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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-001902-ME

REBEKAH SUMMERS (FORMERLY QUEENO) — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 03-CI-500526

TERRY L. QUEENO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: The issues to be decided are whether the Jefferson Family Court abused its discretion by granting Appellee Terry Queeno's motion to modify custody, thereby awarding Terry sole custody of the parties' two minor children, and whether the family court abused its discretion by failing to award

Appellant Rebekah Summers (formerly Queeno) reasonable visitation with the children. For the reasons that follow, we affirm.

## I. Facts and Procedure

Terry and Rebekah married on October 20, 1990. Two children were born of the marriage: Taylor Queeno born October 26, 1997, and Kassandra Queeno born December 26, 1998. In 2003, Terry and Rebekah sought to dissolve their marriage.

On February 24, 2003, Terry and Rebekah entered into an agreed order regarding, *inter alia*, child custody and time-sharing. Under its terms, the parties agreed to share joint custody of their children, with Rebekah being the primary residential parent, and Terry enjoying liberal time-sharing. The decree of dissolution, entered January 30, 2004, incorporated the agreed order. This custody arrangement remained the status quo for several years.

In August 2010, Rebekah's housing situation became unstable; Rebekah and the children came to temporarily live with Terry. While there, calamity ensued. On August 26, 2010, law enforcement contacted Terry to pick up the children after Rebekah was arrested and taken into custody.[1] A few days later, Rebekah threatened suicide in front of the children. On September 27, 2010, Terry filed a motion seeking to modify custody, asserting the children's interests would be best served if he were to be awarded sole custody.

[1] The exact nature of the incident and subsequent arrest is unclear from the record.

While Terry's motion was pending, Rebekah committed an act of domestic violence against Terry. Terry immediately filed for, and the family court issued, an emergency protective order (EPO). Following a hearing, the EPO was converted to a domestic violence order (DVO). Under the terms of the DVO, Rebekah was to have no contact with Terry.

Because the act of domestic violence and Rebekah's suicide threat both occurred in the children's presence, the Cabinet for Health and Family Services (Cabinet) was notified. The Cabinet promptly filed neglect petitions against Rebekah; Rebekah subsequently stipulated to neglect. During the course of the neglect proceedings, the family court awarded Terry temporary custody of the children, and granted Rebekah limited supervised visitation.

Terry's motion to modify custody was held in abeyance pending the outcome of the DVO and neglect proceedings, and eventually came on for hearing in June 2011. Thereafter, on September 14, 2011, the family court concluded it was in the children's best interest to reside with Terry and granted Terry sole custody. In so finding, the family court explained, in relevant part:

> A domestic violence order was entered in this Court against [Rebekah] on October 13, 2010. Under the terms of the [DVO] she is to have no contact with [Terry]. . . . Dependency neglect and abuse petitions were filed regarding the parties' two children in 2010. On December 14, 2010, Rebekah entered an admission that the children were placed at risk when the domestic violence occurred which resulted in the entry of a domestic violence order against [Rebekah] and when [Rebekah] threatened suicide in the presence of the children. . . .

> Joint parenting requires communication. The terms of the [DVO] prevent [Rebekah] from communicating with [Terry]. Temporary custody has been granted to [Terry] as a result of [Rebekah's] actions. The Court finds that it is in the best interest of the children that their sole custody be to [Terry].

No post-judgment motions were filed. Rebekah appealed the family court's order.

## III. Standard of Review

The standard of review for any custody award, including a modification thereof, is well-established:

> Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

*Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (*quoting B.C. v. B .T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

## III. Analysis

Rebekah contends the family court erred in awarding Terry sole custody of Taylor and Kassandra. Rebekah also asserts that the family court abused its discretion when it failed to award her reasonable visitation.

### *A. Custody Modification*

Rebekah first maintains the family court abused its discretion when it granted Terry sole custody of the children. Rebekah's position is two-fold: (1) the family court failed to adequately consider and set forth specific findings of fact with regard to the specific statutory factors enumerated in Kentucky Revised Statutes (KRS) 403.340 and KRS 403.270(2); and (2) the family court's custody-modification determination lacks supporting substantial evidence.

