

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001210-MR

DAVID THOMAS HANCOCK

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 91-CI-00143

JANET LEAH HANCOCK (NOW DUNN)

APPELLEE

OPINION
VACATING AND REMANDING
** **

BEFORE: GUIDUGLI, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: David Thomas Hancock brings this appeal from a March 2, 2001 order of the Green Circuit Court. We vacate and remand.

Appellant and appellee were married on June 13, 1987. One child, Matthew, was born of the marriage on July 20, 1989. On March 4, 1992, the parties were granted a decree of dissolution of marriage. By agreement, appellee was awarded custody of Matthew and appellant was granted visitation rights. About a year later, appellee married one Chris Dunn. In November of 2000, appellant filed a motion to modify the parties' custodial arrangement. Therein, appellant alleged that Matthew

had been physically abused by his stepfather, Chris. The motion was supported by Matthew's affidavit, which stated in relevant part as follows:

A. Chris Dunn has thrown objects at me and hit me with 2 x 6s, used vulgar language at me, referred to me as "too stupid to pick up a board", called me a niger and told me to go to the house and don't ever come back and that he did not ever want to look at my ugly face again. These events have gone on continuously for four years. . . .

B. . . . Chris Dunn has told me that I had chores to do and it did not make a damn to him whether I stayed until 3:00 in the morning and that the chores were going to get done even if I had to go to school without sleep. On many occasions, Chris Dunn has kept me up past midnight doing chores and has even gotten me up at 4:00 and 5:00 in the morning to pack concrete blocks and wood at the garage.

. . . .

D. Just recently on September 6, 2000, a Wednesday, at about 5:00 p.m., I was doing my homework and I guess I did not get it done soon enough. Chris Dunn jerked me up out of my chair, took me to the garage some 200 feet away and beat me and stuck me 14 times with a 2 x 4. He cursed me during this time. I was bent over and made to grasp my ankles and I was told not to flinch or move or else I would be beaten that many more times. I was made then to go back to the house. At that time, I was crying and heaving or wanting to throw up. My mother was in the kitchen. I walked through the kitchen. My mother told me to go to the bathroom and throw up there and if I didn't throw up, just to go to bed. She had no concern for me whatsoever. She did not check on me. She was totally and completely unconcerned and she did not take me to the hospital until Friday, the 8th day of September, 2000. . . .

. . . .

3. I talked to my father and I talked to my Grandmother Copeland about these matters and

I have asked them to promise me that they would not speak to my mother about these things because I will be punished by my mother and Chris Dunn and in fact, on occasions after my Grandmother Copeland has spoken to my mother about some of these matters, I was punished by my mother by cutting off visitation with my Grandmother Copeland who is my mother's mother and I have been sent to my room and have been taken to the garage and spanked with a wooden paddle made by Chris Dunn.

4. . . . I told my mother that Wendy [Wooldrige] takes time and that my daddy takes time with my homework and I said, "They act like they care about me and my well-being". After hearing this from me, my mother got crazy. She jumped up from the kitchen table and began screaming at me. She just began ranting and raving. She just went off! . . . At that point, I got up from the table and started to move away from my mother. My mother was coming after me and backed me into the couch. I tripped over the couch and my mother jumped on top of me at that point and pinned my hands, arms and legs until they were numb. I could not breathe. She jerked me up off the floor and she slapped me across the face once. At the same time, she was screaming at me;

5. . . . I am in the fifth grade. I flunked the third grade and I am now flunking all of my courses. I do not care. My time at home is spent in fear of my stepfather and without kindness of any kind from my mother or him.
. . .

6. I wish the court would help me. . . . I know I will not be able to ever be happy in my mother's home.
. . . .

The circuit court conducted a hearing upon the matter on January 18, 2001. At the hearing, Matthew testified that many allegations in his affidavit were, in fact, untrue. Following the hearing, the court entered an order on March 2, 2001 denying appellant's motion to modify custody. Subsequently, appellant

filed motions for new trial or relief from judgment under Ky. R. Civ. P. (CR) 59 and CR 60. As grounds thereof, appellant states that Matthew's testimony at trial constituted a surprise, and that the testimony of Matthew's maternal grandmother should be heard. It appears that appellant was going to call the maternal grandmother to testify during the hearing. She, however, was unable to attend the hearing because her father-in-law passed away.

The circuit court ultimately denied appellant's motions under CR 59 and CR 60, thus precipitating this appeal.

Appellant contends the circuit court abused its discretion by denying his CR 59.01 and CR 60.02 motions. We must agree.

Given the gravity of the situation, we are of the opinion that every reasonable step should be taken to hear all relevant evidence concerning the alleged abuse of Matthew. Quite frankly, the photographs of Matthew's injuries proved shocking to this Court. Simply stated, we believe that appellant's motion for a new trial should have been granted. Upon remand, we direct the circuit court to allow testimony from Matthew's maternal grandmother, and to require Matthew to testify once again. The maternal grandmother should testify so that all available information will be presented at the hearing. Considering the abrupt change in Matthew's testimony, we also think that appellant should be allowed to examine Matthew once again in closed chambers.

For the foregoing reasons, the order of the Green Circuit Court is vacated and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theodore H. Lavit
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BRIEF FOR APPELLEE:

Jonathan G. Hieneman
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