

RENDERED: July 22, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001605-ME

CHARLES C. TUBBS

APPELLANT

v. APPEAL FROM MCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
CIVIL ACTION NO. 02-CI-00288

RACHEL DIANNE TUBBS (NOW SLEDD)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Rachel Diane Tubbs and Charles C.

Tubbs were married on November 17, 2000. Prior to their

marriage, the parties had one child, Andrea Paige, born on

February 10, 1999. During the marriage, Charles and Rachel had

another child, Charles Nathaniel, born on June 15, 2001. The

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

parties' relationship was tumultuous, and they separated on January 15, 2002. In March 2002, Rachel filed a petition with the McCracken Family Court seeking dissolution of the parties' marriage. On January 14, 2003, an amended interlocutory decree dissolving the parties' marriage was entered in which the court reserved the issue of child custody.

In June 2003, the parties began to share custody of the children on their own initiative. One parent would keep the children for three or four days then the other parent would keep them. This pattern lasted until October 2003. From October 2003 to January 2004, Charles withheld their daughter, Andrea, from Rachel.

In January 2004, an order setting a temporary visitation schedule was entered. Rachel was permitted to keep the children for four days after which she was to turn them over to Charles, who would keep them for four days.

Evidentiary hearings relating to the custody issue were held on March 15, 2004, and on June 29, 2004. At the March hearing, Charles was not represented by counsel, but he did have an attorney at the June hearing. Both parties testified at the hearings and both presented their own witnesses. On July 13, 2004, after considering the evidence, the family court handed down a custody decree. The court found that Charles had a history of substance abuse and violence but noted that he had

testified that he no longer abused either drugs or alcohol. The court observed that after the parties separated, Rachel had been the children's primary caregiver. Determining that it was in the children's best interest, the court awarded joint custody to the parties and designated Rachel as primary residential custodian. Charles was granted standard visitation.

On appeal, Charles argues that the family court abused its discretion when it designated Rachel as the children's primary residential custodian. He says that Rachel admitted during the hearings that she had little past interaction with the children because she "went wild" and "stayed gone". He also claims that she was aware that the children had scabies on at least two occasions. Rachel, he says, wrote a letter to his mother asking her to take custody of the children. Furthermore, he notes, Rachel admitted that she had been arrested for alcohol intoxication. He alleges that Rachel's mother had to seek custody of the children because Rachel abandoned them for six months.

In addition, Charles offered evidence that Rachel had been assaulted by her sister and her new husband. Based on this, he contends that Rachel lacks "the ability to bring out the best in people closest to her"; furthermore, "[a]lthough there was domestic violence between these parties, there was ample evidence that [Rachel] did a less adequate job of avoiding

altercations even with her own family members and new husband." According to Charles, since Rachel was involved (as a victim) in domestic violence, she should not have been designated as primary residential custodian.

Charles insists that the family court's decision is erroneous when considered in light of the statutory factors set forth in Kentucky Revised Statutes (KRS) 403.270, and that the decision is not supported by the evidence adduced at the hearings. He contends proof of Rachel's past behavior constituted clear and convincing evidence that she is not fit to be the children's primary residential custodian.

When we review a child custody decision, we reverse only when the family court's findings of fact are clearly erroneous or its decision reflects a clear abuse of the discretion granted such courts in custody matters.² In child custody cases, it is particularly important to have written findings of facts to enable the reviewing court to understand the family court's view of the underlying controversy and why it reached the decision that it did.³ Unfortunately, in this case, the family court's findings are barely adequate and provide little insight into its thought processes.

² Ky. R. Civ. Proc. (CR) 52.01. See also Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

³ Reichle v. Reichle, supra, note 2, at 444.

It is evident from a review of the record that on appeal Charles has interpreted the evidence in the light most favorable to himself in an attempt to persuade this Court to reverse the custody decision. Many of Charles' factual assertions were contradicted by Rachel. And, when there is a conflict in the evidence, as in this case, it is the responsibility of the family court, not this Court, to decide what evidence is to be believed. As a reviewing court, we must give due regard to the family court's opportunity to judge the credibility of witnesses.⁴ We may not engage in a *de novo* review of the evidence, nor may we substitute our judgment for that of the family court.⁵ In this case, we must defer to the family court's custody decision since Charles has not shown that the findings of fact lack support in the evidence or that the family court abused its considerable discretion when it granted joint custody to the parties and designated Rachel as primary residential custodian.

Charles also argues that the family court erred when it admitted into evidence a so-called "case history" that outlined his criminal history. According to Charles, when Rachel introduced the document, she failed to lay the proper foundation to introduce it, failed to authenticate it and failed

⁴ See Ghali v. Ghali, 596 S.W.2d 31 (Ky. App. 1980); Adkins v. Meade, 246 S.W.2d 980 (Ky. 1952).

⁵ Reichle v. Reichle, supra, note 2, at 444.

to introduce the document through the testimony of a records custodian. Charles admits that he failed to object to the introduction of the document. But, since the family court mentioned his criminal record in the custody decree, he insists the admission of the document affected his substantial rights and constituted a manifest injustice rising to the level of palpable error.

Palpable error is an irregularity that affects the substantial rights of a party and will result in manifest injustice to the party if not addressed by an appellate court.⁶ After considering the whole case, if we do not believe that there was a substantial possibility that the result would have been different, the irregularity will be deemed not to have been prejudicial.⁷ While Charles is correct that Rachel did not conform to the rules of evidence when she introduced the "case history" document, prior to the introduction of the document, Charles testified extensively about his criminal history. Since he testified regarding the document's contents, its admission did not result in a manifest injustice.

Because the findings of fact upon which the custody decree is based have not been shown to be clearly erroneous and McCracken Family Court did not abuse its discretion when it

⁶ Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 837 (2003).

⁷ Id.

named Rachel as the children's primary custodian, the custody decree is affirmed.

ALL CONCUR.

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