen County, Kentucky. Two minor children were born of the marriage, namely, Elizabeth Lane Rutledge, born March 27, 1991, and William David Rutledge, Jr., born December 15, 1993. On August 14, 1996, Sandra filed a petition for dissolution of marriage in the Allen Circuit Court. A final hearing of the matter was conducted on November 13, 1997, before the Domestic Relations Commissioner

(DRC). At the hearing at least seven witnesses testified on the issues of William's character. Additionally, Professor Lane J. Veltkamp, a clinical psychologist, testified by deposition that the parties were beginning to communicate and achieve cooperation with regard to the children. The other witnesses, in summary, testified that William is easy to get along with, friendly and polite. However, Sandra testified regarding numerous incidents of inability to cooperate with William regarding the children, including problems during scheduled visitation and problems in agreeing on medical treatment of the children. She further testified their relationship was continuously confrontational and William often expressed his anger in front of the children.

The DRC filed a final trial report on March 18, 1998, and recommended the trial court award sole custody of the parties' two minor children to Sandra, and William be granted reasonable visitation rights. On March 27, 1998, William filed exceptions and objections to the DRC's recommendations arguing the DRC's recommendation of sole custody in favor of Sandra was not in the best interest of the children. However, on June 2, 1998, the trial court entered a judgment awarding Sandra sole custody of the parties' two minor children. This appeal followed.

Initially it is important to note that "in reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

See also, Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974). "[I]n custody cases great weight must be given to the finding of the [trial judge] concerning custody and...his conclusions will not be disturbed except where he has abused his discretion...." Borjesson v. Borjesson, Ky., 437 S.W.2d 191, 193 (1969). William's sole argument on appeal is that the trial court's award of sole custody to Sandra was clearly erroneous. He argues that "a cooperative spirit between the parties is not necessarily a condition precedent to an award of joint custody" and that "[t]he evidence was extremely strong for joint custody."

Custody decisions in this Commonwealth are governed by KRS 403.270, which states:

> (1) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent. The court shall consider all relevant factors including:
>
> (a) The wishes of the child's parent or parents as to his custody;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with is parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved; and

(f) Information, records, and evidence of domestic violence, as defined in KRS 403.720.

(2) The court shall consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

(3) The abandonment of the family residence by a custodial party shall not be considered where said party was physically harmed or was seriously threatened with physical harm by his or her spouse, when such harm or threat of harm was casually related to the abandonment.

(4) The court may grant joint custody to the child's parents if it is in the best interests of the child.

In recent years, questions have arisen regarding what weight courts should place on the parents' ability or inability to cooperate when making a custody determination. In Hardin v. Hardin, Ky. App., 711 S.W.2d 863 (1986), this Court reviewed a decision by a trial court awarding joint custody to both parents. In applying KRS 403.270, we held that "joint custody cannot be in the best interests of the children where the parents are not sufficiently understanding and mature enough to cooperate in such an agreement." Id. at 865. However, in Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 393 (1992), we stated:

> In finding a preference for joint custody is in the best interest for the child, even in a bitter divorce, the court is encouraging the parents to cooperate with each other and to stay on their best behavior. Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a

> party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy.

In Squires v. Squires, Ky., 854 S.W.2d 765, 769-70 (1993), the Kentucky Supreme Court reviewed Hardin and Chalupa in terms of joint custody and the best interests test and stated:

> While the Court in Hardin considered the proper factors, it depended too much on the parties present failure to cooperate and, in effect, permitted one or both of them to deprive the trial court of a custody option granted it by the General Assembly.
>
> ...
>
> While we stop short of endorsing the Chalupa preference for joint custody, i.e. "consider joint custody first," we endorse many of the views expressed therein... [S]o long as KRS 403.270(4) remains the law of Kentucky, joint custody must be accorded the same dignity as sole custody and trial courts, must determine which form would serve the best interests of the child.

William argues that the trial court erroneously based its decision to grant Sandra sole custody of the parties' minor children on the parties' inability to cooperate. However, a thorough review of the trial court's judgment shows that it based its decision to grant sole custody of the parties' minor children to Sandra on a number of factors only one of which was the parties' inability to cooperate. In its fact-finder, the court stated, in pertinent part, the following:

> 6. The evidence established that the petitioner has been the childrens' primary caregiver throughout their lives and that prior to the parties' separation, the respondent did not

significantly assist her otherwise actively participate in the childrens' daily care. There was evidence presented, however, that the respondent often disagreed with the petitioner over the childrens' medical care which has persisted subsequent to the parties' separation.

7. There were incidents of domestic violence over the course of the parties' marriage and the parties' relationship has continued to be confrontational. The petitioner testified that the respondent has been belligerent and cursed her in the presence of the children and has on occasion refused to leave her residence upon returning the children. She testified that she does not communicate with the respondent on matters involving the children in order to avoid confrontations.

8. The Court does not find the opinion of Lane Veltkamp, the respondent's custodial evaluator, to be persuasive. The Court finds that it is in the best interest of the minor children that their custody be awarded to the petitioner subject to the respondent's reasonable visitation rights. That finding is based on an implicit finding that joint custody is not in the best interest of these children based on the failure and inability of these parties to rationally participate in decision making affecting the children.

As fact finder, the trial court is in the best position to evaluate the parties' situation and make a decision with regard to custody. We will not substitute our opinion for that of the trial court. We believe the decision of the trial court was well reasoned and based upon the appropriate criteria as set forth in KRS 403.270. We find no abuse of discretion or clear error.

For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert E. Harrison Scottsville, KY	John H. McCracken Bowling Green, KY