

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000098-ME

KARLA NUNLEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 02-CI-00328

TIM NUNLEY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: KELLER AND STUMBO, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Karla Nunley has appealed from the order of the McCracken Family Court modifying the custody of her minor children and naming her former husband, Tim Nunley, the primary residential custodian. Because we have determined that the family court did not make its decision on the basis of facts that had arisen since the original decree was entered or on substantial evidence of record, we reverse and remand.

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

Karla and Tim were married in McCracken County, Kentucky, on October 17, 1992. Two children were born of the marriage: Skylar Timothy, born November 10, 1995; and Talon Eugene, born June 6, 2000. After several temporary separations, Karla and Tim permanently separated on March 1, 2002, and Karla filed a Petition for Dissolution of Marriage one month later. The family court entered an interlocutory decree of dissolution the following March, leaving the settlement of the marital estate and custody to be decided. Karla and Tim reached an agreement on all remaining issues, which the family court adopted in its Supplemental Findings of Fact, Conclusions of Law and Decree entered on June 17, 2003. Pursuant to the terms of their agreement, the parties were awarded joint custody of the children, with Karla being named the primary residential custodian. Tim was awarded standard visitation and ordered to pay Karla child support. In October, Tim moved the family court to modify his visitation based upon his move to Wisconsin the previous month. An agreed order was entered shortly thereafter setting up a new visitation schedule. In October 2004, the family court reduced Tim's child support obligation, presumably due to the imputation of income to Karla.

On May 11, 2005, Tim moved the family court to modify child support and to reinstate standard visitation. By this time, Tim had moved back to Kentucky, but was earning a lower hourly wage at Wal-Mart. The record does not reflect a ruling on the motion. On September 12, 2005, Tim filed a motion to modify custody, alleging that Karla had not complied with joint custody in that she made all of the decisions for the children, and that she had recently uprooted the children without advance notice to him or

his parents and moved to Georgetown, Kentucky, several hours away. Tim also mentioned that Karla was suffering from bipolar disorder. He requested that he be named the primary residential custodian. In the affidavit attached to the motion, Tim's father, Larry Nunley, stated that he was concerned for his grandsons' well-being, that Karla suffered from bipolar disorder, and that Karla had taken the boys from the area without letting anyone know. Finally, he stated that Tim was a good father and that it would be in the boys' best interest for Tim to be awarded custody.

In support of his motion, Tim filed the deposition testimony of Larry Nunley; his mother, Linda Nunley; and his sister, Kelly Gross. All three testified that Karla was mentally unstable and recounted examples of past lies, including being raped by Tim, her father, and her former brother-in-law. Tim testified at the hearing, which took place over two days in October and November 2005. Tim first addressed Karla's sudden move to Georgetown without notice to him. Tim testified that she claimed the move was due to a break-in and attempted attack. For the most part, however, Tim focused on Karla's past actions. He testified about false and suspected false accusations Karla had made concerning incidents that took place before their children were born. These incidents included a break-in at an apartment they shared early in their marriage as well as rape allegations. Tim introduced undated, handwritten letters from Karla, either making these accusations or recanting them. Tim admitted, however, that Karla's accusations against her grandfather were substantiated. Further, Tim admitted that Karla had taken out a Domestic Violence Order against him. On cross-examination, Tim

admitted that he relocated to Wisconsin to move in with a woman he met on the internet. Regarding his children, he was unable to testify how old they were, what grade of school they were in, or what medications they took. In further support of his motion, Tim called a former supervisor from Wal-Mart and a woman he knew from church, who both testified that Tim was a good father and interacted well with his children.

Karla testified that she lived with her sister's family in Georgetown, Kentucky, and that her children were enrolled in the 4th grade and kindergarten. She testified about her mental health problems, for which she had been in treatment with Dr. Karl Klauburg since 1989 when she was 16 years old. Karla stated that she had not had any significant problems since 1993 when she was last hospitalized and that she was well-regulated on medication. She stated that Tim was aware of her mental health issues when he agreed to the custody arrangement. Furthermore, Karla testified that she had always been the primary caregiver for the children and that her mental health had not affected her children's lives. Regarding her marriage, Karla stated that she and Tim had separated two times before the final separation, once in 1997 due to his drinking and affairs, and again after Talon's birth in 2000. Tim had little interaction with the children during the periods of separation. Regarding her move to Georgetown, Karla testified that she moved in order to protect herself and her children after she had been sexually assaulted in her home in April and again in July 2005. She also related threats to her life since July. Regarding her past accusations of rape, Karla testified that her grandfather

had gone to prison for raping her, and that she made similar, but admittedly false, allegations against her father because she was angry with him for failing to protect her.

