

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002321-ME

LAURIE McDONALD

APPELLANT

APPEAL FROM LIVINGSTON CIRCUIT COURT  
v. HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 01-CI-00201

DIANA KOHLER AND  
JOHN KOHLER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Laurie McDonald appeals from an order of the Livingston Circuit Court concerning the custody and visitation of her daughter, L.Q. The child is currently in the custody of McDonald's mother, Diana Kohler, and her stepfather, John Kohler, who live in Georgia. Finding no indication that the circuit court abused its discretion in this case, we affirm.

L.Q. was born on November 11, 1999. She was neglected and abandoned by her father, and was removed from McDonald by

the Cabinet for Families and Children (CFC) in Kentucky based on a determination of neglect and abuse resulting from McDonald's alcohol problems. L.Q. was subsequently returned to McDonald for a period of two months, only to be removed again by CFC in September 2001. The court awarded the Kohlers permanent custody of L.Q. on April 2, 2002.

Although the court awarded custody to the Kohlers, it ordered that McDonald have visitation. Because of the friction between the Kohlers and McDonald, visitation has been a problem. Also, the Kohlers moved from Kentucky to Marietta, Georgia, in April 2003 in order to care for Mr. Kohler's father who had suffered a stroke. This led to additional difficulties with the visitation arrangement.

In November 2003, McDonald filed a motion seeking to modify custody in her favor. In response, the Kohlers filed a motion to dismiss the case or transfer it to Georgia. In January 2004, the court entered an order denying both McDonald's motion to modify custody and the Kohlers' motion to dismiss or transfer. Further, the court modified McDonald's visitation to allow her one long weekend a month, designated holidays, and four weeks in the summer. Both sides appealed from the order.

After the circuit court's January 2004 order and while the issues addressed therein were before this court on appeal, the Kohlers made L.Q. available for visitation in February,

March, and April of 2004. From May to August, however, the Kohlers did not make L.Q. available for visitation. In part, this was the result of the Kohlers' discovery of head lice and ringworm following L.Q.'s April visit with McDonald. In addition, the Kohlers were advised by two psychologists, as well as by employees with Georgia's counterpart to Kentucky's CFC, not to make L.Q. available for visitation until allegations of abuse and neglect could be resolved.

As a result, McDonald filed a motion seeking to hold the Kohlers in contempt for failing to make L.Q. available for visitation. McDonald also filed another motion to modify custody. In response, the Kohlers again filed a motion challenging the jurisdiction of Kentucky courts over the matter. Further, the Kohlers filed a motion seeking to modify visitation.

These motions came before the circuit court for a hearing on August 25, 2004. Noting that prior orders in the case were presently on appeal,<sup>1</sup> the circuit nonetheless heard the motions since they involved new issues concerning custody and visitation. The court denied the motion to hold the Kohlers in contempt, finding that they had acted "erroneously yet in good faith" in relying on the opinion of a psychologist that to bring

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<sup>1</sup> Shortly after the court entered its final order in the case sub judice, a panel of this court rendered an opinion affirming the court's order entered in January 2004. See 2004-CA-000337-ME and 2004-CA-000684-ME.

L.Q. to Kentucky for visitation would endanger her emotional and psychological well-being. The court concluded that the Kohlers' behavior was not contemptuous. The court also denied the Kohlers' motion challenging its jurisdiction to hear the case.

After considering the evidence, the court denied McDonald's motion to modify custody. Noting the applicable legal requirements for a change of custody under these circumstances, the court found that McDonald "failed to make this case by a preponderance of the evidence."

Concerning the issue of visitation, the Kohlers had previously made L.Q. available to McDonald in Kentucky so that she could exercise her visitation rights. In their motion to modify visitation, however, they moved the court to require McDonald to exercise visitation under their supervision in Georgia.

The court found the evidence to be overwhelming that to bring L.Q. from Georgia to Kentucky for visitation would be emotionally harmful to her. Therefore, the court granted the Kohlers' motion to modify visitation. This appeal by McDonald followed.

McDonald first argues that the circuit court erred in not granting her motion to modify custody. In support of her argument, McDonald states that the Kohlers consistently and without good cause denied her visitation. In addition, she

claims the Kohlers moved to Georgia less than three weeks after she was awarded visitation and that their relocation to another state violates the spirit of the custody modification statute. She maintains that the court declined to follow, or at least declined to address, KRS<sup>2</sup> 403.340(4) which required the court to consider the mental and physical health of all individuals involved.

Broad discretion is vested in the trial court in making custody determinations. See Futrell v. Futrell, 346 S.W.2d 39 (Ky. 1961), and Grider v. Grider, 254 S.W.2d 714, 715 (Ky. 1953). “[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion.” Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Further, the court in Cherry concluded that it would “not interfere with the action of the trial court unless there has been an abuse of discretion.” Id.

