

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

NO. 2012-CA-000069-ME

JACLYN LOIS FLETCHER (NOW RIGGS)

APPELLANT

v. APPEAL FROM HOPKINS FAMILY COURT  
HONORABLE SUSAN WESLEY MCCLURE, JUDGE  
ACTION NO. 07-CI-00801

RICHARD DALE FLETCHER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Jaclyn Lois Fletcher (now Riggs) has appealed from the order of the Hopkins Family Court entered January 3, 2012, modifying custody of her minor children and designating her former husband, Richard Dale Fletcher, as the primary residential parent. We have thoroughly reviewed the record and the

applicable case law and find no error or abuse of discretion in the court's order.

Hence, we affirm.

Jaclyn and Richard were married on October 31, 1999, when Jaclyn was eighteen years old and Richard was twenty-one years old. Two children were born of the marriage: Joshua, born March 4, 2000; and Carissa, born December 21, 2002. Jaclyn and Richard separated on July 16, 2007, and Jaclyn filed a petition to dissolve the marriage in the Hopkins Family Court on August 9, 2007. In addition to dividing the marital property and debts, Jaclyn requested that the court award joint custody of the children, that she be named the primary residential parent, and that she be awarded child support. In his answer, Richard requested to be named the primary residential parent, as he had been the children's primary caregiver until the parties separated due to Jaclyn's history of mental illness. Otherwise, he did not contest the petition. Pursuant to an agreed *pendente lite* order entered October 11, 2007, Jaclyn was awarded exclusive possession of the marital residence, and the parties were to share joint custody of the children, with no designation of a primary residential parent. The agreed order set up a visitation schedule for Richard and ordered him to pay Jaclyn \$278.00 per month in child support. The court later amended the *pendente lite* order to include an order restraining the parties from communicating any harassing, abusive, threatening, or intimidating statements, from committing any act of harassment, abuse, violence, or intimidation against the other party, and from damaging, disposing of, or destroying any marital property.

On January 15, 2009, the family court entered an agreed interlocutory decree of dissolution, including the necessary statutory findings to support dissolution. Included in the decree was the restoration of Jaclyn's use of her maiden name, Riggs. The interlocutory decree reserved all remaining issues, including custody, the division of marital property, and maintenance. Shortly thereafter, Richard filed a verified motion to show cause related to Jaclyn's refusal to permit him to have any visitation with his children. He stated in his motion that Jaclyn had made accusations on two previous occasions that he had sexually abused their daughter but that he was cleared of any wrongdoing by social services. He further stated that Jaclyn had filed a petition seeking an emergency protective order against him on the same basis. Richard lost his ability to contact his children as a result. The court ordered case management and held the motion for contempt in abeyance pending its completion, noting that no request to modify visitation had been made.

Following the March 5, 2009, case management conference, the court entered an agreed order on April 14, 2009, setting forth the parties' agreement concerning the division of personal property, the appraisal of the marital residence, marital debts, and parenting classes. The court noted no agreement had been reached regarding child custody and ordered that the parties were to continue to be bound by the *pendente lite* order. The motion for contempt, along with the custody issue, would be decided later.

Following two additional case management conferences, the parties reached an agreement on the remaining issues, including that they would share joint custody of the children without the designation of a residential parent. On July 1, 2009, the family court entered its findings of fact and conclusions of law, ordering true joint custody to the parties and ordering Richard to pay Jaclyn \$28.00 per month in child support. The court entered the final decree the same day, incorporating the final settlement agreement reached between the parties and indicating that the motion for contempt had been withdrawn.

On December 11, 2009, less than six months later, Jaclyn moved for sole custody and supervised visitation, citing allegations of sexual abuse regarding their daughter. She also stated that a domestic violence order had been entered on October 19, 2009, due to these allegations. Richard responded to the motion, stating that none of the allegations had been substantiated, but also questioning several choices Jaclyn had made since the beginning of that year. Richard specifically asked for the restoration of the shared custody arrangement as well as a mental evaluation of Jaclyn. The court set this matter for a final evidentiary hearing on April 30, 2010.