Judge Sanderson conducted a rather lengthy examination of Karla. Under her questioning, Karla admitted that she had been receiving Social Security Disability benefits for the past few years solely due to her diagnosis of bipolar disorder, but that she was properly medicated for this condition. She testified that she was sexually abused by her grandfather from the age of 10 until she was approximately 17 years old. Her grandfather admitted to the abuse and was serving a prison sentence when he died of cancer when Karla was 18. Judge Sanderson then questioned Karla about the reported rapes in April and July. Karla testified that she contacted the police and that rape kits were completed, but that she did not know the results. She stated that photographs were taken of bruises on her face after the second rape. Karla also testified about threats to her life that were made to her current boyfriend in September, one from a payphone to his work and one in the form of a letter left on his car.

Karla's sister, Kim Unfried, testified that Karla lived with her and was mentally fine. She detailed Karla's daily routine with her children. McCracken County Sheriff's Department Detective Jim Smith testified regarding his investigation of the second sexual assault. He indicated that no foreign DNA was found in either rape kit, and that the letter found on Karla's boyfriend's car was being processed for fingerprints. He spoke with Karla about the telephone threat, noting that she was scared and concerned

for her safety. They discussed her options and he told her that children are resilient, referring to a move to her sister's home.

In addition to her testimony, Karla submitted the deposition testimony and medical records of her treating psychiatrist, Dr. Klauburg. Dr. Klauburg first saw Karla in 1989 when she was referred by Family Services following an altercation between her and a classmate, as well as a threat of suicide. He noted that Karla had been adopted when she was 9 days old. Karla saw a therapist at Massac County Health Center over the next two years. In 1991, Karla, while married to her first husband, was admitted to Charter Hospital for two weeks due to mood swings, prominent depression, and mild psychotic thinking after she threatened a peer. At that time, Karla disclosed her history of sexual abuse by her grandfather. Her diagnosis of major depression with psychotic features was managed by Prozac. Karla continued to follow up with Dr. Klauburg's office, during which time she learned to deal with her past sexual abuse. She successfully continued her course of therapy and medication until she was tapered off of her medication and discharged from Dr. Klauburg's care in June 1992.

Karla was hospitalized for the second and last time in October 1993 for depression and suicidal thoughts. At this point, she was married to Tim and they were having difficulties. Dr. Klauburg prescribed Paxil to manage her depression. Karla continued with therapy, where she continued to show good control of her depression. Dr. Klauburg discontinued the Paxil, and then discharged her from his care in July 1994.

Four years later, Karla returned to Dr. Klauburg for a reevaluation, noting that her depression had worsened significantly in the preceding two months. Karla began taking Paxil again, and showed good improvement once the medication was reinstated. She started therapy again and over the next several years she recounted her two pregnancies as well as her marital difficulties, including separations and reconciliations. Throughout the process, Dr. Klauburg's record show that Karla maintained good control of her depression and would immediately contact his office if her symptoms of depression began to recur.

In 2000, Karla reported experiencing wild mood swings. At that time, Dr. Klauburg diagnosed her with rapid cycling bipolar disorder, and began treating her with Depakote, a mood stabilizing agent. She showed a significant improvement in her mood swings once she began taking Depakote. She continued to do well through 2001 and 2002, despite the unexpected death of her father in 2001 and finally leaving Tim in 2002. However, in October 2002, she reported that she was not doing well, and that "I feel like 2 different people." She related that she had been caught shoplifting twice at Wal-Mart, but could not remember anything about the incidents. Because she appeared to be developing a significant level of depression, Dr. Klauburg prescribed Lexapro and discontinued Paxil. Karla showed significant improvement on Lexapro. However, in August 2004, Karla reported a fairly rapid onset of progression of her symptoms. Dr. Klauburg opted to increase Karla's dosage of Lexapro. At her next appointment six days later, Karla reported that she did not feel like herself, noting disturbing thoughts and

intermittent suicidal thoughts. Dr. Klauburg described this result as a failed trial of Lexapro, which he discontinued, and began Karla on a trial of Wellbutrin (an anti-depressant) and Seroquel (an anti-psychotic medication), along with Depakote. Karla improved on the new combination of medication and continued to remain stable.

