

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-001276-ME

HEATHER B. LOVELESS

APPELLANT

v. APPEAL FROM LIVINGSTON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 04-CI-00016

HEATH QUERTERMOUS; HAROLD  
DOUGLAS QUERTERMOUS; AND DEANNA  
QUERTERMOUS

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND HENRY, JUDGES; BUCKINGHAM, SENIOR JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE: Heather Loveless has appealed from the judgment of the Livingston Circuit Court awarding sole custody of her daughter, A.L., to her natural father, Heath Quertermous. Heather argues that the circuit court erred in awarding custody to Heath and abused its discretion in denying her request for a forensic custody evaluation. Because we do not agree that the

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<sup>1</sup> Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

circuit court committed any error or abused its discretion, we affirm.

Heath and Heather are the natural parents of A.L., who was born on July 28, 1999. Heath and Heather were never married and their relationship ended around the time of A.L.'s birth. In early 2000, the Livingston District Court adjudged Heath to be A.L.'s legal father and awarded custody to Heather, who had maintained custody of her from the time of her birth. Heath subsequently joined the Navy and left town. Although Heath and Heather did not maintain contact, Heather continued to maintain contact with Heath's parents, Deanna and Harold Quertermous, who often cared for A.L.

A few years later, Heather met Jeff Castile and the two were married on May 3, 2003. During their honeymoon, A.L. stayed with Deanna and Harold. About this time, Deanna and Harold became suspicious that Castile had sexually abused A.L. They immediately filed a neglect and abuse petition in Livingston District Court,<sup>2</sup> and Deanna obtained temporary custody of A.L. Heath returned home as soon as he was notified about the abuse. At this time, A.L. began treatment with court appointed therapist, Shelly Allen. Following the return from

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<sup>2</sup> 03-J-00028-001.

their honeymoon, Heather and Castile separated and were divorced in early 2004.<sup>3</sup>

In June 2003, Castile was indicted by the McCracken County grand jury on a charge of first-degree sexual abuse.<sup>4</sup> Castile eventually entered a guilty plea to third-degree sexual abuse, and was sentenced to serve thirty days in jail, to be served on weekends, and was ordered to have no contact with A.L. and to register as a sex offender. That conviction is now final.<sup>5</sup>

On January 24, 2004, Heath filed a Verified Petition for Custody, seeking sole custody of A.L. He argued that it would be in A.L.'s best interest that he be awarded custody, as he would be able to provide her with a safe and loving environment. In support, Heath cited his employment with the United States Navy and his stable family and home. In contrast, Heath asserted that A.L.'s physical and emotional welfare would be endangered if she were to be returned to Heather's custody due to the molestation she suffered at the hands of Heather's

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<sup>3</sup> The record indicates that Heather and Castile were apparently remarried in Las Vegas in May 2005.

<sup>4</sup> 03-CR-00198.

<sup>5</sup> Castile contested the voluntariness of his guilty plea, based upon his claimed misunderstanding of the length of time he would have to register as a sex offender. The McCracken Circuit Court denied his motion to withdraw his guilty plea, and Castile appealed this ruling and the final judgment to this Court (appeal No. 2005-CA-001081-MR). His conviction was affirmed in an opinion rendered June 9, 2006. Castile did not seek any further review, and the opinion became final on July 21, 2006.

husband, Castile. Heather filed a response to Heath's petition as well as a counter-petition seeking custody. Deanna and Harold later entered appearances in the suit, seeking de facto custodian status (which was later denied) and permanent custody. Heather also moved the circuit court to order a forensic custody evaluation to determine whether A.L. had any lasting psychological harm from the abuse. The circuit court also found that such an evaluation would only have limited value because of stale recollection and reporting.

The circuit court held a custody hearing that began on December 20, 2004, but did not conclude until February 10, 2005. Throughout the hearing, Heath worked to establish that Heather was continuing her relationship with Castile, despite the abuse charges pending against him. While Heather testified that she lived with her grandmother and the only contact she had with Castile was concerning the custody case, Heath produced testimony from a private investigator who located and observed Heather and Castile together. Heath also elicited testimony from Heather that she did not plan on having contact with Castile after the custody case was completed. During her own case, Heather testified that she never abused A.L. or allowed her to be abused, and that, as her mother, A.L. was her first priority.

