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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000820-MR

NICOLE M. PREBECK

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 03-CI-00250

CORY ERDMANN, GUARDIAN AD LITEM

APPELLEE

AND

NO. 2012-CA-001347-ME

LILLIE TRONC

APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 03-CI-00250

MICHAEL WATTENBERGER

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Lillie Tronc (mother) appeals from an order of the Clark Family Court entered on July 16, 2012, modifying custody and awarding sole custody of the parties' two minor children to Michael Wattenberger (father).

Mother's attorney in the custody action, Nicole M. Prebeck, appeals from an order of the Clark Family Court imposing sanctions against her under Kentucky Rules of Civil Procedure (CR) 11. We affirm the order awarding custody to father and vacate the order imposing sanctions.

The parties were married on November 7, 1990, and during the marriage, had a son, born in 1995, and a daughter, born in 2000. A decree of dissolution was entered on December 17, 2003, that incorporated the terms of a separation agreement, including a provision for joint custody of the children with equal physical timesharing.

In July 2006, mother and father filed motions to modify the timesharing arrangement. The family court entered an order modifying the timesharing arrangement and mother appealed. After this Court reversed and remanded, in January 2008, the parties entered into an agreed order providing for nearly equal timesharing.

In November 2010, the parties filed motions to modify timesharing. Following a hearing, the family court denied both motions and ordered the parties to obtain counseling for the children.

In August 2011, a domestic violence petition was taken on behalf of the son by mother alleging abuse by father. While the allegations were investigated, the parties entered into an agreed order giving mother temporary sole custody of the son and providing that father would have no contact with his son. At that time, the son began living with his maternal grandparents. Ultimately, an investigation determined the allegations of abuse were unsubstantiated.

In November 2011, the daughter told father about a video of the son on You Tube in a gymnastics class that had been posted by mother's husband (stepfather). Father was unable to locate the video until the daughter provided him with stepfather's You Tube username. Father searched on Google with stepfather's username and discovered that stepfather had accessed numerous lewd and perverse websites and, on one website, stepfather posted lewd photos of him and mother.

After discovering the information, father filed a motion for modification of timesharing requesting that he be named the primary residential custodian and restricting stepfather from being in the children's presence unsupervised.

After a hearing on December 20, 2011, the family court found that mother had exposed the children to a risk of emotional harm. The family court awarded father temporary sole custody of the children, changed the timesharing arrangement by limiting mother's parenting time to every other weekend, and ordered that stepfather not be allowed around the children. Father was ordered to

ensure that the son continued with counseling and mother was to undergo a psychological assessment. During the transition in timesharing, the son was to continue to live with his maternal grandmother and her husband.

Mother hired new counsel, Nicole Prebeck, and on January 26, 2012, filed a verified motion to alter, amend or vacate the January 20, 2012, order. On February 10, 2012, father filed a motion to modify custody and requested sole custody of the children. A custody hearing was held on July 11, 2012.

At the hearing, stepfather admitted that he accessed various sex sites and had a ten-year pornography addiction. Nude and pornographic photos of mother and stepfather and other interactive pornographic materials posted by stepfather were introduced at the hearing. Mother testified that she voluntarily participated in the taking of the photographs and stepfather testified that he had posted them. Moreover, she admitted that this action was a mistake and put the children at risk of harm. Nevertheless, mother stated that she and her husband were working on their relationship and she intended to remain married to him. The guardian *ad litem* (GAL) gave a complete report and expressed his concerns about the children. He recommended that father be given sole custody of the children and the children have no contact with stepfather.

The family court issued findings of fact, conclusions of law, and an order awarding father sole custody of the children with the son to reside with his grandparents. Mother was awarded visitation every other weekend from Friday after school or 5:00 p.m. until Sunday at 7:00 p.m. The children were to have no

contact with stepfather or children's uncle, who the family court found had also engaged in viewing pornography.

The appeal filed by Ms. Prebeck is from an order imposing CR 11 sanctions because of a statement made in the January 26, 2010, motion to alter, amend or vacate the family court's January 20, 2010, order that, in addition to awarding temporary custody to father, ordered mother to pay Cory Erdmann's GAL fees. Ms. Prebeck stated in the motion that Mr. Erdmann did not perform his duties as GAL and did not interview the children.