We conclude that the trial court did not abuse its discretion in denying McDonald’s motion to modify custody. As noted by the Kohlers, missed visitations alone cannot serve as grounds for modifying custody. See KRS 403.340(4)(c).<sup>3</sup> Further,

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<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> McDonald attempted to rely on visitation issues occurring prior to January 2004. These issues were addressed by the court in prior orders. As such,

the court did not abuse its discretion in determining that the Kohlers had acted "erroneously yet in good faith" in denying visitation to McDonald.

Also, the court found no evidence of a change since the January 2004 order that would indicate L.Q.'s present custody arrangement posed a substantial risk of physical, mental, moral, or emotional growth. Rather, there was abundant evidence that any emotional or psychological problems suffered by L.Q. arose in connection with her visitation in Kentucky with McDonald and not from her custody arrangement with the Kohlers in Georgia.

McDonald also argues that the court failed to specifically consider the physical and mental health of the Kohlers prior to ruling on her motion to modify custody. She refers to KRS 403.340(4)(b) in this regard. She points to the fact that the court never ruled on the guardian ad litem's motion to require the parties to undergo mental evaluations.

The record indicates that the Kohlers objected to such an evaluation, and one of the psychologists testified that he saw no need for them to be evaluated. Because the court entered its final order without requiring the Kohlers to be evaluated, we assume the court did not find sufficient grounds to support

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they cannot serve as a basis for modification of custody. See KRS 403.340(3).

the motion. Further, as neither McDonald nor the guardian ad litem sought further findings on this matter, we find no error in the court's action. See CR<sup>4</sup> 52.04; Whicker v. Whicker, 711 S.W.2d 857, 860 (Ky.App. 1986).

McDonald's second argument is that the circuit court erred in granting the Kohlers' motion to modify visitation. In support of her argument, she implies that the court should not have relied so heavily on the testimony of out-of-state child psychologists. She also contends that "common sense dictates that denying visitation rights between a four year old child and her natural mother seriously endangers the child's mental or emotional health."

Matters involving visitation rights are held to be within the discretion of the trial court. Drury v. Drury, 32 S.W.3d 521 (Ky.App. 2000). Furthermore, as with the issue of custody modification, we will not disturb the decision of the trial court absent an abuse of discretion. See Cherry, 634 S.W.2d at 425.

KRS 403.320(3) states that "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the

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<sup>4</sup> Kentucky Rules of Civil Procedure.

child's physical, mental, moral, or emotional health." When the issue involves the visitation of a natural parent, the statute specifies that "[a] parent not granted custody of the child 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).

Again, we conclude that there was considerable evidence to support the court's ruling. Two psychologists testified to this effect.<sup>5</sup> Further, there was evidence that L.Q. learned the process for rolling a marijuana cigarette during her time at the McDonald residence. In fact, the Kentucky State Police had discovered marijuana in the McDonald residence on a prior occasion.

Finally, the record indicates L.Q. had made statements concerning inappropriate touching, physical abuse, and neglect while in McDonald's care. The court determined that these allegations were under investigation and need not be resolved during that proceeding. The court nevertheless was concerned with whether the allegations were true, L.Q. was making them up

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<sup>5</sup> McDonald mentions in her brief that the court never ruled on the guardian ad litem's motion to quash the testimony of one of the psychologists. However, she makes no argument as to why this testimony was not competent and relevant. Furthermore, the objection to the testimony was made during a deposition and was never presented to the court. Thus, any error in this regard was not preserved.



on her own, or L.Q. was being coached to say things that never occurred.

In addition to requiring McDonald to exercise her visitation rights with L.Q. at the Kohler residence in Georgia, the court further conditioned visitation on McDonald's agreement to enter "con-joint" therapy with her mother and the child. The court noted that it intended "to establish standard visitation once the Respondent had shown her good faith and intentions by participating in this [sic] sessions, and after said sessions have borne enough fruit to justify further modification of visitation." Considering all the evidence, we find no abuse of discretion in the court's granting of the Kohlers' motion to modify visitation.

McDonald's third argument is that the circuit court was predisposed, if not prejudiced, when it made its decision in this case. McDonald cites a statement made by the court to the parties prior to hearing all testimony. The portion of the tape cited by McDonald in her brief offers no support for her argument. Further, the statements made by the court at the conclusion of evidence on August 25 and at the conclusion of all the evidence on August 26 do not support the contention that the trial judge had either prejudged the case or would not consider the evidence presented. To the contrary, the judge's statements make it clear that he would consider all the evidence presented

and would decide the issues based on the applicable law. In short, we conclude that McDonald's argument in this regard is without merit.

The order of the Livingston Circuit Court is affirmed.

ALL CONCUR.

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