Prior to the hearing date, Jaclyn filed a motion for contempt regarding the title to her vehicle, a loan Richard had agreed to take over which had not yet been refinanced, and the refinancing of the marital residence. On May 18, 2010, the court entered a partial agreed order resolving the property issues that had arisen since the entry of the decree. The court also ordered Jaclyn to submit to a

psychological evaluation at Pennyroyal Mental Health Center within sixty days, and scheduled a review for November 29, 2010, to determine the status of the case after receiving the report of her evaluation. Pursuant to a docket order from that date, entered December 1, 2010, the court indicated that Jaclyn's attorney orally withdrew the pending motion to modify custody and related matters filed the previous December. The order indicated that no issues remained pending, and the case was removed from the active docket.

Less than two weeks later, Jaclyn filed a motion to hold Richard in contempt for his failure to make a required loan payment. At the same time, the Hopkins County Attorney's Office moved the court for a review of the parties' child support obligations for possible modification based upon substantial changes in incomes or expenses. Richard objected to the modification of his child support obligation as well as to the contempt order, and the court set both issues for a hearing in January 2011. Furthermore, Richard filed his own motion for show cause related to his claim that Jaclyn had violated his custodial rights by denying him his shared time with the children. Jaclyn, in response, objected to Richard's motion to show cause, stating that Richard and his current wife were being investigated for abuse of their child. She requested a change in the visitation schedule so as not to be disruptive of the children's school week. Richard also moved for a reduction in his child support obligation, stating that he had been laid off from his job and that he had applied for unemployment benefits.

Following a hearing in late January, the court issued an order on February 16, 2011, ruling on the various motions. The court recalculated the amount of child support to establish Richard's child support obligation to be \$13.00 per month, which exceeded the 15% statutory requirement of a substantial change in a party's financial circumstances. Regarding Richard's contempt motion, the court found Jaclyn to be in contempt for denying Richard his parenting time and sentenced her to a thirty-day sentence suspended on condition that she abide by the terms of the order and resume the parenting schedule.

On July 18, 2011, Jaclyn moved for a change in custody due to her belief that Richard would be moving to Eastern Kentucky, meaning that the current custody order would no longer be feasible. She requested to be named the primary residential parent and that Richard be granted visitation, noting that the children were both of school age and had been attending school in the Hopkins County school system since they began their education. She included a letter from herself in support of her motion as well as an affidavit from her parents. In response, Richard objected to Jaclyn's motion and filed his own motion for a change in custody, arguing that it would be in the children's best interest to name him as their primary residential parent. In an affidavit attached to the motion, Richard explained that he and his wife had moved to West Liberty, Kentucky, to reunify with their son, and that Joshua had reported to him that Jaclyn had hurt him and that he did not like her current boyfriend. By separate motion, Richard requested

that the court interview the children as part of the evidentiary custody hearing, to which Jaclyn objected.

The court held the custody modification hearing on October 21, 2011, and heard testimony from Richard, Jaclyn, and Ronald Riggs, the children's maternal grandfather. The court also interviewed the children, over Jaclyn's objection that it would put too much pressure on them. The court indicated that it was willing to listen to the children, but it would let the children know it was not their decision to make. The first witness to testify on behalf of Jaclyn was Ronald Riggs, the children's maternal grandfather. Mr. Riggs testified that the children have been in their home daily for several years. He and his wife helped care for the children and provided some financial support. Mr. Riggs testified it would be in the children's best interest to remain in Jaclyn's primary custody, describing her as a good mother, even though she did not have a lot of time to spend with them due to work. He stated that the children spent almost every night at his house, noting that they were familiar with the house and wanted to stay there. Since school started, he estimated that the children spent all but five or six nights at their house. Jaclyn's job is from 9:00 a.m. (at the earliest) to 7:00 p.m. (at the latest), three or four days per week. Jaclyn spent time with the children at their house before school and after work, and then would return to her house where she resided with her fiancé, Tim Rigdon, and his three children.