On April 9, 2012, Mr. Erdmann filed a motion to strike this section of mother's verified motion to alter, amend or vacate and to sanction Ms. Prebeck under CR 11 for these statements. He argued that the statements concerning his actions as GAL were unfounded and without factual basis.

On April 24, 2012, the family court issued an order imposing Rule 11 sanctions against Ms. Prebeck. She was ordered to withdraw her statements regarding Mr. Erdmann and pay him \$500 or, in lieu of payment, write a letter of apology to him. Pending the outcome of the appeal, Ms. Prebeck withdrew that section of the motion to alter, amend or vacate and wrote a letter of apology. Ms. Prebeck appealed.

Mother's initial contention is that the family court improperly delegated drafting of the findings of fact and conclusions of law to father's counsel. Similar arguments have been rejected by our Supreme Court.

In *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982), the Court specifically rejected the notion that a trial court cannot adopt proposed findings tendered by a party. Subsequently, in *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 956 (Ky. 1997), the Court clarified that a trial court may adopt a party's proposed findings regardless of whether any substantive corrections or changes are made by the court. The rule is that absent a demonstration that "the decision-making process was not under the control of the [family court] judge" or "that these findings and conclusions were not the product of the deliberations of the [family court] judge's mind[,]," an order supported by substantial evidence will be affirmed on appeal. *Bingham*, 628 S.W.2d at 629-630.

We are convinced by the family court's oral and written findings that it did not blindly accept the tendered findings without its own deliberations. The findings were consistent with those made at the hearing and the family court made significant alterations to the findings proposed by father. It deleted a portion mandating integration of the son into father's home and added that father's brother-in-law would have no contact with children. Contrary to mother's conclusion, these changes undeniably demonstrate that the findings of fact, conclusions, and order is "the product of the deliberations of the [family court] judge's mind." *Id.* at 630.

Additionally, mother expresses concern regarding the family court's scrutiny of the facts because it did not state the evidence with precision and did not mention certain evidence mildly favorable to mother. If mother believed the family court's

findings of fact were incomplete, it was incumbent upon her to file a motion for more specific findings. CR 52.04. In *Anderson v. Johnson*, 350 S.W.3d 453, 459 (Ky. 2011), our Supreme Court emphasized that when a family court makes “good-faith but incomplete findings,” a party desiring additional findings must file a motion pursuant to CR 52.04. Even if considered incomplete, the family court made findings of fact addressing the relevant statutory factors and it was incumbent upon mother to file an appropriate motion in the family court.

The ultimate question under the applicable standard of review is whether the family court’s findings are clearly erroneous. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). Its findings will be discarded only if not supported by substantial evidence. *Id.*; 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)(internal quotations and footnotes omitted). The weighing of evidence is a function of the family court and whether we would have reached a contrary custody-modification decision is immaterial. *Id.* After making its findings of fact, a family court must apply the proper law and make its custody award. This Court will not disturb that award absent an abuse of discretion. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000).

In *Fowler v. Sowers*, 151 S.W.3d 357, 359 (Ky.App. 2004), it was recognized that Kentucky Revised Statutes (KRS) 403.340, applicable to custody modifications, was “significantly altered by the General Assembly in 2001.” The

amendments “relaxed the standards for modification of custody” and the statute now “directs the trial court to consider and to permit a change of custody based on the factors enumerated in KRS 403.270(2), the statute used in making initial custody decisions.” *Id.* To determine whether the child’s present environment endangers his or her physical, mental, moral, or emotional health, under KRS 403.340(4), the family court must consider “all relevant factors.” These factors include the interaction and interrelationship of the child with his parent or parents, the mental and physical health of all individuals involved, and domestic violence. KRS 403.340(4)(a), (b), and (d). The trial court may consider the misconduct of a parent as a factor in the determination of custody, but it must first conclude “that such misconduct has affected, or is likely to affect, the child adversely.” *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). However, the court “is not required to wait until the children have already been harmed before [it] can give consideration to the conduct causing the harm.” *Id.*

The evidence that convinced the family court custody should be modified was more than substantial. The family court heard extensive evidence regarding stepfather’s online pornographic activities, the children’s potential access to those sites, and stepfather’s admitted sexual addiction. It also heard evidence that mother blamed daughter for these activities and, despite his sexual on-line activities and admitted addiction, mother chose to remain loyal to stepfather even after the family court explained the danger stepfather’s conduct posed, prohibited

contact between stepfather and the children, and awarded temporary custody to father.

