

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-002277-MR

ALENA KAYE BOSLEY

APPELLANT

v. APPEAL FROM MADISON FAMILY COURT  
HONORABLE JEAN CHENAULT LOGUE, JUDGE  
ACTION NO. 02-CI-00571

ROBERT WAYNE BOSLEY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Alena Bosley appeals from a decree of the Madison Family Court, entered September 3, 2003, dissolving her marriage to Robert Wayne Bosley (Wayne); awarding the parties joint custody of their son, Isaac; and designating Wayne as Isaac's primary residential custodian. Alena contends that the trial court failed to make findings substantiating its award of

primary residence to Wayne and that the court erred by making an award that is not in Isaac's best interest. We affirm.

The parties married in January 1999. Each had a child from a former marriage. Alena's daughter, Taylor, who suffers from autism, resided with the couple, and Wayne's daughter, Brittany, visited regularly. Isaac was born in November 1999.

Alena filed the petition for dissolution on May 22, 2002, five days after Richmond police, largely on the basis of information supplied by Wayne, had charged her with having abused Taylor and Isaac. At the same time, the Cabinet for Families and Children filed abuse charges in the Juvenile Division of the Madison Family Court and took emergency custody of the children. The Cabinet placed Taylor initially with her father and then with Alena's mother and placed Isaac with Wayne. During the course of the investigation, Wayne turned over to the police a video recording, made in September 2001, of Alena giving malt liquor to the then not-quite-two-year-old Isaac. In August 2002, the Madison Grand Jury indicted Alena for second-degree wanton endangerment, a misdemeanor, and Wayne for aiding and abetting that crime. In September 2002, Alena pled guilty to a reduced charge of disorderly conduct. The charge against Wayne was dismissed.

Both of the actions in the Madison Family Court, the divorce petition and the Cabinet's juvenile petition, had been

continued pending the outcome of the criminal proceedings. In October 2002, not long before a scheduled hearing in the juvenile matter, Alena's counsel was permitted to withdraw, with the result that both actions were again continued. The court held a final hearing in the divorce in April 2003, issued its decree in August 2003, and denied Alena's motion to reconsider the designation of primary residence in October 2003. This appeal then followed.

KRS 403.270 provides that in marriage dissolution proceedings, courts "shall determine custody in accordance with the best interests of the child." The same standard applies to the designation of the child's primary residence.<sup>1</sup> As Alena notes, the statute lists several factors likely to be relevant to a determination of the child's best interest and requires courts to consider them. These factors include the parties' wishes, the child's wishes, other relationships of the child apt to be affected, and the mental and physical health of all individuals involved. As she further notes, CR 52.01 requires courts trying matters without a jury to enter findings with some specificity.

Aside from acknowledging that both parties wished to provide Isaac's primary residence, the court's findings in this case did not specifically address any of the factors listed in

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<sup>1</sup> Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003).

the statute. We agree with Alena's contention that these findings are not as specific as the civil rule contemplates. Nevertheless, unless its failure to make adequate findings is brought to the trial court's attention, that failure alone cannot serve as the basis for relief from the court's decree.<sup>2</sup> Alena did not request more specific findings and so waived her right to complain about this error. Her reliance on McFarland v. McFarland,<sup>3</sup> is not availing, for in that case not only did the trial court make no findings in support of its custody award, but it also failed to apply the best-interests-of-the-child standard. Here, the court did make some supportive findings and applied the proper standard. The general rule that a party must request more specific findings or waive their inadequacy therefore applies.

Otherwise, this Court may disturb the trial court's designation of primary residence only if the court's findings were clearly erroneous or the designation amounted to an abuse of discretion.<sup>4</sup> Alena contends that the trial court's lack of findings indicates that it did not consider some of the factors it should have considered and that if those factors are properly weighed she is entitled to provide Isaac's primary residence.

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<sup>2</sup> CR 52.04; Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982).

<sup>3</sup> Ky. App., 804 S.W.2d 17 (1991).

<sup>4</sup> Cherry v. Cherry, *supra*.

In particular, she contends that Wayne was as culpable as she was for the alleged abuse of Isaac and thus that the abuse should not have weighed against her. She also contends that Isaac's integration into Wayne's household should be discounted because her former attorney failed to object to Isaac's placement with Wayne and then unduly prolonged the period of temporary placement by withdrawing from the case. Finally, she contends that the court failed to weigh the importance to Isaac of his relationships with Taylor and his new half-sibling<sup>5</sup> and with his maternal relatives. Wayne's move from Richmond, site of the marital residence, to Georgetown, she insists, interferes with those relationships.

We do not agree with Alena's contention that the trial court failed to consider the statutory factors. Although not well reflected in its findings, the court's concern for Isaac's relationships is apparent from its questions during the hearing. At only three-and-a-half, Isaac was not old enough to be questioned regarding his preferences. And neither party suffers from a mental or physical disability, although Taylor's autism was clearly to be considered.

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<sup>5</sup> Alena gave birth to a third child, not Wayne's, during the pendency of these proceedings.

The trial court having considered the proper factors, it is not for this Court to reweigh the evidence.<sup>6</sup> Although, as Alena maintains, it might have been possible to weigh the evidence in her favor, the trial court did not abuse its discretion by declining to move Isaac from a primary residence where he was established and apparently doing well to one where Taylor's special needs as well as those of a new infant already placed substantial demands on Alena's time and attention. Alena's parenting time, we trust, will enable Isaac to maintain his relationships with Alena and her family.

The Madison Family Court having neither erred nor abused its discretion, we affirm its September 3, 2003, decree.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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<sup>6</sup> Cherry v. Cherry, *supra*.