A motion for custody modification is governed by KRS 403.340, which authorizes a child-custody adjustment if:

> after [a] hearing [the family court] 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[ren].

KRS 403.340(3); *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008) ("If a motion for change of custody is made more than two years after the date of the custody decree, the court must then evaluate custody based on the best interests of the child, and determine whether a change of custody from joint to sole should occur on that basis.").

In evaluating the children's best interest, KRS 403.340 directs the family court to consider several statutory factors, including, but not limited to:

> (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) 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.

KRS 403.340(3). Other factors pertinent to the best-interest determination include: (a) the parents' wishes as to custody; (b) the children's wishes as to their custodian; (c) the children's relationship and interaction with their parents, siblings, and other persons who may affect their best interests; (d) the children's "adjustment to [their] home, school, and community"; (e) "[t]he mental and physical health of all individuals involved"; (f) evidence of domestic violence; and (g) evidence the children have been placed with and cared for by a *de facto* custodian. KRS 403.270(2); KRS 403.340(3)(c).

Rebekah argues the family court committed reversible error when it failed to address each of the factors enumerated in KRS 403.340(3) and KRS 403.270(2). In support, Rebekah relies upon the decision of this Court in *Murphy v. Murphy*, 272 S.W.3d 864 (Ky. App. 2008), in which we held "it was clear error for the trial court to modify custody without engaging in the mandated statutory analysis and

reducing its required findings to writing." *Id.* at 869-70. *Murphy* is factually and legally distinguishable from the case at hand.

In *Murphy*, the trial court granted the father's motion to modify custody without setting forth *any* findings. Importantly, "[t]here were no affidavits, no testimony and no findings by the trial court." *Id.* at 869. This Court was unable to discern from the trial court's bare-bones order which, if any, statutory factors it considered prior to modifying custody, and the factual underpinnings in support of its custody-modification determination.

Quintessentially, *Murphy* addresses the situation in which a trial court fails to make *any* factual findings in support of its legal conclusion. Our Supreme Court has emphatically concluded that this is error because "trial court opinions affecting child custody [must] state the court's findings in support of its decision in writing." *Keifer v. Keifer*, 354 S.W.3d 123, 124 (Ky. 2011) ("A bare-bone, conclusory order . . . setting forth nothing but the final outcome, is inadequate[.]").

Unlike *Murphy*, the family court's order here indicates that it did consider statutory factors, made relevant factual findings, and reduced those findings to writing.[2] The family court considered Rebekah's mental health, noting she threatened suicide in the presence of the children (KRS 403.270(2)(e)). The family court took into consideration evidence of domestic violence, particularly Terry's DVO against Rebekah (KRS 403.270(2)(f)). Similarly, the family court considered whether the children would be seriously endangered if placed with

[2] The family court's order does not specifically cite the relevant statutes; this, however, is not fatal because the order clearly references facts pertinent to the applicable statutory factors.

Rebekah, especially in light of Rebekah's admission that the domestic violence incident and her attempted suicide placed the children at risk (KRS 403.270(2)(d), (e), KRS 403.340(3)(e)). The family court also noted that Terry has had temporary custody of the children for approximately one year without concern or incident (KRS 403.270(2)(c), (d)). Rebekah's reliance on *Murphy* is misplaced.

The crux of Rebekah's argument is that the family court erred by not explicitly analyzing each specific factor in its order, and setting forth factual findings in support of those factors. We reject this argument for two reasons.