At her April 11, 2005, appointment, Karla reported an incident the prior Saturday when she had been raped at gunpoint in her house. Dr. Klauburg noted a modest degree of depression, secondary to trauma. When she reported problems sleeping since the rape, Dr. Klauburg increased the dosage of Seroquel. During her next appointments, Dr. Klauburg noted that Karla was feeling better and responding to her medication. The last office note was dated October 13, 2005. During that appointment, Karla related that she had recently had to relocate after a second rape in July and after her boyfriend had received threats to her life. Despite this, Dr. Klauburg noted that she had continued good control of her depression and mood swings.

In his deposition, Dr. Klauburg testified that he was not aware of any evidence that Karla's mental health issues had affected her ability to parent, or that her rape allegations were the product of her mental disorder. He testified that Karla was still compliant with her medications and displayed no evidence of psychotic thinking or hallucinations.

On September 16, 2006, almost a year later, the family court entered an order granting Tim's motion to modify custody and making the following findings:

1. The court has some very grave concerns about the mental health capacity of [Karla]. Specifically, her

propensity to make false allegations of abuse and sexual abuse against innocent parties, including but not limited to [Tim]. Not only was credible evidence of this propensity presented at the hearing, but the psychological and medical records submitted to the court for review bear out that [Karla's] mental health is unstable at best.

2. [Tim] is able and willing to drive [sic] a stable home for the parties' minor children. Additionally, [Tim] has the strong support of his family who live in the area and are willing to assist him in providing childcare to the parties' minor children.

3. The court regrets the long delay in issuing this Order; but it took a significant amount of time to secure the psychological records of [Karla] as requested by the court.

4. After reviewing the evidence and testimony, the court finds that it is [in] the best interests of the parties' minor children that custody should be modified and [Tim] should be named as the primary residential custodian of the parties' minor children subject to the reasonable visitation of [Karla]. [Karla] is hereby granted the standard visitation schedule of the McCracken Family Court effective as of the date of this Order.

Following the entry of this order, the family court apparently allowed the parties to supplement the record with evidence of events that had taken place since the hearing the previous year. While Tim did not submit any additional evidence, Karla introduced the medical report and live testimony of licensed clinical psychologist Dr. Laura Liljequist. Dr. Liljequist performed a psychological evaluation on Karla in October 2006, and reviewed Dr. Klauburg's records. Based upon her evaluation, Dr. Liljequist agreed with Dr. Klauburg's diagnosis and stated that Karla's condition was stable on medication. Regarding her mental stability, Dr. Liljequist testified that Karla

would experience a mild impairment in her day-to-day functioning when her symptoms reoccurred, at which times she would see Dr. Klauburg more often. Karla was able to self-monitor her symptoms, and then would call her physician. Regarding Karla's refusal to discuss the details of the 2005 rapes, Dr. Liljequist testified that this was common for trauma victims, as it would cause anxiety. Therefore, such victims avoid talking about the incidents.

At the conclusion of Dr. Liljequist's testimony, the family court reaffirmed its decision on the record, and stated that Karla was not stable enough to have her children full-time. The family court also found that Karla's lack of stability affected her children, as her fear made her move, and that the children were not sheltered from her mental problems. Finally, the family court found that Tim was a better parent at that point under the best interest standard.

On December 14, 2006, the family court entered an order memorializing its oral findings:

1. In Ordering the [sic] custody be modified to name [Tim] as the primary residential custodian of the parties' minor children, SKYLAR TIMOTHY NUNLEY and TALON EUGENE NUNLEY, the court, in addition to hearing the testimony and reviewing the evidence presented at the hearing by the parties' respective counsel, also reviewed the psychiatric records of [Karla] developed over her course of treatment [with] her psychiatrist, Dr. Klauberg [sic]. The records from Dr. Klauberg [sic] show that [Karla] was under his care and treatment, and continues to be under his treatment, for the past sixteen (16) years. Based on the court's review of Dr. Klauberg's [sic] records and the testimony presented at the original custody modification hearing, the court believes that [Karla] was not mentally stable.

2. At the supplementary hearing held on October 31, 2006, [Karla] presented expert witness, Dr. Laura Lilequist [sic], a Ph.D. in clinical psychology. The court accepted Dr. Lilequist [sic] as an expert witness and allowed her to testify as to her psychological opinion of [Karla] with whom Dr. Lilequist [sic] had met on two (2) occasions and had administered various psychological tests to [Karla]. It became apparent during the course of the hearing and Dr. Lilequist's [sic] testimony that she had reviewed Dr. Klauberg's [sic] psychiatric records of Ms. Nunley, but did not have a full and complete set of records from Dr. Klauberg [sic]. Nevertheless, Dr. Lilequist [sic] still agreed with Dr. Klauberg's [sic] findings.

