

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001808-MR

MATTHEW GULLION

APPELLANT

APPEAL FROM MAGOFFIN CIRCUIT COURT  
v. HONORABLE JULIE PAXTON, JUDGE  
ACTION NO. 99-CI-00379

STEPHANIE GULLION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY,<sup>1</sup> SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This child custody dispute began in 1999 when Matthew Gullion filed a petition against Stephanie Gullion seeking a dissolution of marriage and emergency temporary custody of the parties' two-year old daughter. The issues presented are whether, after the case was remanded by the Kentucky Supreme Court, the family court properly awarded primary residential custody of the child to Stephanie; whether the family court had authority to change the circuit court's

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

custody order; and whether the doctrine of res judicata precludes consideration of the stability of the parties. We affirm.

#### **PROCEDURAL HISTORY**

The series of custody orders and appellate litigation began in December 1999, when Matthew was awarded emergency temporary custody. Following a hearing, that order was set aside and Stephanie and Matthew were awarded *pendente lite* joint custody with the child to reside with each party for two weeks on an alternating basis. After a final hearing, the Domestic Relations Commissioner recommended that the parties have joint custody with Matthew having primary custody and Stephanie reasonable visitation.

On February 14, 2002, prior to the time expiring for filing exceptions under CR 53.06, the circuit court adopted the DRC's recommendation; Stephanie, however, filed a timely CR 59.05 motion to alter or amend the custody order on the basis that the finding that Matthew could provide a more stable home for the child was clearly erroneous and she requested permanent custody. That motion remained pending for almost one year. During that time, Matthew sought and obtained an emergency custody order and a suspension of Stephanie's visitation because she failed to return the child after a regularly scheduled visit. Stephanie was ordered to return the child and appear for

a show cause hearing. On September 20, 2002, Stephanie filed a response to the show cause and filed a motion to set aside the emergency custody order. In that motion, she sought to reinstate the order of joint custody and asked the court to designate her as the primary residential custodian.

In November 2002, the case was transferred to the family court where the show cause order and Stephanie's pending CR 59.05 motion were heard in a single proceeding. At the hearing, both parties were permitted to introduce evidence of events following the 2002 order. In January 2003, the family court set aside the order of emergency custody and found it in the child's best interest to continue joint custody, but designated Stephanie as the primary custodian. Explaining its reasoning, the court stated:

Based upon the testimony before the commissioner as well as the testimony before this court, it is clear both parents are most capable to care for and are able to care for this child. In addition the fact that the motions of the parties were not attended to in timely fashion have resulted in the child's further integration into the home of the father. The court notes as well that in the hearing of September 2001 as in the hearing before this court, the father has difficulty in allowing contact between the mother and the child and difficulty in communicating with the mother regarding the child.

Thus, although the family court found both parents to have stable homes, it found decisive Matthew's interference with the

child's relationship with Stephanie. As the basis for the custody award, the family court considered the evidence from the DRC hearing in addition to that introduced at the subsequent hearing.

Disappointed with the designation of Stephanie as the primary custodian, Matthew appealed to this court arguing that the family court did not have subject matter jurisdiction and that it erred when it changed the custody order based on events that occurred after the entry of the February 2002 order. In an unpublished opinion, Gullion v. Gullion, Case No. 2003-CA-000250, this court held that Stephanie's CR 59.05 motion sought a modification of a custody award and that, therefore, compliance with KRS 403.340<sup>2</sup> was required. We also agreed with Matthew that additional evidence was improperly admitted. The February 2002 order was ordered reinstated.

The Kentucky Supreme Court granted Stephanie's motion for discretionary review and reversed this court's holding that compliance with KRS 403.340 was required. Because the statute applies only to final custody orders and the custody order was not final until Stephanie's CR 59.05 motion was ruled upon, Stephanie was not required to meet the requirements for a custody modification. Gullion v. Gullion, 163 S.W.3d 888, 891 (Ky. 2005).

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<sup>2</sup> The statute requires the filing of two supporting affidavits.