The other major issue raised in the hearing was the expert testimony concerning whether A.L. had been abused. Shelly Allen, A.L.'s therapist since May 2003, testified that A.L. disclosed the abuse to her during their first session. Allen then determined that A.L. had been sexually abused by Castile, basing this opinion on A.L.'s behaviors, nightmares and sexual acting out. Allen testified that she discussed the abuse with Heather, who thought it was a vendetta against her and Castile. In contrast, Heather introduced the expert testimony of clinical and forensic psychologist Dr. Fred Steinberg. He testified that the interviews Allen conducted were done improperly and that coaching occurred. Likewise, he questioned the reliability of the therapies Allen used with A.L. Finally, he recommended a forensic custody evaluation, despite the circuit court's statement that such an evaluation would be stale. The circuit court later excluded those portions of Allen's testimony concerning the credibility or reliability of A.L.'s testimony.

Before ruling on the custody issue, the circuit court waited for a ruling on Castile's pending criminal case. Castile entered a guilty plea in March 2005, and the circuit court issued its custody order the following month. After detailing its prior order denying de facto custodian status to Deanna and Harold and determining that there was no evidence presented

concerning the unfitness of both parents, the circuit court determined that custody should be modified and awarded sole custody to Heath. The relevant portions of the order detailing the findings of fact read as follows:

The Court finds that there has been a change in circumstances since the original custody order of the Livingston District Court was entered in January of 2000. The Court finds that based upon the evidence heard in this case, the mother has married Jeffrey Castile who in May of 2003 was accused of sexually molesting the child. Because of those allegations and the prosecution of Jeffrey Castile in McCracken Circuit Court, [A.L.] was removed from her mother's custody for almost two years, residing with the paternal grandparents.

The Court further finds that based upon the testimony of the parties at the hearing herein, and especially the testimony of the Respondent/mother, she continued to have a relationship with her husband Castile in spite of the fact that there was probable cause to believe that he had sexually molested her child. The Court finds that the Respondent's credibility in this case was severely undermined as she was caught several times in contradictions and misstatements. At the time of the hearing she was still talking every other day on the telephone with Castile who was under indictment for sexually molesting her child. Contrary to her assertions, the evidence was produced that she had rendezvoused with Castile in Nashville, Tennessee, and was continuing some type of ongoing relationship with him. Her explanation for talking to him "every other day" on the telephone was that they were discussing financial matters. What financial matters were of such magnitude as to require such frequent discussions never came to light. There were

indications, however, that the financial matters may have had more to do with her husband's family providing funding for this expensive litigation and perhaps its relationship with the criminal prosecution of Castile in Paducah.<sup>6</sup>

Finally in the McCracken Circuit Court case concerning the prosecution of Jeffrey Castile, he pled guilty to sexual abuse in the third degree on March 15, 2005, with a recommendation by the Commonwealth of a sentence of thirty days confinement. The victim of that crime was the Petitioner and Respondent's child, [A.L.], who is the subject of this litigation. If Mr. Castile violates his probation, the maximum penalty for a Class B Misdemeanor is 90 days incarceration which would not assure that he would not be around the child within a short period of time, even if his probation was revoked.

The conviction of Jeffrey Castile substantiates the Court's finding on the evidence in this case that the child had been subject to sexual abuse at the hands of Jeffrey Castile. He has admitted it. In addition, the light sentence received by the Respondent/mother's husband will not require him to be incarcerated for any length of time. Therefore placing the child back with the mother would seriously endanger her physical, mental, moral, and emotional health; and the harm likely to be caused by this change in environment is outweighed by the advantages of changing custody to the father.

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<sup>6</sup> There was testimony that the husband Castile's aunt had helped to pay legal expenses for the Respondent/mother in this action. The Court notes that the evidence would infer that the litigation expenses in this case would be quite substantial. She was represented by two lawyers, one of which was from Florida and had made two separate trips to Livingston County, Kentucky, for hearings. Also a very well qualified, well versed and articulate expert witness from Florida made two trips to Livingston County. This depicts a "cozy" arrangement at least. (footnote 2 in original.)