3. No testimony was produced at the supplemental hearing to change the court's ruling that Karla Nunley is not stable enough to care for the children on a permanent basis. The court finds that it was Ms. Nunley's mental instability and fear that led her to uproot the children from the community in which they lived near their extended family, and to move them several hundred miles away to live in a basement. Although the court believes that Ms. Nunley was afraid and traumatized in part due to her condition, her actions as a result of that condition were witnessed by her children and it was certainly detrimental to them.

4. While the court believes that Ms. Nunley has sought treatment when she feels necessary, the fact that she has to seek treatment for her mental issues certainly affects the children and the court believes that the father, [Tim], remains better suited to have primary custody of the children.

The family court went on to order Karla to send the children's Social Security Disability checks to Tim and terminated Tim's child support obligation as of October 1, 2006. It is from this order that Karla has appealed.²

² We note that at the conclusion of the December 14, 2006, order, the family court stated, "This is a Final, unappealable Order, there being no just cause for delay." (Emphasis added.) We shall assume that the family court meant to state that the order is final and appealable.

Karla raises two issues on appeal. First, she argues that the family court erred in considering irrelevant mental health testimony and records, specifically any information that predated the birth of her children or that had no impact on her ability to parent. Second, she argues that the family court erred in modifying custody based upon the relocation of the primary residential custodian. In his brief, Tim asserts that Karla's mental health is relevant to the determination of child custody. He then argues that the family court did not modify custody based on Karla's relocation, but rather on her lack of mental stability.

STANDARD OF REVIEW

Our standard of review in this matter 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.

In *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003), the Supreme Court of Kentucky addressed this standard, 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] reversal,” and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we shall review the family court’s decision in this matter.

ANALYSIS

The applicable statute in this case is KRS 403.340, which provides for the modification of a custody decree. The statute, as amended by the General Assembly in 2001, provides:

- (2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
 - (a) The child’s present environment may endanger seriously his physical, mental, moral, or emotional health; or
 - (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.
- (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;
 - (c) The factors set forth in KRS 403.270(2)³ to determine the best interests of the child;
 - (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;

³ 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.

- (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 orders shall not be made solely on the basis of which parent is more likely to allow visitation or pay child support;
- (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

In amending the statute, “the General Assembly not only relaxed the standards for modification of custody, but it also expanded upon the factors to be considered when modification is requested. . . . The former standards for modification . . . are now mere elements or factors to be considered by the court.” *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky.App. 2004). KRS 403.350 requires a party seeking modification of a custody decree to submit an affidavit supporting the motion. The court must deny the motion “unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.” *Id.*

In the present case, Tim filed his motion to modify custody over two years after the entry of the custody decree. Therefore, we shall concentrate on the two-prong test set out in KRS 403.340(3); namely, whether a change has occurred in the circumstances of the children or their custodian and whether modification would be in the

children's best interest. The statute makes it clear that both findings must be based on facts that have arisen since the original, or prior, custody decree was entered.

Karla first argues that the family court improperly considered irrelevant testimony and records concerning her mental health. She asserts that conduct of which the children were not aware and that did not adversely affect them should not be considered. She relies upon KRS 403.270(3) in the general custody section of the Act, which provides that, “[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. . . .” She also relies upon this Court's opinion in *Basham v. Wilkins*, 851 S.W.2d 491 (Ky.App. 1993), Superseded by Statute on other grounds as stated in *Elery v. Martin*, 4 S.W.3d 550 (Ky.App. 1999), which addressed, in part, the lower court's consideration of the mother's mental health in deciding the custody of a child born out of wedlock. In *Basham*, the Court noted that the record contained evidence that the mother's mental disorder affected her ability to parent. Here, Karla argues that there is no evidence in the record that her mental health affected her ability to parent, and should therefore have been excluded. Finally, Karla relies upon *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983), for the proposition that misconduct of a proposed custodian must have adversely affected, or be likely to adversely affect, the child before such misconduct may be considered.

We disagree with Karla's assertion that the family court improperly considered her mental health in deciding to modify custody. The mental health of all individuals involved in a custody dispute is a relevant factor the court must consider.