After deciding that Stephanie's CR 59.05 motion was properly filed, the Supreme Court continued its CR 59.05 analysis and addressed the issue of whether the family court improperly considered evidence that occurred subsequent to the February 2002 order. Finding error, the court held that the consideration of additional evidence, even in a child custody dispute where the child's best interest is paramount, is outside the scope of CR 59.05.

If facts have occurred since the trial that justify a change of custody, the law adequately provides a method to address such a situation, but because a CR 59.05 motion cannot be granted on facts that did not exist at trial, the filing with a CR 59.05 motion of affidavits showing a change of circumstances does not make it a proper motion to change custody under KRS 403.340. Id. at 894.

On remand, the court was instructed to "limit its consideration of Appellant's CR 59.05 motion to facts that existed at the time of trial." Id.

#### **PROCEEDINGS ON REMAND**

On remand, the family court, without a further hearing, again considered Stephanie's 2002 CR 59.05 motion and, following the Supreme Court's directive, considered only the evidence presented at the DRC hearing.

The court found that both parties had stable homes. Stephanie was then a Georgia resident, living with her parents

in a four-bedroom home and a senior at the University of Georgia pursuing a degree in child psychology. She worked part-time at local restaurant. While she was away, the child was cared for by Stephanie's mother and step-father. Both Stephanie and her parents testified that they intended to remain in Georgia.

Matthew, a minister, also offered the child a suitable home, the love and nurture of his church family, and presented a suitable babysitter for the child.

The family court found that while both parents provided stable homes, it again found that Matthew had interfered with the child's relationship with Stephanie. As examples, the court referred to events that occurred prior to the DRC hearing; one when Matthew refused to disclose the child's location and another when he refused to allow the child to speak with her mother.

The family court found that the best interests of the child were served by granting the CR 59.05 motion and awarding joint custody with Stephanie as the primary custodian.

**MATTHEW'S CONTENTION THAT THE FAMILY COURT ERRED  
WHEN IT AWARDED PRIMARY CUSTODY TO STEPHANIE**

In child custody cases, appellate courts recognize that the family court is in the best position to evaluate the testimony and weigh the evidence; an appellate court, therefore, will not substitute its judgment for that of the family court.

Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986). On review of factual findings, appellate review is limited to the clearly erroneous standard which requires that the findings be affirmed unless they are manifestly against the weight of the evidence. Id. The family court's decision in a custody matter will not be disturbed unless it clearly abused its discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

As revealed by its lengthy history, this custody litigation has been protracted. The reasons for the delay are varied and, in part, attributable to the failure to promptly rule on Stephanie's CR 59.05 motion. With the passage of time, the child has grown older, the parties' circumstances have changed, and the child has no doubt become integrated with family, school, and friends. Nevertheless, as instructed by the Supreme Court, the family court was restricted to review this case within the permissible context of CR 59.05; specifically, to a review of the evidence heard by a different court three years earlier. On appeal, this court is likewise limited to the same evidence.

Matthew recognizes our limited scope of review but contends that his work as a minister, his ties to the community, and an available babysitter, render him the more suitable primary custodial parent rather than Stephanie, who offers only a home owned by her parents, is a college student, and works

part-time as a waitress. Thus, Matthew asks that we hold the findings of fact to be clearly erroneous and the decision of the family court an abuse of discretion.

The family court's designation of a primary custodian is a factual issue and, therefore, will not be disturbed if supported by substantial evidence. Sherfey v. Sherfey, 74 S.W.3d 777, 783 (Ky.App. 2002). Under KRS 403.270 the court is required to resolve the custody issue based on the best interests of the child. Factors relevant to that decision include the wishes of the parents and the child; the interaction of the child with the parents; the child's adjustment to home, school and community; and the mental and emotional states of the proposed custodians. KRS 403.270(2)(a),(b),(c),(d), and (e).

The family court found that both Matthew and Stephanie could provide a physically stable and loving home for the child. The court's concern again, however, was Matthew's history of not supporting and nurturing the relationship between Stephanie and the child while in Matthew's custody. Pointing out that there was evidence at the DRC hearing that Matthew demonstrated open hostility toward Stephanie and had intentionally attempted to prevent Stephanie from contacting the child, the court stated:

The concern of this court is the ability of the parties to raise this child together while living apart. To accomplish this requires putting differences aside and putting the child first. The testimony at



the hearing before the commissioner showed a failure on the part of the petitioner to communicate or allow the child to communicate with the respondent during the times the child was with the petitioner.