The family court found stepfather admitted he actively participated in interactive pornographic websites on a nearly daily basis for over ten years. His web postings included lewd photos of himself and mother, comments about mother, and graphic comments about his sexual fantasies. Although stepfather requested these postings be removed, refrained from sexual activity on the internet since December 2011, and sought treatment for his addiction, he admitted to engaging in inappropriate sexual conversations on Twitter in March 2012.

The family court found that the children had access to stepfather's username and, consequently, access to pornographic material. The pornographic material was easily discovered by father with stepfather's username and a simple Google search: It would be naïve to believe the children could not do the same.

The family court found that after stepfather's username was disclosed, mother was openly hostile toward the daughter. Mother told family members not to discuss anything in front of the daughter because she would tell her father. Mother told the daughter she had no time to Christmas shop for her and because she revealed stepfather's username, mother and stepfather would be unable to have a baby.

The family court also determined that the parents lacked an ability to communicate and cooperate in joint decision-making for the children. Mother previously claimed that father had abused the son, but an investigation determined

that this claim was unsubstantiated. Further, the parents had conflicts regarding obtaining appropriate dental care for their daughter.

The family court found that the daughter was doing well in father's home and that the son was doing well living with his grandparents while in father's legal custody. It found the GAL's recommendations as to custody arrangements persuasive.

Mother misrepresents the family court's findings, insisting that custody was awarded to father not because of any risk that she posed, but because she continued to remain married to stepfather. She minimizes her own improper conduct and blames any possible harm to the children on father's initiation of court action. While stepfather's conduct alone may not be a sufficient reason to permanently change custody, the family court found that mother's participation and response to stepfather's conduct justified a custody modification.

The family court also made appropriate conclusions of law to support awarding sole custody to father. The family court previously determined that mother exposed the children to a high risk of emotional harm when it granted father temporary custody. The family court repeatedly found that sole custody by father would serve the children's best interest over joint custody with both parents.

The family court's order restricting contact with stepfather and the children's uncle was not an abuse of discretion. Both men were found to have engaged in pornographic activities, which the family court found was harmful to

the children. A family court retains discretion in custody matters to issue its orders in accordance with the children's best interests.

Having concluded that the family court's findings were not clearly erroneous and it did not abuse its discretion, we affirm.

Ms. Prebeck's appeal concerns the imposition of Rule 11 sanctions.

CR 11 requires that every pleading, motion, or other paper of a party represented by an attorney to be filed with the court be signed by an attorney of record and that:

The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Although sanctions may be imposed against an attorney who violates the rule, "sanctions are to be used only in extraordinary circumstance[s]." *Yeager v. Dickerson*, 391 S.W.3d 388, 395-396 (Ky.App. 2013). "The test to be used by the trial court in considering a motion for sanctions is whether the attorney's conduct, at the time he or she signed the alleged offending pleading or motion, was reasonable under the circumstances." *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 420 (Ky.App. 1988). The rule does not provide substantive rights to litigants but is a procedural rule designed to curb abusive conduct in the litigation

process. *Id.* Our standard of review is a multi-standard approach: “[A] clearly erroneous standard to the trial court’s findings in support of sanctions, a *de novo* review of the legal conclusion that a violation occurred, and an abuse of discretion standard on the type and/or amount of sanctions imposed.” *Id.* at 421.

Ms. Prebeck examined the history of the case and discussed it with mother. In her motion, Ms. Prebeck alleged the GAL admitted that he had not investigated the issues in father’s motion and, to her knowledge, Mr. Erdmann had not done any work on the most recent motion to modify custody. Ms. Prebeck stated that the GAL had not contacted the children or anyone else who may have information. She requested that Mr. Erdmann be removed as GAL.

At the April 17, 2012, hearing on the motion, Ms. Prebeck argued that there was no report filed by the GAL prior to the December 20, 2011, hearing. Mr. Erdmann pointed out that he reviewed the photographs, notes and file, and had a long history with the family. Consequently, he did not believe that it was appropriate or necessary to speak to the children. The court agreed that speaking with the children would have been unnecessary and inappropriate.

Based on our *de novo* review, we conclude that the family court erred when it imposed sanctions. In *Clark Equipment*, the Court approved suggestions from the Federal Civil Rules Advisory Committee regarding factors the court should consider when determining whether an attorney violated Rule 11 including,

how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other

paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Id. at 420.

In this case, Ms. Prebeck reviewed the court file and did not find any recent report by the GAL. She believed Mr. Erdmann had a duty to interview the children. Further, when retained, she had only ten days to file a motion to alter, amend or vacate. Under the circumstances, we conclude that no exceptional circumstances exist for the imposition of Rule 11 sanctions.

Accordingly, we affirm the Clark Family Court's findings of fact, conclusions of law, and order awarding sole custody of the children to father. The order imposing Rule 11 sanctions against Ms. Prebeck is vacated.

ACREE, CHIEF JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

CLAYTON, JUDGE, DISSENTING: Respectfully, I dissent. I am of the opinion that the family court's findings of fact, conclusions of law, and order were not supported by substantial evidence because the family court failed to consider the specific statutory factors set forth in Kentucky Revised Statutes (KRS) 403.340 for modification of custody. Therefore, I would reverse and remand for another hearing to enable the family court to make findings and conclusions that specifically address the factors set out in KRS 403.340.

Before beginning my analysis, I note that I disagree with the reasoning of the majority that if the mother had concerns about the findings, then it was incumbent upon her to file a motion for more specific findings under Kentucky Rules of Civil Procedure (CR) 52.04. Here, the mother was not requesting additional findings but rather argued that the findings were not supported by substantial evidence. Since the family court made findings of fact with which she disagreed, it was unnecessary for her to make a CR 52.04 motion for additional findings. She had the authority to appeal the merit of the findings under CR 52.01. *See Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011).

I now turn my attention to the mother's contention, on appeal, that the family court erred in awarding the father sole custody because the family court's findings of fact, conclusions of law, and order were not based on substantial evidence. I am not necessarily suggesting that the family court erred when it awarded sole custody to the father but rather it made its decision in a faulty manner because it did not assess the pertinent statutory factors. A decision regarding the custody of children is one of the most difficult ones a court must make. Because of its complexity, the legislative mandate for making such judgments becomes even more essential to the process.

Clearly, my disagreement is not based on the family court's use of submitted findings. As highlighted by the majority, *Bingham v. Bingham*, 628 S.W.2d 628, 629 (Ky. 1982), supports the proposition that a trial court may adopt the proposed findings tendered by a party. Indeed, the majority notes that under

Bingham, the findings must be supported by substantial evidence. *Id.* at 629-630.

I agree, and observe that the Kentucky Supreme Court has held that tendered findings and conclusions adopted by a trial court should not be easily rejected “in the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility under Kentucky Rules of Civil Procedure (CR) 52.01[.]” *Id.* at 630.

Still, the language is somewhat cautionary when it says that “the delegation of the clerical task of drafting proposed findings of fact and conclusions of law *under the proper circumstances* does not violate the trial court's responsibility.” *Id.* (Emphasis added.) Thus, it is not a blanket rule that the delegation of drafting findings of fact is per se acceptable. It requires the proper circumstances and does not abrogate the trial court's responsibility in ensuring adequate findings are supported by substantial evidence.

In the case at bar, while I do not dispute the ability of a family court to use tendered findings of fact, I am concerned that the findings are not only inaccurate but also unsupported by substantial evidence. Undoubtedly, a reviewing court is entitled, regardless of authorship of the findings, to set them aside when they are clearly erroneous. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence. CR 52.01. In the case at hand, I believe that that the family court's findings of fact and

conclusions of law were not supported by substantial evidence. First, the family court adopted the father's proposed findings verbatim except for minor changes. Second, there are clerical errors and inaccuracies in the findings. Finally, and most significantly, the family court made its findings and conclusions without addressing in particular the pertinent statutes that govern modification of a custody decree. Furthermore, it is not each reason alone that guides me in my difference with the majority's opinion, but it is the sum total of all the reasons, which I believe, impugns the substantiality of the evidence underlying the family court's findings and conclusions.

With regard to my first reason, I observe that the family court adopted verbatim the father's proposed findings of fact. Any changes made by the family court to the findings were clerical. For instance, the incorrect username of the stepfather was crossed out in the family court's order and the correct one handwritten on top of the correction. Only one change was made to the proposed conclusions of law, and it involved the son's living arrangements. As far as the judgment, the entered order only had minor changes. Again, I am cognizant that the use of tendered findings alone is not sufficient to challenge the efficacy of the findings. Still, I believe it has an impact on the ultimate legitimacy of these particular findings, conclusions, and order.

My second reason is predicated on inaccuracies in the adopted findings of fact. The findings neglect to mention the testimony of Tiv Jacina and Marvin Collier, who both testified about the father's interaction and relationship

with his son. Furthermore, although the stepfather is not under consideration for custody, it is notable that testimony was provided about the stepfather's good relationship with his stepchildren. The findings also include facts that were never presented at the trial. For example, no one testified at the trial about the findings numbered "20" and "21," which maligned the mother's relationship with her daughter. The majority relies very heavily on this factor in its opinion, but this information was not provided at the hearing. Lastly, some findings, such as the children's computer ability and the daughter's excellent performance at school, were never supported by evidence but merely mentioned.

Additionally, my understanding of the record itself varies with the majority's order regarding some parts of the record. For instance, in August 2011 the mother took out a domestic violence petition on behalf of the son alleging abuse by the father. During the pendency of an investigation of the alleged abuse, the parties entered into an agreed order, which gave the mother temporary sole custody of the son and included a civil no-contact order for the father with his son. In addition, the son began living with his maternal grandparents. Notwithstanding that the report was later labeled unsubstantiated, it was clear that communication problems existed between the father and the son. In fact, the son continued to live with the maternal grandparents.

Next, while the mother testified that she voluntarily participated in the taking of the photographs, she was completely unaware and shocked that the pictures had been posted online. Since learning about the posting, she has done

everything in her power to have the photos removed from the internet. She freely admitted that this action was a mistake and put the children at risk of harm. Thus, although parental misconduct is certainly a factor in deciding custody, the mother has done all that is possible to reform the results of her actions. The family court does not address the mother's dismay at discovering the pictures were posted online, her efforts to have them removed, her acknowledgment that it put her children at risk, and her emphatic avowal that she would never do this again.

Further, in the majority opinion, it is stated that a complete report was provided by the GAL at the hearing. The GAL did make an oral report but provided no written report or that he had met independently with the children prior to the hearing on custody.

My most disquieting concern about the family court's decision, however, is the failure of the family court to address with particularity the statutory requisites in KRS 403.340 concerning modification of custody. The majority opinion relies on *Fowler v. Sowers*, 151 S.W.3d 357 (Ky. App. 2004), to opine that the statutes regarding custody modification were significantly altered in 2001 by the General Assembly and that it "relaxed the standards for modification of custody." *Id.* at 359. Indeed, the General Assembly did change the statutory requisites but I am uncertain about characterizing them as "relaxed." Nevertheless, modification of custody is a consequential decision that deserves detailed and thoughtful decision-making.

Under the statutes, a party, seeking modification, must still establish that “a change has occurred in the circumstances of the child or his custodian” and that “modification is necessary to serve the best interests of the child.” KRS 403.340(3). Notwithstanding the changes, the modification statute still requires that a party seeking modification show that the child's present environment seriously endangers his physical, mental, moral, or emotional health and that the harm likely to be caused by the change of environment is outweighed by its advantages to the child. KRS 403.340(3)(d) and KRS 403.340(2)(a). The statute then sets forth factors for the court to consider in deciding whether a change has occurred and modification of custody is in the child’s best interest.

Clearly for a family court to make such an arduous decision, it must apply the pertinent statute that governs modification of a custody decree. This statute serves to help a family court to make an appropriate decision in family situations, which are painful, heart-wrenching, and sometimes involve vile circumstances. And these decisions are rarely, if ever, easily made.

Apparently, the father believes that the most relevant factor is “[w]hether the child's present environment endangers seriously his physical, mental, moral, or emotional health.” KRS 403.340(3)(d). But in considering this factor, the family court considered not only whether the child's present environment endangers his or her physical, mental, moral, or emotional health, but under KRS 403.340(4), “all relevant factors.” These factors include the interaction and interrelationship of the child with his parent or parents, the mental and

physical health of all individuals involved, and domestic violence. KRS

403.340(a), (b), and (d).

