

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000015-ME

DAVID THOMASSON

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE ELEANORE GARBER, JUDGE  
ACTION NO. 02-D-500341 & 02-D-500341-002

LIBBY THOMASSON

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND REMANDING

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BEFORE: CAPERTON, COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: David Thomasson appeals from a Jefferson Family Court order finding that he committed domestic violence against Libby Thomasson, his former wife, and modifying the custodial arrangement regarding the parties' minor child. For the reasons stated herein, we affirm in part, vacate in part, and remand.

On November 17, 2010, Libby filed a domestic violence petition alleging David yelled at her, grabbed her, and threatened to break out her car or house windows. She further alleged that David had previously struck her in the head, causing her to bleed. She requested a restraining order and temporary custody of the parties' minor child. The family court then issued an emergency protective order against David and deferred a temporary custody decision.

On November 30, 2010, the family court held a hearing where the parties appeared without counsel. The family court read Libby's petition into the record and asked David if the allegations were true. David denied portions of the petition but admitted that he threatened to break the windows of Libby's car. He further admitted that he had struck and punched Libby in the past. After hearing this testimony, the family court found that David committed domestic violence by threatening to break Libby's car windows, which was a continuation of his prior history of physical abuse. The family court also found that David was likely to commit domestic violence in the future. The family court then issued a restraining order against David and ordered that he have no contact with Libby.

Libby then asked the family court to address the issue of child custody because she did not want their child to be around a drug user. While testifying that she and David had a history of drug abuse, she stated that she had been clean for several years but that David had begun to abuse drugs again. However, David denied that he was using drugs and submitted to a court-ordered drug screening. Subsequent to the hearing, David's drug screening revealed he was drug free.

After Libby's testimony, the family court issued an order designating the mother as the child's residential parent.<sup>1</sup> The family court ordered that David would no longer exercise time-sharing during the child's school week but would have physical custody of the child on weekends. This custody modification was a reduction of David's time with the child since the parties previously had equal time with the child. The family court ordered that the parties' divorce agreement would continue to control the holiday time-sharing schedule. This appeal follows.

David contends that the family court erred by failing to hold a full evidentiary hearing before modifying the parties' custody arrangement. David further argues that the family court improperly denied him the right to call witnesses at the hearing. He argues that the family court's domestic violence order must be vacated.

On appeal of a decision from a bench trial, we review the lower court's findings of fact for clear error and its legal determination *de novo*. *Arnold v. Patterson*, 229 S.W.3d 923, 924 (Ky.App. 2007). A family court's findings of fact are not clearly erroneous if supported by substantial evidence. *Clark v. Bd. of Regents of Western Kentucky University*, 311 S.W. 3d 726, 729 (Ky.App. 2010). Substantial evidence constitutes proof of facts which have sufficient probative value to permit a reasonable person to reach a factual determination. *Id.*

Before a domestic violence order can be issued, a family court must conduct a full evidentiary hearing where the parties have an opportunity to be

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<sup>1</sup> Based on the testimony at the hearing, it appears that the parties exercised full joint custody of their child prior to the family court's domestic violence order.

heard. *Wright v. Wright*, 181 S.W.3d 49, 53 (Ky.App. 2005). Under KRS<sup>2</sup> 403.750(1)(f), a family court is further empowered to make a temporary award of custody if it finds that domestic violence and abuse have occurred and may occur again. In making a temporary custody determination, a family court is required by the statute to comply with the criteria set forth in KRS 403.270, 403.320, and 403.822.<sup>3</sup> Relevant to this case, KRS 403.270 and 403.320 require a family court to engage in specific tasks to determine a custody award.

KRS 403.270 requires a family court to make a custody decision that is in the best interest of a child after the consideration of several factors. *Chappell v. Chappell*, 312 S.W.3d 364, 366 (Ky.App. 2010). KRS 403.320 requires family courts to determine a custodial arrangement if domestic violence is alleged that does not seriously endanger a child's or custodial parent's physical, mental, or emotional health. *Abdur-Rahman v. Peterson*, 338 S.W.3d 823, 825-26 (Ky.App. 2011). When making a custody determination, the family court must consider all relevant factors and make sufficient findings to support its decision. *McFarland v. McFarland*, 804 S.W.2d 17, 18 (Ky.App. 1991).

From a review of the record, the family court did not engage in the consideration of the factors required by KRS 403.750(1)(f). This statute expressly requires family courts to apply the factors found in KRS 403.270 and 403.320.

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<sup>2</sup> Kentucky Revised Statutes (KRS).

<sup>3</sup> KRS 403.822 concerns the jurisdiction of Kentucky courts to make an initial child custody determination and has no application in the current case.

Before custody of a child is modified under these statutes, it is imperative that an analysis be conducted to determine the best interests of the child. *McFarland*, 804 S.W.2d at 18. Ultimately, in cases where a parent's misconduct is at issue in determining a custodial arrangement, a family court must consider the potential impact that the alleged misconduct has on the child's relationships. *Krug v. Krug*, 647 S.W.2d 790, 792-93 (Ky. 1983). While an earnest effort was made, the family court did not consider the relevant custody factors or make sufficient findings.

We are cognizant of the heavy dockets and responsibilities of our family courts and the difficulty in resolving custody issues. However, the statutory scheme provided by the legislature mandates that custody changes proceed in a specific manner, and we must effectuate this intent. *Cromwell Louisville Associates v. Commonwealth*, 323 S.W.3d 1, 4 (Ky. 2010).

We finally note that the family court properly conducted the hearing in all other regards. The parties were administered oaths and were permitted to testify regarding relevant matters without restriction. While David contends that his witnesses were improperly excluded, he did not call a witness and the family court did not deny him the right to call witnesses. Consequently, because the family court did not issue a ruling regarding his witness and David made no reasonable effort to obtain a ruling, this issue is not preserved for review. *Jewell v. City of Bardstown*, 260 S.W.3d 348, 350-51 (Ky.App. 2008).

Accordingly, we hereby vacate the portion of the domestic violence order which modified custody and remand the matter to the family court for an

evidentiary hearing regarding child custody in conformity with this opinion. The remaining portion of the domestic violence order issued against David is affirmed.

For the foregoing reasons, the Jefferson Family Court's domestic violence order is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Hyatt Gaston  
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed