

RENDERED: November 6, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003113-MR

CAROLYN SUE MADDEN

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 97-CI-000082

CHRISTOPHER MADDEN

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

** ** * * *

BEFORE: COMBS, KNOFF, and KNOX, JUDGES

KNOFF, JUDGE. This is a pro se appeal by Carolyn Sue Madden from an order of the Carter Circuit Court granting custody of the parties' infant child to appellee Christopher Madden and restricting Carolyn to supervised visitation with her child. We affirm in part and vacate and remand in part.

The parties were married on January 15, 1994. The marriage produced one (1) child, Craig Anthony, born on March 18, 1995. On March 12, 1997, Christopher filed a petition for dissolution of the marriage and requested temporary and permanent

custody of Craig. Carolyn filed a response to the dissolution petition and likewise requested temporary and permanent custody of the child. On April 21, 1997, the trial court entered an agreed temporary order providing for joint physical custody of Craig. Following a contentious interim period and several continuances, the domestic relations commissioner (commissioner) held a final hearing on October 17, 1997. The commissioner issued a report recommending, among other things, that Christopher be awarded sole custody of the child and that Carolyn's visitations with Craig be supervised. Following the filing of exceptions by Carolyn, on November 3, 1997, the trial court issued an order substantially accepting the commissioner's custody and visitation recommendations. This appeal followed.

On appeal pro se, Carolyn raises a rambling assortment of complaints, including allegations to wit: that she was not adequately represented by her attorneys, that the commissioner was unfair, that she lacked transportation to attend hearings and transport the child, and that she did not receive notice of the final hearing. It appears that few of these issues were raised before the trial court. When the trial court has not had an opportunity to address an alleged error, an appellate court is precluded from reviewing the alleged error. See, Sherley v. Commonwealth, Ky., 889 S.W.2d 794, 799 (1994). Furthermore, Carolyn has failed to establish proper citation to the trial court record that her arguments are preserved for appeal. Errors to be considered for appellate review must be precisely preserved

and identified in the lower court. Combs v. Knott County Fiscal Court, Ky., 141 S.W.2d 859 (1940); CR 76.12(4)(c)(iv); Skaggs v. Assad, By and Through Assad, Ky., 712 S.W.2d 947, 950 (1986). Nevertheless, our review of the record reflects that Carolyn's fundamental concerns, the awarding of custody of Craig to Christopher and the restrictions on her visitation with the child, are preserved for review, and we accordingly address those issues.

We discern no abuse of discretion by the trial court in awarding sole custody of Craig to Christopher. In rendering child custody decisions the trial court is bound by the "best interests" standard set out in KRS 403.270:

- (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 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; and
 - (e) The mental and physical health of all individuals involved.

Neither the commissioner nor the trial court made findings of fact addressing the best interest factors of KRS 403.270. The trial court is obligated to make specific findings of fact supporting its determination of the child's best

interest. McFarland v. McFarland, Ky. App., 804 S.W.2d 17, 18 (1991); CR 52.01. Where these findings have not been made, as here, the proper procedure is to request them in writing. CR 52.04. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal. Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997). In the case at bar, Carolyn did not make the requisite request for findings of fact to now complain, on this appeal, of the trial court's best interest determination.

In any event, the trial judge has broad discretion in deciding what is in the best interest of the child when making a custody determination. Krug v. Krug, Ky., 647 S.W.2d 790 (1983). We will not substitute our judgment for that of the trial court unless a manifest abuse of discretion has occurred. Smith v. Smith, Ky., 429 S.W.2d 387, 391 (1968); Borjesson v. Borjesson, Ky., 437 S.W.2d 191, 193 (1969). In view of the broad discretion accorded the trial court in determining the best interest of the child, we cannot say that there was an abuse of discretion in the trial court's conclusion that Christopher should be awarded sole custody of Craig.

The second issue preserved for our review is the trial court's ruling that Carolyn's visitation with Craig be restricted to supervised visitation at the Department of Social Services in Carter County. While neither the commissioner's report nor the trial court's order explicitly so states, in her brief, Carolyn

states that her visitation is further restricted to one hour one day per week.

A non-custodial parent "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1). "[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral or emotional health." KRS 403.320(3). As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation." Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995). Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both parents. Smith v. Smith, Ky. App., 869 S.W.2d 55, 56 (1994). The burden of proving that visitation would harm the child is on the one who would deny visitation. Id.

The record reflects that Carolyn has demonstrated a pattern of disregarding orders of the trial court. Specifically, Carolyn has defied the visitation schedules established by the trial court by refusing to return Craig to Christopher pursuant to the schedules. As a result of her defiance, the trial court understandably found Carolyn in contempt of court. Presumably the trial court had Carolyn's pattern of contempt in mind when it restricted visitation. However, the trial court did not make the

requisite findings to restrict visitation under KRS 403.320(1). The trial court's failure to make the mandatory finding under KRS 403.320(1) "that visitation would endanger seriously the child's physical, mental, moral, or emotional health" requires us to vacate the order restricting visitation and remand for additional findings on the issue of Carolyn's visitation with Craig. See Alexander v. Alexander, Ky. App., 900 S.W.2d 615, 616 (1995). On remand, the trial court should conduct additional proceedings, as needed, and enter appropriate findings of fact and conclusions of law pursuant to KRS 403.320.

For the foregoing reasons we affirm in part and vacate and remand in part.

ALL CONCUR.

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