At no point in the family court's order is the language of the pertinent statute or its factors referenced to explicate the family court's reasons for modifying custody. Interestingly, neither are the words "best interest of the child" used in the order, although it is evident that the family court judge reflected on the best interests of the children. Still, a juxtaposition of the statute against the order immediately makes clear that an analysis of the specific and distinct statutory factors is missing.

Below are some issues that, I believe, are relevant for such a statutory evaluation. First, there is the issue of communication among all the parties. The father provided evidence that indicated the parties did not get along and communication was difficult. In his brief, the father appears to be suggesting that this factor is also significant for necessitating the order of sole custody. Our review of the record, however, indicates that difficulty in communication implicates both parties. For example, even after the change in the father's custody of his son following the domestic violence report, the father testified that difficulty in communication with his son continued as of the date of the custody hearing, and his son continued to live with the maternal grandparents. As provided in KRS 403.340(4)(a), the family court must reflect on this matter when ascertaining whether a custody change is desirable.

As I have noted above, the misconduct of the mother was the major factor used to support a change in custody. In such situations, evidence of the misconduct must be established, but evidence of misconduct alone is not sufficient to support a change in custody. The family court must also decide that such misconduct has affected, or is likely to affect, the child adversely. *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. App. 1983). Once such a determination is made, the trial court then considers the potential adverse effect of such misconduct as it relates to the best interests of the child. *Id.*

Here, unlike the facts in *Krug* where the appellate court in denying the mother custody relied heavily on her refusal to refrain from drug usage, the mother clearly expressed that she had no intention in the future to put her children at risk because of pornographic activity by her husband. In addition, after the family court ordered that the stepfather have no contact with the children, the no-contact order was strictly followed by the mother. In this case, the family court never specifically considered whether the mother's actions were and continued to be sufficiently aberrant to adversely affect the children. Nor did it expressly state that permitting the mother to have joint custody would seriously endanger the children's physical, mental, moral, or emotional health. KRS 403.340(3)(d).

Instead, the family court orally at the conclusion of the trial commented that the mother's "horrible mistake is continuing to trust him [the stepfather] and insist he still be around the children . . . outside an abuse case, the stuff we heard today is the most vile, filthy, disgusting and perverse information

ever discussed in my courtroom.” Then, the family court judge says “I’ll confess, in my experience, I don’t believe pedophiles can be cured. We don’t know if he is one or not.” Next, the family court judge says that “no proof that Josh Tronc has done anything to these kids” but then opines that the father “can’t help but wonder how many times that man [Mr. Tronc] has checked them out . . . the boy and the girl.”

The most important deficit in the court’s oral conclusions is that they are not legally sufficient, on their own, to necessitate a change in custody. First, the behavior of Mr. Tronc, although relevant, is not the major focus in this custody dispute because he is not a proposed party for joint custody. Second, no allegation of pedophilia or even child pornography was ever made against Mr. Tronc. Mr. Tronc’s behavior does not necessarily make his wife, the mother, unsuitable for joint custody of the children.

Regarding the mother’s activities, the record demonstrates that the mother was unaware of her husband’s sex addiction until late December 2011 when the father filed a motion to modify timesharing. Further, even before her knowledge about her husband’s activities, she testified that the family computer was in the kitchen and had parental controls on it. Moreover, the mother complied with the family court’s order that her husband have no contact with the children. The majority states that the mother planned on remaining married to the stepfather and, thus, was not suitable to remain as a custodian. Regardless of the mother’s

marital status, no evidence was given that she violated any court order regarding the stepfather's contact with the children or that she would do so.

Thus, the family court's findings of fact are not supported by substantial evidence on the pertinent factors and, thus, are, in my opinion, clearly erroneous. The family court abused its discretion by its failure to consider the evidence in light of the statutory factors for modification of custody and the necessity to delineate them in proffered findings and conclusions. Therefore, I would reverse and remand this case for another hearing in which the specific factors set out in KRS 403.340 as related to the mother, the father, and the children are considered and addressed in the findings of fact and conclusions of law. This is the only legal method for the determination of whether custody should be modified.

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