Jaclyn testified next. She testified that she worked thirty hours per week at Advance America as the assistant manager, and had worked there for two

years. She was engaged to Mr. Rigdon. She said her parents had been the children's primary babysitters for most of their lives, and they have a close bond with her children. The children spend time with her mother on a daily basis, going to church and taking weekend trips with their grandparents. Jaclyn would arrive at her parents' home no later than 8:00 p.m. and put the children to bed, and would get them up in the morning. She helped with finances as she was able to. She testified that Richard did not see the children during the recent Fall break, despite their daughter's call. She believed it would be in their best interest for her to be the primary residential parent, noting their school and after-school activities, church, friends, and relatives were all in the Hanson area, where they had always lived.

Richard testified next. He lived in a four-bedroom house with a full, unfinished basement along with his wife, Tiffany, her child, and her elderly grandparents. The children each had their own room, and he and Tiffany help care for her grandparents. He stated that his wife's whole family lives in the area and her family had accepted them all. He believed it was in the children's best interest to live with him because they had a tight bond, the children should be able to bond with their half-brother, and due to his method of discipline of putting them in time-out, not yelling and hitting. The children would have internet and telephone access so that they could contact Jaclyn while at his house. Richard reported that he regularly communicated with their son on Facebook.



Following this testimony, the parties discussed the court's requested interview with the children. While Richard did not have any specific questions to ask, he indicated concerns that the children were living primarily with their grandparents rather than with their mother when in Hanson. The court permitted the parties and their attorneys to watch the interviews from separate rooms by monitor where the children could not see them. The first child to be interviewed was Carissa. Carissa stated that she walked home from school in Hanson (or was picked up by her grandmother if it was raining), and she would go to her mother's or her grandparents' house. She spent the night at her grandparents' house, but not at her mother's house because there were too many children present and she was not able to sleep there. She had a room at her father's house that she shared with her brother. She had games to play at her father's house, and they had a lot of fun. She expressed concern that she would not get to see her mother if she was with her father all of the time, but liked playing with her toys at her father's house. She stated that she wanted to live with her dad "a lot," and live with her mother "some," despite having to change schools. She expressed a preference to be with her mother during school breaks and with her father during school days. She said her mother did not play with them as much as her father did.

The court then talked with Joshua. He stated that he wanted to live with his father because he played with them and did not yell at him frequently like his mother would. After school, he and his sister would walk home and normally go to their grandmother's house, but sometimes they would go to their mother's

house. Tim and his three children were there after school. He said that they (Tim and his mother) would yell at Tim's children. If he lived with his father, he would still want to see his mother sometimes. He recalled talking to another person about being spanked and hit while at his mother's house, and stated it had last happened a few months ago.

On January 3, 2012, the family court entered an order ruling on the designation of a primary residential parent and support. Regarding custody, the court first noted that neither party had requested a change from the original joint custody award and that they agreed it would be in the children's best interest for them to continue to exercise joint custody. The court then considered Kentucky Revised Statutes (KRS) 403.320 and KRS 403.270(2) to determine the children's best interests, and it made extensive findings for each applicable statutory subsection, including the children's stated desire to reside primarily with Richard and that while in Jaclyn's care, they spent the majority of their time, including nights, with their maternal grandparents. Based upon its findings, the court concluded that it would be in the children's best interest to designate Richard as the primary residential parent. The court then provided Jaclyn with reasonable parenting time. Finally, the court noted that Richard had not requested child support, and it terminated Richard's obligation to Jaclyn effective December 31, 2011. Jaclyn has timely appealed from this order.

On appeal, Jaclyn contends that the family court erred in failing to take judicial notice of and consider the juvenile proceedings regarding the abuse of

Richard's son. She also contends that the court erred when it interviewed the children over her objection and failed to take into consideration Richard's coaching of and influence over the children. Richard disputes both of these arguments.