First, in *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), our Supreme Court clarified that when a family court makes "good-faith but incomplete findings" the party seeking relief must make a request for additional findings pursuant to Kentucky Rules of Civil Procedure (CR) 52.04.[3] *Id.* at 459. As explained, the family court here issued findings of fact addressing relevant statutory factors; we cannot say the family court failed to engage in a good-faith effort to make factual findings. In Summers' view, these findings are simply incomplete because the family court failed to consider additional statutory factors and issue related factual findings. Yet Summers, to her detriment, failed to request additional findings from the family court. *Id.* at 458 ("CR 52.04 . . . bars reversal or remand 'because of the failure of the trial court to make a finding of fact on an

[3] The Supreme Court took considerable care to distinguish this situation in which a family court makes "good-faith but incomplete findings" from a situation in which a family court fails to make *any* factual findings. *Anderson*, 350 S.W.3d at 457-58.

issue essential to the judgment' when a litigant fails to bring it to the court's attention by a written request for a finding.").

Second, we do not interpret KRS 403.340(3) as requiring the family court to conduct a surgically precise analysis setting forth in minute detail every conceivably relevant statutory factor and every plausible fact in support thereof. Instead, the family court need only consider those statutory factors truly relevant to the case before it. *Anderson*, 350 S.W.3d at 457 ("KRS 403.270 directs the court to 'consider all relevant factors.'"); KRS 403.270(2) (explaining in ascertaining the children's best interest, the family court "shall consider all ***relevant*** factors" (emphasis added)); *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) ("KRS 403.270(2) requires the trial court to consider all relevant factors and provides a list of non-exclusive, demonstrative factors to be considered in custodial determinations.").

Admittedly and ideally, the family court's order in this case could have been more explicit and more extensive; a simple review of the record reveals the family court could have made additional findings of fact pertinent to other statutory factors in support of its legal conclusion. However, our review also reveals that a substantial majority of those factors not specifically addressed by the court are either irrelevant, lack an evidentiary basis, or weigh in favor of Terry, not Rebekah. For example, while the evidentiary hearing did not produce any direct evidence of the children's wishes as to custody, Rebekah and Terry both testified that one child refuses to participate in visitation with Rebekah, indicating that child

would not wish to return to Rebekah's custody. KRS 403.270(2)(b), (c). Additionally, the evidence revealed the children were well-integrated into Terry's home and their school. KRS 403.270(2)(c), (d). As evidence of this, Rebekah testified she did not wish the children to be immediately uprooted from their present living situation, but requested a gradual transition back to her care. Additionally, Terry testified that when the children came to live with him, one daughter had a grade point average of 1.0 but, by the end of the school year, she had raised her GPA substantially and even received an award in social studies for outstanding performance. KRS 403.270(2)(d). Furthermore, Rebekah testified she is clinically depressed and is receiving mental health counseling, while Terry testified he is mentally stable and physically healthy. KRS 403.270(2)(e). Of particular concern was Rebekah's testimony that she lives with her current husband who allegedly molested the children in or about 2010 and intends for the children to return to that home, though Rebekah also indicated her husband may be moving to a long-term care facility. KRS 403.270(2)(c). While the family court could have made more in-depth factual findings, we nonetheless conclude it adequately considered the statutory factors and made sufficient written findings; reversal is not warranted.

Rebekah next asserts the family court's custody-modification determination is not supported by the evidence. Therefore, Rebekah maintains, the family court's custody-modification decision must be reversed. We disagree.

In custody proceedings, this Court may only discard the family court's findings if they are clearly erroneous, *i.e.,* not supported by substantial evidence. *Frances*, 266 S.W.3d at 756; CR 52.01. Substantial evidence constitutes "[e]vidence that a reasonable mind would accept as adequate to support a conclusion[.]" *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). The weighing of evidence is a function of the family court; whether we would have reached a contrary custody-modification decision is immaterial. *Id.* Likewise, it is not enough for Rebekah to assert that the evidence could have supported the outcome she desired, *i.e.,* maintaining joint custody and re-naming Rebekah the children's primary residential parent. To justify reversal, our review must reveal that the evidence does not, in fact, support the family court's modification decision.

