RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001207-MR

DAVID LeROY JONES — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DEBRA HEMBREE LAMBERT, JUDGE
ACTION NO. 01-CI-00101

FLORENCE K. JARRELL JONES — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, SCHRODER, AND TACKETT, JUDGES.

SCHRODER, JUDGE. This is an appeal from a decree of dissolution awarding sole custody of the parties' daughter to appellee with reasonable visitation by appellant. Appellant argues that the trial court abused its discretion in awarding sole custody to appellee instead of joint custody, and in allowing the record to be supplemented by appellee without an opportunity for cross-examination by appellant. Upon review of the arguments, the record herein and the applicable law, we believe the court did

not abuse its discretion in awarding sole custody to appellee and that any error resulting from the supplemental evidence was harmless. Thus, we affirm.

Appellant, David Jones, and appellee, Florence Jones, were married on May 20, 1997, and had one child during the marriage, Norie Cierrah Jones, born October 27, 1997. The parties separated on January 1, 2001. Both parties filed petitions for dissolution which were ultimately consolidated. Each party initially sought joint custody of their daughter and likewise sought primary residential custody. The case was originally submitted to the court solely on the depositions of both parties. However, on April 2, 2002, prior to the court's original decree, Florence made a motion to supplement the record. In this motion, she updated her employment information and stated that she had been the primary caretaker of Norie for the child's entire life. She further attached to the motion copies of a derogatory sign and a pair of soiled women's underwear that she alleged David had hung on her car. The purpose of this evidence, she stated, was to show the mental state of David to be improper for full custody of the child. On April 16, 2002, David filed a response to the motion objecting to the fact that Florence was permitted to present supplemental evidence which could have been raised in her memorandum brief filed on January 28, 2002. According to David, a hearing on the

motion was set for April 26, 2002, although we could not find such an order in the record.

On April 23, 2002, the court entered an order indicating that the case had been submitted for judgment. On that same date, the court entered its findings of fact, conclusions of law, and decree of dissolution. In the court's findings, the court stated, "The parties shall be the (sic) granted care, custody and control of the infant child, with [David] having visitation (sic) reasonable visitation, at all reasonable time upon reasonable notice to [Florence]." Later in the decree portion of the judgment, the court stated, "[Florence] shall be granted the care, custody and control of the one infant child, [David] having reasonable (sic) at all reasonable times upon reasonable notice to [Florence]." Thereafter, on May 3, 2002, David filed a motion to alter, vacate or amend the April 23 judgment, seeking clarification as to whether the custody award was a joint custody award or an award of sole custody to Florence. In the motion, David also argued that he should be awarded sole custody of Norie or at least should be designated her primary residential custodian. On May 8, 2002, the court entered its amended findings of fact, conclusions of law, and decree of dissolution. In it, the court awarded sole custody to Florence, stating:

> The Court finds that the parties have been unable to share in the parenting decisions of the minor child during the pendency of this action. Therefore, it would be in the child's best interest for [Florence] to be the (sic) granted care, custody and control of the infant child, with [David] having reasonable visitation, at all reasonable time upon reasonable notice to [Florence].

This appeal by David followed.

David first argues that the trial court abused its discretion in awarding sole custody to Florence. He maintains that the court did not make sufficient findings to justify the sole custody award to Florence. He further argues that there was no evidence to support the court's finding in the amended decree that the parties were unable to cooperate for the benefit of the child.

As to his argument that the court failed to make sufficient findings to support the award of sole custody, we would note that David's motion to amend pursuant to CR 52.02 - 52.04 only requested that the court clarify whether it had entered an award of joint or sole custody and that sole custody be awarded to David. The motion did not ask the court for more specific findings regarding the award of custody. CR 52.04 provides:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the

> trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

As to David's assertion that there was no evidence to support the court's finding that the parties were unable to cooperate for the benefit of the child, we note there was evidence in the record of a dispute between the parties over how many days Norie should go to pre-school, although the parties did eventually come to an agreement on the matter. Further, Florence testified in her deposition that the parties had problems exchanging physical custody of Norie because David could not control himself. She stated that her mother-in-law would have to pick up the child, and eventually the exchange had to be made at the police station. Moreover, in reviewing the record, we see that David admits that the parties were unable to cooperate regarding the child in attempting to seek sole custody for himself. In David's memorandum brief he states:

> The parties are not currently compatible and cooperative in reaching decisions for Norie's best interests. Since David's deposition was taken on June 25, 2001, Florence has not permitted Norie to attend church functions. . . . Moreover, the parties cannot reach an agreement regarding pre-school education for Norie. . . . In addition, Florence has represented to school officials that her boyfriend – who resides with her in the same household at 405 Newton Street, Ferguson – is Norie's stepfather. . . . Given this representation, Florence's boyfriend is permitted to pick-up

> Norie from school, a situation which David strongly disagrees with. . . .
>
> At present, given that the parties are unable to communicate or cooperate effectively for the best interests of the child, an award of sole custody to David is appropriate.

In his memorandum in support of his motion to alter or amend, David again admits that "the parties cannot reach an agreement regarding the pre-school education for Norie." David also mentions that the parties cannot agree on whether or not Norie should attend certain church activities.

A trial court's findings as to custody will not be reversed unless they are clearly erroneous. Largent v. Largent, Ky., 643 S.W.2d 261 (1982). In our view, there was sufficient evidence to support the trial court's finding that the parties were unable to cooperate for the benefit of the child.

We now turn to the issue of the propriety of the overall award of sole custody to Florence. It is well established that the trial court has broad discretion in determining what is in the best interests of a child in making a custody decision. Krug v. Krug, Ky., 647 S.W.2d 790 (1983); KRS 403.270.

At the time of the divorce, David was thirty-three years old and employed as a contractor. Florence was twenty-nine and had recently obtained a job at a bank. In his deposition, David testified that since the petition had been

filed, he had cared for Norie 102 days out the last 170 days. Florence testified that she had been Norie's primary caretaker since her birth, and that in the first three years of Norie's life, David cared for Norie by himself only four or five times. When asked why the child was more often in David's possession recently, she explained that David had asked to see the child more often and that she had agreed in order to make the adjustment of the separation easier on the child. Florence testified that she and Norie had established a daily routine together that she felt was good for the child. Florence admitted that she and Norie were presently living in a house owned by her current boyfriend's mother with the mother and the boyfriend, although she denied being intimate with him as of that date. She also stated that she ultimately intended to marry this boyfriend. She further acknowledged that she had mistakenly listed this boyfriend as Norie's stepfather on Norie's registration form with her pre-school so that her boyfriend could pick Norie up after school. From our review of the evidence, both parties had good relationships with Norie, and there was no evidence that either party was not fit to have custody.

KRS 403.270(5) provides that "[t]he court may grant joint custody to the child's parents, or the child's parents and a de facto custodian, if it is in the best interests of the

child." (emphasis added.) The trial court shall give equal consideration to joint custody and sole custody and ultimately determine which form serves the best interests of the child. Squires v. Squires, Ky., 854 S.W.2d 765 (1993). While a cooperative spirit between the parents is not a condition precedent to an award of joint custody, if there is evidence that cooperation between the parties in the future is unlikely, an award of sole custody would be proper. Id. at 768-769. The trial court possesses broad discretion in determining whether sole custody or joint custody is in the child's best interests. Id. at 770. In the present case, it is clear that the court, at least in the amended decree, considered joint custody and determined that the parties would be unable to cooperate for the benefit of the child if joint custody was awarded. We cannot say the trial court abused its discretion in so finding. Nor can we say that the trial court abused its discretion in awarding sole custody to Florence.

David's final argument is that the trial court abused its discretion in allowing Florence to supplement the record on an ex parte basis without allowing David an opportunity to cross-examine Florence regarding this evidence. First, the fact that the supplemental evidence was filed in the record belies the claim that it was filed ex parte. Ballentine's Law Dictionary 438 (3d ed. 1969) defines "ex parte" as "Application

made to the court without notice to the adverse party." Secondly, although David did not get to cross-examine Florence regarding the supplemental evidence, he did file a response to the motion before the court entered its first decree in the case. In this response, David does not dispute the assertions contained in the supplemental evidence, rather, he merely objects to the fact that Florence did not include this evidence in her memorandum brief. Further, there was no indication that the trial court considered this supplemental evidence in entering either of the decrees in this case. Hence, if there was any error in David's inability to cross-examine this evidence, we believe it was harmless. CR 61.01.

For the reasons stated above, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles J. McEnroe Somerset, Kentucky	Bruce W. Singleton Somerset, Kentucky