Jaclyn's first argument addresses whether the court erred when it failed to consider the juvenile proceeding concerning Richard and his son from his subsequent marriage. Jaclyn contends that the court improperly refused to permit her to testify concerning this case during a court hearing on January 27, 2011. We agree with Richard that this issue is not properly before this Court. The January court hearing dealt with motions for contempt related to Richard's failure to make a loan payment and Jaclyn's failure to permit Richard to have parenting time with the children. At the hearing, the court refused to allow the parties to discuss the juvenile action due to its confidential nature, and reminded Jaclyn that she had not petitioned the court for a change in custody or visitation due to her expressed fears for the children's safety. The court ruled on these matters in an order entered February 14, 2011, and Jaclyn did not timely appeal from that order pursuant to Kentucky Rules of Civil Procedure (CR) 73.02(1)(a). Therefore, Jaclyn is precluded from raising this issue in the present appeal, and we shall not address it further.

For her second argument, Jaclyn contends that the family court erred in interviewing the children over her objection and failed to take into account Richard's coaching in its findings of fact. She had objected to such interviews so that the children would not be put in the position of having to choose between their

parents. On the other hand, Richard argues that the family court properly considered the wishes of the children in making its determination.

KRS 403.290(1) affords a court the option to interview children involved in custody actions: “The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.” We review a trial court’s decision whether to conduct such an interview for abuse of discretion. *See Chappell v. Chappell*, 312 S.W.3d 364 (Ky. App. 2010). Based upon our review of the record, we hold that the family court did not abuse its discretion in choosing to interview the children pursuant to Richard’s request.

Jaclyn cites to *Chappell, supra*, in support of her argument that the court should not have conducted the interviews. The trial court in *Chappell* opted not to conduct the interviews, a decision affirmed by this Court:

The separation and divorce were particularly acrimonious, and although the children were not of tender years, the trial court was seriously concerned about the potentially lasting effects resulting from an in-chambers interview. Although the children were available and could have been called to testify, both of the attorneys of record declined to summon them to the witness stand—presumably electing to spare them a possibly traumatic experience in eliciting testimony that had already been presented from other sources.

*Chappell*, 312 S.W.3d at 365. In the present action, Jaclyn never described the dissolution proceedings as particularly acrimonious, as was the case in *Chappell*,

but merely stated that she did not want the children in a position to have to choose between their parents. Jaclyn also cites to this Court's unpublished opinion in *Blevins v. Kerr*, 2010 W.L. 2977047 (2009-CA-001872-ME) (Ky. App. 2010).

However, in *Blevins*, the court actually interviewed the child on two occasions, but opted not to decide custody in accordance with her stated wishes based upon the other evidence of record.

Neither the parties, nor their attorneys, were in the courtroom during the interviews, and the family court explained to the children that they would not be the ones to make the decision about where they would live and that their wishes would simply be for the court to consider. The children did not hesitate when they expressed the wish to live with their father, even though it meant moving to a different part of the state, but they still expressed a desire to visit with their mother. However, this was only a small part of the evidence the court had to consider when reaching its determination as to the primary residential parent. The court also considered the undisputed evidence that the children spent the majority of their time in the care of their maternal grandparents rather than with Jaclyn and that they did not have their own bedroom in the house their mother shared with her fiancé, but had to share a two-bedroom house with Jaclyn, her fiancé, and his three children. Furthermore, the court considered the home Richard provided, where they would have their own rooms, and the support their stepmother's extended family provided for the children.

We specifically disagree with Jaclyn's argument that the family court failed to consider her allegations that Richard was coaching the children. Jaclyn cross-examined Richard extensively about a Facebook chat he had with their son, and he was able to provide an interpretation to the court. The court also had the opportunity to discuss Joshua's internet communication with his father during the interview. While not mentioned in the findings of fact, there is no indication that the court did not take this testimony into account when reaching a determination on the designation of the primary residential parent.

Based upon our holdings that the issue regarding the prior juvenile case is not properly before this Court and that the family court did not abuse its discretion in choosing to interview the children, we affirm the January 3, 2012, order of the Hopkins Family Court designating Richard as the primary residential parent.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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