

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001539-ME

MAX STARNES II

APPELLANT

v. APPEAL FROM GALLATIN CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 10-CI-00066

HOLLIE HUDSON
(FKA HOLLIE BLEVINS)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS AND MOORE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Max Starnes, II (Starnes) appeals from an order of the Gallatin Circuit Court allowing Hollie Hudson (Hudson) to relocate with their

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

child. Starnes argues that the trial court's findings of fact are clearly erroneous and that it failed to make essential findings on whether Hudson's proposed relocation would be in the best interests of the child. We agree that the trial court's findings are inadequate. Hence, we reverse and remand for additional findings and conclusions as required by KRS 403.270.

The child, M.F.S., was born to Hudson in June of 2008. Starnes, the father, was not married to Hudson. However, he was very involved with raising the child for the first year of his life. In June of 2009, the parties broke up. However, they verbally agreed to share custody of the child. The Grant District Court entered a judgment of paternity adjudicating Starnes to be the father of M.F.S.

Thereafter, Hudson began a relationship with Daniel Hudson, who was then serving in the United States Army. In November 2009, Hudson and the child moved to Clarksville, Tennessee, to be near where Daniel was stationed at Fort Campbell, Kentucky. The two were married in January 2010, and they now have a child together.

Starnes alleges that Hudson took M.F.S. out of Kentucky without his knowledge or permission. Hudson states that she informed Starnes of the move and offered him opportunities to visit the child. In any event, Starnes filed this action in March of 2010, seeking sole custody of M.F.S. Hudson responded and also sought sole custody.

The trial court held a hearing on April 15, 2010, on the respective motions for temporary custody. At the conclusion of the hearing, the parties agreed to a temporary custody order granting joint custody of the child with each parent exercising parenting time during alternating weeks. The parties also agreed that Starnes would pay child support in the amount of \$250 a month, which was a deviation from the child-support guidelines due to the shared parenting arrangement. The trial court entered a written order adopting the parties' agreement on May 14, 2010.

In May 2011, Hudson filed a motion to modify the temporary custody order to accommodate her relocation. Daniel Hudson was discharged from the Army and the couple wanted to move to Delaware to be close to Daniel's family. Starnes objected to the relocation.

Following a hearing, the trial court entered an order on June 29, 2011, granting joint custody with Hudson designated as the primary residential custodian. The court granted parenting time to Starnes for five weeks in the summer, from Christmas Eve through New Year's Day, from the day after Thanksgiving until the following Monday and during the child's fall and spring breaks. The court directed that the parties meet at a halfway point to exchange the child. The court also directed that Starnes have reasonable phone contact with the child. The court kept Starnes's child support obligation at \$250 per month, with the deviation now based upon Starnes's increased travel expenses. Hudson is responsible for providing medical insurance for the child. Unpaid medical, dental, optical and

prescription expenses are to be divided equally after the first \$100, which is Hudson's responsibility.

After entry of this order, Starnes filed a motion to alter, amend or vacate, Kentucky Rules of Civil Procedure (CR) 59.05, and for more specific findings pursuant to CR 52.04. He specifically sought findings that the relocation would be in the best interests of the child. On July 25, 2011, the trial court entered additional findings and an order denying the motion to vacate. Starnes now appeals to this Court.

The current case does not involve modification of a final custody order, but only modification of a temporary custody order. Consequently, the requirements of KRS 403.340 do not apply. *Frances v. Frances*, 266 S.W.3d 754, 757 (Ky. 2008). Rather, the trial court must apply the best interests standard of KRS 403.270. *Id.* That statute directs the court to “determine custody in accordance with the best interests of the child[.]” KRS 403.270(2). Factors relevant to this determination include, among other things, the wishes of the parents, the wishes of the child, the interaction of the child with his parents and siblings, the child's adjustment to his home, school, and community, and information and evidence of domestic violence. *See* KRS 403.270(2)(a)-(d) and (f).