The Court recognizes the value of the bonding which has taken place between the mother herein as the primary caregiver of this small child during the first three years of the child's life. This is a strong factor in considering custody determinations of children the age of [A.L.]. However the weight given to that very important consideration is outweighed in this case by the two years absence from the mother as primary custodian and most importantly, the danger of further abuse which the child might receive if placed in the mother's primary care.

The circuit court concluded its order by awarding custody to Heath and supervised visitation to Heather. Heather filed a motion to alter, amend or vacate, and for clarification of the custody order. The circuit court denied the motion to modify, but clarified the order to confirm that Heath had been awarded sole custody. This appeal followed.

On appeal, Heather presents two arguments. First, she argues that the circuit court based its decision to award custody upon an erroneous finding of fact that she and Castile were married. Second, she argues that the circuit court should have ordered a forensic custody evaluation before awarding custody to Heath. We disagree with both propositions, and hold that the circuit court properly awarded sole custody to Heath and did not abuse its discretion in denying a forensic custody evaluation.



Before we address the issues Heather has raised, we observe that our standard of review is set forth in CR 52.01:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

The Supreme Court of Kentucky addressed this standard in Moore v. Asente,<sup>7</sup> and held that a reviewing court may set aside findings of fact,

only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[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]

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<sup>7</sup> 110 S.W.3d 336, 354 (Ky. 2003).

reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

Specifically in child custody appeals, we review the lower court's ruling using a clearly erroneous standard.<sup>8</sup> With this standard in mind, we shall review the circuit court's decision in this matter.

This particular case addresses the modification of a previous custody order, for which KRS 403.340 applies. The statute provides, in pertinent part, as follows:

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

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<sup>8</sup> Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986).

- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;<sup>9</sup>
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

- (a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;
- (b) The mental and physical health of all individuals involved; [and]
- (c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody

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<sup>9</sup> The factors listed in KRS 403.270(2) include the wishes of the parent or parents as to the child's custody; the child's wishes; the interaction of the child with parents and siblings; the child's adjustment to his home, school and community; and the mental and physical health of everyone involved.

orders shall not be made solely on the basis of which parent is more likely to allow visitation or pay child support[.]

In her first argument, Heather focuses on a single finding of the circuit court that she claims is clearly erroneous: that Castile was still her husband. While the circuit court referred to Castile as her "husband" in its order, no one disputes that their marriage was dissolved prior to its entry, although they were still married, albeit separated, at the time of the December hearing date. In our opinion, the circuit court continued to use this description of Castile to emphasize that their relationship had continued, despite the dissolution of their marriage. The ultimate ruling was not based upon Castile's status as husband or ex-husband; it was based, in part, upon their continuing relationship and Heather's lack of credibility concerning the existence of their relationship, coupled with his admission that he sexually abused A.L. For this reason, we cannot hold that the circuit court's use of the word "husband" in relation to Castile was clearly erroneous.

The circuit court properly found that new facts had arisen since the entry of the original custody order and that a change in circumstances had occurred, in that Heather's former husband, Castile, pled guilty to sexually abusing A.L. Based

upon this change in circumstances, A.L.'s best interests would be served through an award of custody to Heath due to the ongoing nature of Heather and Castile's relationship, despite his admission that he sexually abused her daughter, and the future harm to A.L. an award of custody to Heather would possibly cause.

Heather's second argument concerns the propriety of the circuit court's denial of her request for a forensic custody evaluation to determine whether A.L. was sexually abused and where it would be in her best interest to live. She focuses on the testimony of Shelly Allen and Dr. Steinberg, specifically on the credibility of A.L.'s statements about abuse. In reviewing the circuit court's order, the circuit court did not rely upon either witness's testimony in reaching its decision. On the contrary, the circuit court based its decision upon Castile's own admission in the criminal action that he had sexually abused A.L. Indeed, the circuit court specifically stated that Castile's conviction substantiated its finding that Castile had sexually abused A.L. Once Castile admitted his crime, any need to determine whether A.L.'s statements concerning the abuse were reliable became moot. The undisputed fact of Castile's abuse, coupled with Heather's lack of credibility concerning her continuing relationship with Castile, led the circuit to the inevitable conclusion that custody should go to Heath, negating

any need for a forensic custody evaluation of the possible custodians. For this reason, we identify no abuse of discretion, or error, in the circuit court's denial of Heather's motion for a forensic custody evaluation.

For the foregoing reasons, the judgment of the Livingston Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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