

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002056-ME

J.J.

APPELLANT

v. APPEAL FROM McCRACKEN FAMILY COURT  
HONORABLE CYNTHIA E. SANDERSON, JUDGE  
ACTION NO. 06-J-00359

P.C.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; GRAVES,<sup>1</sup>  
SENIOR JUDGE.

THOMPSON, JUDGE: J.J. (father) brings this appeal from an order of the  
McCracken Family Court awarding joint custody of the parties' minor child to  
father and P.C. (mother) and designating mother as the child's primary residential  
custodian. For the reasons stated herein, we affirm.

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<sup>1</sup> Senior John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to  
Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Father and mother are the biological parents of a minor child, E.C., born August 21, 2002. The parties were never married and never resided together. During the child's earliest years, he resided with his mother but was frequently visited by father. On June 5, 2005, father filed a petition to establish paternity, custody, child support, and visitation. By order entered on November 29, 2006, the parties stipulated that J.J. was the biological father of child.

On March 26, 2007, the family court conducted an evidentiary hearing on the custody issue. During the hearing, a substantial amount of evidence was introduced regarding mother's mental health. On April 2, 2007, the family court issued an order, awarding the parties joint custody and designating the father as the child's primary residential custodian.

Following the family court's order, mother appealed to this Court, and a unanimous panel of this Court, in Case No. 2007-CA-000925-ME, vacated the family court's order due to its failure to "make any findings of fact as required by CR 52.01 to support its award of custody." On remand, on September 23, 2008, the family court held another evidentiary hearing regarding all events occurring after the issuance of its initial custody order. After the hearing, the family court issued an order awarding the parents joint custody and designating mother as the child's primary residential custodian. This appeal follows.

Father argues that the family court erred by using his motion to relocate against him in reversing its initial primary residential custodian award. We disagree.

On June 6, 2007, father filed a motion for modification of visitation and a motion to relocate. He claimed that his employer was relocating him to Idaho Falls, Idaho, due to a staffing reduction at its Kentucky facility. On July 2, 2007, the family court issued an order denying father's motion. The family court's order provided that the proposed 1,600-mile relocation would substantially restrict mother's visitation to approximately four times per year. Therefore, the family court held that it was not in the child's best interest to grant the relocation.

While father contends that his relocation should not have been a factor in the family court's decision, this contention, regarding the application of KRS 403.270, unduly restricts the proper scope of a family court's analysis. The unequivocal language of KRS 403.270(2) provides that all relevant factors, including those enumerated by statute, must be considered when determining the best custody arrangement for a child. Accordingly, to the extent that the family court believed that father's attempt to relocate the child was detrimental to the child's best interest, the family court permissibly used the relocation proceedings as one of many factors in determining the best custody arrangement for the child.

Father next argues that the family court erred in its reliance on mother's mental health records in reaching a custody determination. He argues that the record was clear that mother experienced significant mental health incidents. Additionally, he argues that the family court's decision was unsupported by new evidence to justify changing the existing custody arrangement and, thus, must be reversed. We disagree.

When ruling on a child custody matter, a family court must determine what custodial arrangement is in the best interest of the child. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky.App. 2009). Further, KRS 403.270(2) outlines the factors which a family court must consider in deciding its custody award. KRS 403.270(2) provides the following:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his 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;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a

result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Our review of the family court's decision is limited to the clearly erroneous standard whereby we are required to give due regard to the family court's determination regarding the credibility of witnesses. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Under this standard, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). If the findings of fact were not clearly erroneous, our remaining task is limited to determining if the family court abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Because there is no dispute regarding the family court's findings of facts, we accept them as being conclusive for the purpose of this appeal.

While father contends that the family court improperly relied upon the mother's medical records, the family court's consideration of the records was proper and did not constitute error. Although father points out that mother had experienced past mental health episodes, mother's mental health therapist testified that mother's treatment was successfully ongoing, that she had not experienced any major mental status changes, and that her long-term prognosis was very good. Although father emphasizes events occurring in the past, the family court properly decided that her recent and projected mental health status was more important in its

decision. *Frances*, 266 S.W.3d at 758-59 (trial court is in the best position to resolve competing evidence).

Father further argues that there was no new compelling evidence to support the family court's decision. However, this argument ignores the newly introduced evidence regarding the parenting of the child subsequent to the family court's initial custody order. Specifically, the family court's order stated that "[t]he parents...have different approaches to parenting. The Court finds that the parenting approach of the mother is more appropriate and nurturing than the parenting approach of the father." Although the family court's determination can be disputed, there was sufficient evidence in the record to support its conclusion.

For example, based on a Conners Rating Scale report, father believed that his son was not experiencing any significant behavioral difficulties, but the mother's report indicated that she believed that her son had significant behavioral difficulties which adversely affected his academic achievement. When the child's kindergarten teacher was questioned regarding this inconsistency, she agreed with the mother's behavioral assessment of child. Mother further testified that father was resistant in obtaining behavioral therapy for child even though a diagnostic test revealed that child appeared to have ADHD. Finally, the family court noted the positive effect of the mother's presence on the child.

While father disagrees with the family court's decision, we are limited to determining whether the decision constitutes an abuse of discretion. The test for abuse of discretion is whether the trial court's ruling was arbitrary, unreasonable,

unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). From a review of the record, we conclude that the family court did not abuse its discretion in designating mother as the child's primary residential custodian.

We finally note from father's argument that there was no new compelling evidence to support a custody modification is misplaced. Although citing *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987), for the proposition that a child custody arrangement must remain static unless a change of circumstances necessitates modification, father misreads *Chenault* and fails to appreciate the import of this Court's decision in Case No. 2007-CA-000925-ME, the parties' earlier appeal.

First, *Chenault* simply limits the modification of a "prior custody decree," not a child custody arrangement, to circumstances necessitating modification for the best interest of a child. *Id.* Second, when an appellate court overturns a decision of a lower court, it is as if the lower court's decision never existed. *Clay v. Clay*, 707 S.W.2d 352, 353 (Ky.App. 1986). Consequently, due to the reversal of the parties' initial custody decree and the lack of a presumption for a mere child custody arrangement, father's argument has no basis in fact or law.

For the foregoing reasons, the McCracken Family Court's custody order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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