KRS 403.270(2)(e). However, we note that Karla's medical records reveal that she, for the most part, had good control of her depression and bipolar disorder, that her symptoms were successfully regulated by an evolving regimen of medications, and that she was able to recognize changes in her mental health and would promptly seek treatment.

Furthermore, her long-time treating psychiatrist testified that he was not aware of any evidence that her mental health issues affected her ability to parent. We perceive no error in the family court's reliance upon the evidence of Karla's mental health.

Next, Karla argues that the family court erred by basing its decision to modify custody on her relocation, which she asserts is not enough to justify modifying custody. Tim points out, correctly, that the family court did not base its decision on Karla's decision to relocate. Rather, Tim states that the decision was based upon the family court's finding that Karla was too mentally unstable to care for her children on a permanent basis.

However, we do agree with Karla that the family court abused its discretion in modifying custody in this matter, as the decision was not based on facts that had arisen since the prior decree. Additionally, the family court's finding that Karla was too mentally unstable was clearly erroneous. The two orders made it clear that the decision was solely based upon the family court's finding that Karla was mentally unstable. The Legislature made it clear that a decision to modify custody must be based on "facts that have arisen since the prior decree or that were unknown to the court at the time of entry

of the prior decree.” KRS 403.340(3). Furthermore, such facts must be based upon substantial evidence of record. Otherwise, such factual findings are clearly erroneous.

While it is arguable that the family court did not know of Karla's mental health history when the custody decree was entered, as it was based upon Karla and Tim's agreement, neither Tim nor the family court can be permitted to rely upon incidents prior to the 2003 custody decree to justify a modification. Tim quite clearly knew of Karla's mental health issues when he agreed that she should be designated as the primary residential custodian. Despite this knowledge, Tim specifically stated in his motion to modify custody that Karla had been diagnosed with bipolar disorder, a diagnosis that Karla received in 2000, well before Karla even filed the petition for dissolution. In the initial order modifying custody, the family court specifically cited to Karla's “propensity to make false allegations of abuse and sexual abuse against innocent parties[.]” Many of these allegations happened years before the children were born, and at least one allegation (against her grandfather) was indisputably true. Karla's false accusations against her father were explained by expert witness testimony as a transfer of blame for her father's failure to protect her from abuse. Additionally, Karla's accusations against Tim precipitated their final separation, which necessarily came before the custody decree in the matter.

The only possible false allegations post-dating the 2003 custody decree were about the rapes in 2005. However, there is absolutely no evidence in the record that Karla was lying about the 2005 rapes; in fact, at the time of the hearing, those police files

remained open and active. Any inference the family court could have made that Karla fabricated these accusations would necessarily be based upon pre-2003 incidents.

Karla's relocation to Georgetown serves as the only possible change in circumstance, post-decree, upon which the family court could have based its decision to modify custody. However, the family court did not cite to this relocation when it made its decision; rather, the family court based its decision solely on its finding that Karla was mentally unstable.

Even if we were to hold that the family court properly found a change in circumstance took place, we nevertheless hold that the family court's findings that Karla was not mentally stable and that her mental health issues affected her children are not based upon substantial evidence of record. Even a brief review of Dr. Klauburg's records reveals that Karla was able for a majority of her many years of treatment to maintain good control of her depression and later her bipolar disorder through psychotropic medication and therapy. Even when her symptoms returned, she immediately sought treatment and was able to quickly regain control of her disorders.

Furthermore, there is no evidence that her seeking treatment affected the children, as found by the family court. Dr. Klauburg specifically testified that there was no evidence that her mental health issues had affected the children. The one incident when her symptoms increased following the 2003 custody decree came about when the children were staying with Tim, and that incident represented a failed trial of a medication that Dr. Klauburg prescribed. There is also no evidence that the children

were negatively affected by the move to Georgetown. Karla's sister testified that Karla enrolled them in school and that she had already implemented a routine with her children. Detective Smith also testified that he told Karla that children were resilient in their discussion of her possible relocation.

For the foregoing reasons, we hold that the family court erred in failing to base its decision to modify custody on facts that had occurred since the original decree in 2003. Furthermore, we hold that the family court's findings were not based on substantial evidence of record. Accordingly, we reverse the order of the McCracken Family Court modifying custody and remand this matter for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Delbert K. Pruitt
Paducah, Kentucky

BRIEF FOR APPELLEE:

Jeffery P. Alford
Paducah, Kentucky