The family court found that both Matthew and Stephanie are capable of successfully parenting the child; the issue, however, is the child's best interest.

It is always in the child's best interest to have a loving and nurturing relationship with both parents. When one parent seeks to use a custodial relationship to interfere with the other's development of that relationship, the child's best interest is not served. Based on the evidence, the family court found that the opportunity for both parents to love and nurture the child was most likely if Stephanie had primary custody. We cannot say that there was an abuse of discretion.

**THE AUTHORITY OF THE FAMILY COURT TO SET ASIDE  
THE ORDER OF THE CIRCUIT COURT**

The original custody order was rendered by the circuit court and the initial CR 59.05 motion presented to that court. Because the case was transferred to the family court, a different judge ruled on the motion. Matthew contends that since the family court did not observe the witnesses, deference to the DRC and the circuit court was required.

In Herring v. Moore, 561 S.W.2d 95 (Ky.App. 1977), the court addressed the authority of a successor judge when

reviewing the judgments of a predecessor judge. Although extreme caution was urged, the court did not restrain the successor from a full review of the interlocutory judgments and orders of a predecessor.

It is settled that a trial judge who has entered findings, conclusions and judgment can, upon timely motion, change his mind and enter new findings, conclusions, or judgment directly opposite to those first entered. We see no reasonable basis for holding that a successor judge is without power to take an action which would have been appropriate by his predecessor. Id. at 98(citations omitted).

The circuit court had authority to consider Stephanie's timely CR 59.05 motion. Likewise, when the case was transferred to the family court, it had the same authority. There was no error.

#### **RES JUDICATA**

Matthew's application of the doctrine of res judicata is misplaced. The DRC found that Matthew provided a more stable home life than Stephanie; on its initial consideration of Stephanie's CR 59.05 motion, however, the family court disagreed that Matthew could provide a more stable home life. Although it found that both parents had "stable environments" in which to raise the child, the court pointed to Matthew's interference with the child's relationship with Stephanie as the basis for awarding primary custody to Stephanie. On remand, the family

court was instructed to, and did, consider only the evidence from the DRC hearing and reached the same conclusion.

Matthew contends that the family court was precluded from considering the "stability" issue because it, and the circuit court, had previously ruled on the issue. The doctrine of res judicata is applicable only when there has been a prior action that has been finally determined and consists of two sub-parts: (1) claim preclusion and (2) issue preclusion. Buis v. Elliott, 142 S.W.3d 137, 140 (Ky. 2004). Claim preclusion bars a party from relitigating a previously adjudicated claim and bars a subsequent action on the same claim, while issue preclusion prevents a party from litigating an issue litigated and decided in a prior action. Id. at 140.

The attempt to apply the doctrine fails for two reasons. The family court was reviewing the case pursuant to a CR 59.05 motion. As held by the Kentucky Supreme Court, there was no final custody judgment until that motion was ruled upon. Gullion, at 891. Absent a final determination by a court, res judicata is not applicable.

We also find troublesome Matthew's interpretation of the two orders of the family court as inconsistent. Although based on different evidence, the court's findings, both prior to and after remand, are strikingly similar. In both orders, the court stated that both parties have stable homes, and in both,

Matthew's behavior was a decisive factor in the award. Thus, Matthew's basic premise that the family court reversed its own findings of fact on remand is flawed.

#### CONCLUSION

The various courts that have reviewed this case have all come to the uniform conclusion the both Matthew and Stephanie are loving and caring parents who can provide a stable home for the child; only one, however, could be awarded primary custody. The family court considered all the relevant factors and, although it reached a conclusion different than the DRC and circuit court, it was based on substantial evidence in the record. Under the circumstances, it is not the role of this court to substitute its judgment for that of the family court.

The judgment is affirmed.

ALL CONCUR.

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