

RENDERED: OCTOBER 18, 2013; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2012-CA-002197-ME

SHANDA LEE GAUTNEY

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT  
HONORABLE SUSAN WESLEY MCCLURE, JUDGE  
ACTION NO. 05-CI-00394

DENNIS DWAYNE BRASHER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Hopkins Circuit Court holding that it was in the best interest of the parties' minor child not to modify residential custody. Based upon the following, we affirm the decision of the trial court.

## BACKGROUND INFORMATION

The Appellant, Shanda Lee Gautney, and the Appellee, Dennis Dewayne Brasher, are the parents of two children, only one of which is a minor. The child, J.R.B., was born August 1, 2003. On October 7, 2005, a divorce decree was entered by the Hopkins Circuit Court. Pursuant to the decree, the parties were granted joint custody of J.R.B. with Gautney having primary residential custody.

Gautney remarried and her new spouse was a resident of Mobile, Alabama. Brasher filed a motion to modify the custody and visitation arrangement due to Gautney's intention of moving to Alabama. On June 19, 2009, the circuit court granted Brasher's motion and he was made the primary residential parent.

On May 6, 2011, Gautney filed a motion to modify residential custody and visitation and moved for the appointment of a custody evaluator, which was appointed by the trial court. The custody evaluator, Mary Fran Davis, LCSW, tendered to the trial court her finding in November of 2011. Davis found that it would be in the best interest of J.R.B. to have primary residence with Gautney.

On August 24, 2012, the trial court held a hearing on the issue of modifying the primary residence and afterwards denied Gautney's motion. This appeal followed.

## STANDARD OF REVIEW

CR 52.01 provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of witnesses.” A judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

In determining whether the court erred in granting or denying custody, the appellate court must determine whether the findings of the court were clearly erroneous or whether there was an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). With these standards in mind, we review the trial court’s decisions.

## DISCUSSION

Gautney first asserts that the trial court misinterpreted the findings of the custodial evaluator’s written report (the Report) and abused its discretion by discounting the report. After Ms. Davis was appointed, she interviewed witnesses, analyzed them and observed the family dynamics before submitting her report to the court in November of 2011. Ms. Davis spent five months in gathering and analyzing the data for her report.

The court has found as follows regarding the Report:

3. Written report of custodial evaluator. The Court notes that the report includes a summary of the evaluator's conversations with each person interviewed. The recommendation seems to be based primarily on these conversations and her observations of one interaction between the child and each parent. Some of those interviewed did not testify in person at the hearing. While these items of hearsay may be included by her to establish the basis for her findings, the Court notes that they cannot be considered by the Court as offered for the truth of the matter asserted. The Court has not done so.

The Court also notes some discrepancies between the statements that were included in the reports and evidence that was provided during the hearing. As an example, Ms. Davis reports that Shanda was unaware that the child participates in Cub Scouts. However, testimony during the hearing indicates that the child began Cub Scouts in 2008, which would have been during the time period that the child primarily resided with Shanda. Additionally, Ms. Davis indicates that Shanda "went back to court to get more visitation time." However, there was no motion filed with the Court prior to this motion.

The Court recognizes that the evaluator recommends that the Petitioner's motion be granted. However, she did not testify and thus, could not address the Court's concerns regarding the evaluation and report: That [t]he evaluator relied on statements concerning the situation prior to the 2009 order; that she failed to use any indicator other than her own impression taken from conversations; that there was no attempt to verify statements made to her; that some statements made to her were apparently misrepresentations or contained significant omissions; that she was unable to obtain criminal records for Shanda due to Shanda's refusal to provide identifiers; that she employed no testing modules for determining the parties' maturity, decision-making, or propensity for honesty; that the report appears to be merely an assimilation of information that she received; and other concerns about the validity of the recommendation. Therefore, the weight given this report is reduced. Additionally, the Court notes that this piece of evidence is but one item considered by the Court.

Gautney argues that the trial court's findings of error within the custodial evaluation report were incorrect. She asserts that due to the child's age and the evidence regarding when he joined Cub Scouts, it was actually while Brasher had custody of him that he was involved in the program. As to the criminal identifiers, she contends that it was, in fact, Shari Brasher who had not been forthcoming to the evaluator. Finally, Gautney asserts that the trial court's notation that she had not made a motion for more parenting time was in error since the evaluator was referring to this action in her report.

We find Gautney's arguments unpersuasive. An appellate court may "only reverse a trial court's determination as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). In this case, the trial court stated that it based its decision regarding custody on several factors, one of which was the custody evaluation report. It then went on to set forth ways in which it found the report lacking. The trial court is not bound by the opinions set forth in the Report. Kentucky Revised Statutes (KRS) 403.290. Thus, the trial court did not err in the weight it gave to the Report.

Gautney next argues that the trial court's findings of fact were clearly erroneous when it found that she did not produce any evidence that the change in visitation would be in the best interest of the child. Specifically, in its November 20, 2012 ruling, the court set forth that Gautney had "not presented any evidence that it would be in [J.R.B.]'s best interests to modify his primary residence."

Gautney contends that the court discounted and ignored the report as well as the testimony of the witnesses in her favor at the hearing. She asserts it was an abuse of discretion by the trial court to make a blanket finding that she proffered no evidence.

As set forth above, KRS 403.290 allows a court to seek the assistance of experts in making custody evaluations; however, it is not bound to follow their recommendations. Consequently, the trial court did not err in making its findings based on the evidence presented.

In making its finding, the trial court set forth that while Gautney could provide an appropriate residence for the child, there was no evidence presented from which to conclude that the current arrangement was not in his best interests, that the current arrangement is detrimental to the child, or that the child would benefit from the move. Gautney asserts that the benefit to the child with the move would be that she could be his fulltime caregiver. She contends that the custody evaluation report should have been sufficient evidence of her ability to provide a good home environment for the child and that he was a child who should adapt well to a move.

The trial court's decision to leave the child with his father was not an abuse of its discretion. There was evidence set forth that both the mother and father would provide adequate homes for the child. Thus, there was sufficient evidence to support the trial court's decision to leave the child with his father. We, therefore, affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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