

RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002686-MR

REBECCA HONRINE

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 00-CI-00078

STEVEN RHODES

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

VANMETER, JUDGE: This is an appeal from a judgment entered by the Martin Circuit Court, Family Court Division, awarding custody of the parties' minor child to appellee Steven Rhodes. For the reasons stated hereafter, we affirm.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

Steven and appellant Rebecca Honrine are the biological parents of Erica, who was born in December 1999. The parties, who never married, were awarded temporary joint custody in May 2000, with Rebecca being designated as the residential custodian. Steven thereafter regularly paid child support and exercised visitation rights.

In March 2003 Steven filed a motion seeking a change of custody, alleging by affidavit that Erica's health and welfare would be endangered if she remained in Rebecca's custody, and that it would be in Erica's best interest to be in Steven's permanent residential custody. After a hearing the trial court agreed. In an order entered on August 14, 2003, the court found:

4. Pursuant to this Court's Order entered July 28, 2000, the Cabinet for Families & Children, Martin County Division for Protection and Permanency was awarded Temporary Custody of the minor child, due to the Respondent's refusal to allow the Petitioner visitation, as was previously ordered by this Court.

5. Pursuant to this Court's Order entered August 10, 2000, temporary custody of the minor child with the Cabinet for Families & Children was terminated, and temporary custody was returned to the Respondent.

6. The Petitioner is a college graduate, pursuing a law degree. His wife has a Master's Degree and has been accepted to medical school. They earn approximately \$3,000.00 per month.

7. While the Respondent has an Associate's degree, she only works part-time at a local dairy bar, earning approximately \$500.00 per month.

8. The Court's paramount concern is the best interests of the minor child. The record in this case, including testimony at the hearing, will reflect that this situation is one in which both parties appear to have a loving and nurturing relationship with the minor child, however, the Court is concerned with the Respondent's numerous attempts to prevent the Petitioner from developing a nurturing parent/child relationship with the minor child, as well as her numerous attempts to prevent the Respondent from exercising visitation. Of further concern to the Court is the fact that the minor child, more often than not, has a large amount of "bug bites," for which the Respondent previously received counseling from the Cabinet For Families & Children as to how to prevent and treat. Nevertheless, the Respondent continues to allow the child to reside in an environment where she is exposed to various types of insects.

9. The record also establishes that the child is "lagging" behind in her grammar, size, and social skills. This would indicate to the Court that the Respondent has not provided the essential parental attention necessary to ensure that the minor child's best interests are first and foremost, evidenced by the fact that the child has never seen a pediatrician.

10. The Petitioner is greatly concerned that if the minor child continues to reside in her present environment, she will not develop mentally, educationally, physically, and socially as she would if he were to be granted custody, and, has also testified of his willingness and ability to provide

this type of environment and upbringing for the minor child.

11. After considering the factors set forth in KRS 403.270, the Court is of the opinion, and so finds, it is in the best interest of the minor child that Petitioner be awarded custody and the Respondent awarded standard time-sharing.

The court denied Rebecca's motions to alter, amend or vacate, and this appeal followed.

First, Rebecca contends that the trial court erred by following KRS 403.270 and applying the best interests of the child standard when examining the issue of custody, rather than following KRS 403.340 and applying the standards applicable to custody modification. We disagree.

KRS 403.280 provides in pertinent part:

(1) A party to a custody proceeding may move for a temporary custody order. . . . The court may award temporary custody under the standards of KRS 403.270 after a hearing, or, if there is no objection, solely on the basis of the affidavits.

(2) If a proceeding for dissolution of marriage or legal separation is dismissed, any temporary custody order is vacated unless a parent or the child's custodian moves that the proceeding continue as a custody proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a custody decree be issued.

(3) If a custody proceeding commenced in the absence of a petition for dissolution of marriage or legal separation under KRS

403.420(1)(a) or (b) is dismissed, any temporary custody order is vacated.

The statute indicates on its face that a temporary custody order is a nonfinal order which may be vacated by the trial court. As noted in subsection (2), such an order may be followed by a "custody decree" if required by the child's "best interests," which is the standard set out in KRS 403.270 for determining custody after consideration of specific named factors. A custody decree, by contrast, may be modified only if the court finds that one of the conditions set out in KRS 403.340(2) exists, including that the child's "present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him." KRS 403.340(2)(c).

Here, the record clearly shows that although Rebecca was awarded temporary custody in May 2000, the trial court never made a determination of custody pursuant to KRS 403.270 until entry of the order now on appeal. The trial court therefore was required to determine custody "in accordance with the best interests of the child" after considering the factors set out in KRS 403.270(2), and it did not err by failing to determine custody in light of the modification standards set out in KRS 403.340.

We also are not persuaded that the trial court erred by awarding custody to Steven. A trial court's findings of fact may be set aside only if clearly erroneous, with the dispositive question being "whether or not those findings are supported by substantial evidence."² Substantial evidence is defined as

"[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.³

As stated in *Cross v. Clark*,⁴ "[t]he determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of" the trier of fact, who "may believe any of the witnesses in whole or in part, and may accept the testimony of one set of witnesses to the exclusion of

² *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted).

³ *Id.* at 354 (footnotes omitted) (quoting *Black's Law Dictionary* 580 (7th ed. 1999), *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62, 64 (Ky. 1970), CR 52.01, and 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 52.01, note 55, comment 8 (5th ed. 1955)).

⁴ 308 Ky. 18, 213 S.W.2d 443, 446 (Ky. 1948).

that of another or the testimony of one witness as against the testimony of a number of witnesses."

Here, Steven testified regarding the many bruises and apparent bug bites which he observed on Erica, and he introduced into evidence numerous photographs of the child and the exterior of her maternal grandparents' home, where she lived with Rebecca. He testified regarding his observations of the child, including his perception that she was somewhat delayed in her language and social development, and he expressed concern about the adequacy of the medical and dental care provided by Rebecca. He compared his and Rebecca's living environments, urging the court to conclude that the child would benefit from the financial, educational and other opportunities which he and his wife could provide. Rebecca, on the other hand, introduced photographs and testimony regarding the adequacy of her home, as well as evidence to show that Erica had received appropriate medical care and developmentally was on target, and that a social services investigation had found no reason for intervention. Rebecca disputed Steven's testimony regarding Erica's bruises and alleged bug bites, asserting that the marks on Erica's skin resulted from a grass allergy rather than from excessive bug bites, and that any bumps or bug bites received appropriate medical attention.

Regardless of whether the members of this panel might have reached different conclusions if sitting as the triers of fact, it is clear that the trial court was entitled to believe the testimony of any of the witnesses in whole or in part, and to accord weight to various portions of the testimony as it saw fit. *See Cross v. Clark.*⁵ Having reviewed the record, we cannot say that substantial evidence did not support the trial court's findings, or that the trial court abused its discretion by awarding custody to Steven.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lana M. Gresham
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Valarie H. Scaggs
Leo A. Marcum
Lowmansville, Kentucky

⁵ *Id.* 213 S.W.2d at 446.