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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000715-MR

DAN LINDEMAN — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 85-CI-00760

MARY LINDEMAN — APPELLEE

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

BEFORE: HUDDLESTON, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Dan Lindeman (Dan) from an order of the Campbell Circuit Court denying his motion for a modification of custody of the parties' children; for child support; for assignment to him of the tax exemptions for the minor children; and for orders relating to the children's medical expenses. Upon reviewing appellant's argument and the applicable authorities, we affirm.

Dan and Mary Lindeman (Mary) were married on August 24, 1974. The marriage produced five children: Dan Jr., born November 11, 1975; Zachary, born June 9, 1977; Nathan, born January 15, 1979; Holly, born March 13, 1980; and Neil, born January 22, 1985. On September 9, 1985, Mary filed a petition to

dissolve the marriage. In December 1985, the decree dissolving the marriage was entered and the parties entered into a "separation agreement" whereby, among other things, the parties agreed to joint custody of the children, with the parties sharing equal physical custody, but with Dan to pay $50.00 per week per child to Mary for child support. In March 1991, the parties commenced a period of litigation regarding custody and child support, and in July 1991, an order was entered whereby the parties agreed that Dan would have sole custody of Dan Jr. and would be relieved of the associated child support obligation. However, subsequently, various litigation involving issues related to the children continued.

In September 1991, as a result of a criminal complaint by Mary for non-payment of child support, the parties entered into an agreement whereby, among other things, Dan would make a substantial lump-sum payment of past-due child support; neither party would thereafter pay child support; and custodial arrangements would continue as previously agreed. Mary subsequently disputed the enforceability of the agreement; however, on January 7, 1994, the trial court entered an order accepting the recommendation of the Domestic Relation Commissioner (Commissioner) that the agreement be upheld subject to the court's continuing jurisdiction to consider and modify such matters as medical expenses and tax exemptions. Thereafter, various litigation continued.

On April 22, 1997, Dan filed a motion initiating the present phase of litigation. The motion sought sole custody of

Nathan, Holly and Neil[1]; child support[2]; assignment of tax exemptions; and orders related to medical expenses. Hearings on the motion were held before the Commissioner on July 17 and 24, 1997. On September 2, 1997, the Commissioner issued his report recommending that Dan's motion be denied in its entirety. Dan filed timely exceptions, and on October 16, 1997, the trial court issued an order denying Dan's exceptions and confirming the Commissioner's report. This appeal followed.

Dan argues that the trial court erred in denying his motion to grant him sole custody of the minor children. Pursuant to their original separation agreement, the parties have had joint custody of the minor children throughout the marriage. In nonconsensual joint custody modification situations, as here, the 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. Mennemeyer v. Mennemeyer, Ky. App., 887 S.W.2d 555, 558 (1994). The trial court, through its adoption of the Commissioner's report, found that "[b]ased upon the testimony of the parties, and based upon the conduct of the parties as described in their testimony, the [trial court] cannot find that there has been an inability or bad faith refusal by [Mary] to cooperate[.]" The findings of the trial court cannot be set

---

[1]Nathan and Holly are now 18 and, having attained the age of majority, are entitled to make their own living arrangements with their parents.

[2]Similarly, it would appear that child support issues are moot except as to Neil. See KRS 403.213(3).

aside unless they are clearly erroneous. CR 52.01; Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

While Dan protests that no cooperation exists between the parties over most aspects of the children's upbringing, the examples he cites in support of his position do not, we believe, establish an inability or bad faith refusal to cooperate. Dan states that the "most glaring examples of the parties' inability to cooperate" are as follows: (1) at age seventeen, Zach was permitted to drive to Boston with friends, the oldest of whom was "only twenty-one"; (2) Mary permitted Zach to drive, unaccompanied by a licenced driver, with only a temporary licence, and then allowed Zach to drive his sister's sports car only two weeks after receiving his licence, on which occasion he wrecked, severely injuring himself and a friend; (3) Mary permitted Holly, at age fifteen, to go camping with five boys and "little adult supervision"; (4) Holly violated Ft. Thomas curfew during a visit with Mary, as a result of which Dan was issued a court summons and fined; and (5) Mary purchased an automobile for Zach. Dan was in opposition to Mary's decisions regarding each of these matters.

Mary disputes Dan's characterization of certain aspects of these incidents. Mary demonstrated deficient parenting if she in fact permitted Zach to drive unaccompanied by a licenced driver when he was ineligible to do so, and if she permitted Mary to violate Ft. Thomas curfew laws. The car accident appears to have been an unfortunate accident and undue blame should not be

assessed to Mary. The remaining examples represent expected disagreements in parenting which do not undermine joint custody. "Joint custody is an arrangement whereby both parents share the decision making in major areas concerning their child's upbringing[.]" Burchell v. Burchell, Ky. App., 684 S.W.2d 296, 299 (1984). (Emphasis added.) The examples of uncooperative decision making cited by Dan, while significant, do not rise to this level.

Dan also identifies various financial issues the parties have quarreled over; however, these are relatively minor matters that do not justify a reversal of the trial court's findings. Burchell, 684 S.W.2d 296. There is substantial evidence in the record to support the trial court's finding that there is no bad faith failure to cooperate by Mary. It follows that, pursuant to Mennemeyer, 887 S.W.2d 555, the existing joint custody may not be modified by the trial court.

Appellant argues that the trial court erred when it denied his motion for child support. In September 1991, the parties, in conjunction with the settlement of a criminal complaint charge for non-support, entered into an agreement which provided, among other things, that "no specific amount of child support shall be ordered at this time." In subsequent litigation, when Mary has sought child support, Dan defended the agreement as disallowing an award of child support in these proceedings. In Mary's motions for child support, the trial court enforced the agreement against her. The trial court, by its acceptance of the Commissioner's report, stated that it

"cannot find that any change in circumstance has occurred since the agreement was reached[,] . . . [and that it] can find no compelling reason to disturb this agreement[.]" We discern no abuse of discretion in the trial court's enforcement of the agreement term disfavoring child support and the denial of Dan's motion for child support on that basis.

Finally, Dan argues that the trial court erred when it did not award the tax exemption for the minor children to him and in denying his motion to require Mary to pay certain medical bills. The trial court, through its acceptance of the Commissioner's report, stated, "[it] can find no evidence of a change in circumstances that would require modification of this award of dependent tax exemptions[.]" Similarly, the trial court stated that, "[it] can find no proof of the existence of a medical bill owed by the parties to Dr. Beckmeyer, and therefore finds that [Dan's]'s motion should be denied." We must accept these findings unless clearly erroneous. CR 52.01; Reichle, 719 S.W.2d 442. There is substantial evidence in the record to support the findings of the trial court and we discern no abuse of discretion regarding the trial court's judgments on these issues.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy L. Nolan
Newport, Kentucky

BRIEF FOR APPELLEE:

Mary E. Hensley, Pro Se
Cincinnati, Ohio