As explained, KRS 403.340(3) permits a family court to modify custody "whenever modification would serve the best interests of the child." *See also Coffman*, 260 S.W.3d at 769 (family court is "authorized to change custody based upon the best interests of the child"). Here, the family court found it was in the children's best interest to award Terry sole custody. In support, the family court found Rebekah recently engaged in domestic violence, resulting in Terry seeking, and the family court issuing, a DVO. The DVO prevents Rebekah from communicating with Terry and, as aptly noted by the family court, joint parenting requires communication. The family court also found Rebekah's act of domestic violence placed the children at risk, resulting in the filing of dependency, neglect, and abuse actions, and calling into question Rebekah's mental stability, noting that

she threatened suicide in the presence of the children. This evidence, in addition to the evidence produced at the evidentiary hearing discussed above, is sufficient to support the family court's decision to modify custody.

In sum, Rebekah provides us with no persuasive grounds for concluding the family court abused its discretion when it granted Terry sole custody of the children. On that issue, we affirm.

***B. Visitation***

Rebekah next asserts the family court erred when it failed to address visitation in its order modifying custody. Rebekah maintains the family court, as a matter of law, should have granted her reasonable visitation absent a finding that visitation would seriously endanger the children's physical, mental, moral, or emotional health.

In response, Terry asserts this issue is unpreserved because at no point during the course of the family court proceedings did Rebekah seek or move for visitation. Alternatively, Terry maintains the family court already addressed visitation in the course of the dependency, neglect, and abuse matter.

KRS 403.320 controls visitation of minor children. That statute provides:

> (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

> (2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.
>
> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

KRS 403.320(1)-(3).

Rebekah reads this statute as automatically mandating that the family court issue a visitation order whenever there is a change of custody, unless the family court first conducts a hearing and finds visitation would seriously endanger the children involved. We do not agree. We must construe a statute so that no part of its provisions is rendered meaningless and ineffectual. *Hardin County Fiscal Court v. Hardin County Bd. of Health*, 899 S.W.2d 859, 861-62 (Ky. App. 1995). Rebekah's reading of the statute would render meaningless the triggering language in KRS 403.320(1) that the family court will enter a visitation order "[u]pon request of either party[.]" Since neither party requested such an order, the failure to enter one could not be error. The family court was never given the opportunity either to deny or to grant visitation and, therefore, this Court has nothing to review in that regard. *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky. App. 2008) (Kentucky courts "have long held in Kentucky that an issue not raised in the circuit court may not be presented for the first time on appeal.").

However, we also reject Terry's argument that visitation was effectively established in the dependency, neglect, and abuse proceeding. He argues that the order in that case is dispositive of the issue. But the dependency, neglect, and abuse action is a separate matter, distinct and apart from this custody modification proceeding. While harmony between the family court's orders in both cases is desired, it is within the family court's discretion to determine how that harmony should occur, when, and if, one of the parties first makes a request that the family court enter a visitation order pursuant to KRS 403.320(1).

In that vein, we note that Rebekah is not prohibited, during the pendency of this appeal, from requesting of the family court a visitation order as authorized by KRS 403.320(1). Our highest court has "long held in many instances that a trial court has continuing jurisdiction to enter supplementary and ancillary post-judgment orders[.]" *Penrod v. Penrod*, 489 S.W.2d 524, 527 (Ky. 1972). The only order on appeal is the award of custody to Terry. An order establishing visitation is certainly supplementary and ancillary to that order and, Rebekah's appeal of the custody order notwithstanding, the family court retains jurisdiction to enter a visitation order ancillary to the change in custody. *Combs v. Combs*, 304 Ky. 271, 200 S.W.2d 481, 483 (1947) ("[P]ending appeal in a divorce case, the circuit court retains jurisdiction of all matters pertaining to the care and custody of the children of the parties."). The only restriction is that "any action taken by the trial court . . . shall in no way modify or change the judgment of the trial court

which is being considered upon an appeal then pending." *Penrod*, 489 S.W.2d at 527.

## IV. Conclusion

We affirm the Jefferson Family Court's September 14, 2011 order granting Terry sole custody of the children.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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