Starnes first argues that the trial court's factual findings were not supported by substantial evidence. In reviewing a child custody determination, this Court reviews the trial court's factual findings for clear error. *Reichle v. Reichle*,

719 S.W.2d 442 (Ky. 1986). The court’s “[f]indings 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.” CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). “A factual finding is not clearly erroneous if it is supported by substantial evidence.” “‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey* at 782 (internal footnotes omitted). After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

Starnes takes issue with three of the factual findings in the trial court’s July 25, 2011, order. First, Finding # 4 states: “From November, 2009 to March, 2010 [Starnes] saw the child only on weekends.” Second, Finding # 12 states: “The Court finds that [Hudson] has been the primary caregiver for the minor child since November of 2009.” And third, Finding # 13 states: “The Court finds that both parties are adequate parents but that [Hudson] could spend much more time with the minor child due to her not being employed.

We agree with Starnes that Findings # 4 and 12 are clearly erroneous. With regard to Finding # 4, the parties agree that Starnes did not see the child at all during the period from November of 2009 to March 2010. As noted above, Starnes alleges that Hudson relocated to Tennessee without informing him or

asking his permission. Hudson agrees that Starnes did not see the child on weekends during this time, but she alleges that this was due to Starnes's decision to decline visitation. In either case, the trial court's finding that Starnes saw the child on weekends is not supported by any evidence. Similarly, Finding # 12 is expressly contradicted by the record. Although Hudson clearly was the child's primary caregiver from November 2009 until April 2010, the parties exercised equal parenting time after entry of the court's temporary custody order.

Nevertheless, the trial court's factual errors on these two points are not determinative. Finding # 4 concerns Starnes's relationship with the child from November 2009 until April 2010. Although Starnes suggests that Hudson improperly kept him from seeing the child during this time, the trial court accepted her testimony that she offered Starnes the opportunity to see the child after she moved to Tennessee. Furthermore, any disruption in visitation was relatively brief and Starnes promptly brought a motion seeking custody and visitation. Moreover, the events during this period are not directly relevant to a determination of whether the relocation would be in the best interests of the child.

The parties' exercise of alternating parenting time under the temporary custody order is more relevant. However, the trial court is not necessarily bound by the terms of a temporary custody order when making a final custody determination. *Frances*, 266 S.W.3d at 757. Rather, the controlling question is whether the relocation would be in the best interests of the child based on the standards set out in KRS 403.270(2). *Id.*

However, this matter goes to Starnes's next argument that the trial court failed to make sufficient findings of fact concerning the best interests of the child. He argues that the trial court was required to make specific findings regarding each of the factors set out in KRS 403.270(2). KRS 403.270 requires the court to make findings on all *relevant* factors, and the court's findings must be sufficient to allow for meaningful appellate review. *Anderson v. Johnson*, 350 S.W.3d 453, 457-458 (Ky. 2011). The trial court did not make specific findings on each of the factors set out in KRS 403.270(2) and did not expressly find that relocation would be in the best interests of the child.

The trial court's findings may be sufficient to infer an ultimate conclusion that relocation would be in the best interests of the child. Indeed, Finding # 13 specifically addresses the best interests standard, concluding that Starnes and Hudson are both "adequate" parents, but determining that Hudson will likely be able to spend more time with the child. Starnes agrees that Hudson is currently unemployed, but notes that Hudson plans to attend school in the near future. It may be debatable whether Hudson can spend "much more" time with the child than Starnes for an indefinite period. But based on their current employment and schedules, we cannot conclude that this finding was clearly erroneous.

However, there are no other findings regarding the other relevant statutory factors. Although the trial court is not obligated to consider the terms of a temporary custody order, it must address the interaction and interrelationship of the child with his parents. KRS 403.270(2)(c) & (d). The trial court was under the

mistaken impression that Hudson has been the child's primary caregiver since birth. Furthermore, while the court suggested that Hudson may be able to spend more direct time with the child, it did not address the child's adjustment to his home and community with Starnes or how the proposed relocation may affect those relationships. KRS 403.270(2)(d). Since the court did not address whether it considered this factors, its findings are inadequate to allow this Court to determine whether its decision to grant primary residential custody to Hudson was an abuse of discretion.

Accordingly, the order of the Gallatin Circuit Court is reversed and this matter is remanded for additional findings and conclusions as set forth in this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Acena Beck
Aaron Beck
Covington, Kentucky

BRIEF FOR APPELLEE:

William R. Adkins
Williamstown, Kentucky