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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001678-ME

APRIL RETHERFORD — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JUDY D. VANCE MURPHY, JUDGE
ACTION NO. 12-CI-00082

KYLE MONDAY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: April Retherford appeals the Casey Circuit Court order awarding primary custodial care of the parties' child to Kyle Monday. The circuit court had originally found in Kyle's favor, but on appeal a different panel of this Court vacated and remanded the matter for further findings. The circuit court, without considering any new evidence or holding an additional hearing (although

none was moved for by either April or Kyle), made further findings and again held that it would be in the child's best interests to reside primarily with Kyle and attend Casey County Public Schools. We affirm the circuit court's ruling.

We rely on the facts and procedural history as stated in the previous appeal:

> Appellant, April Retherford (April), appeals from a judgment of the Casey Circuit Court designating Appellee, Kyle Monday (Kyle), as the primary residential parent of the parties' one minor child. April contends that the court failed to make specific independent findings and that it merely adopted the proposed findings submitted by Kyle. We agree. Therefore, we vacate and remand with instructions.
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> April and Kyle were never married. They lived together for approximately four years—first in Indiana. They are the natural parents of one child (Daughter), born December 30, 2010, in Fayette County, Kentucky. Before they separated, the parties were living with Kyle's paternal grandfather in Liberty, Kentucky. On April 13, 2012, April departed with Daughter and returned to her parents' home in Kokomo, Indiana, where she currently resides. Kyle currently lives in Liberty, Kentucky.
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> The parties initially agreed to sharing joint custody of Daughter. However, contested issues arose as to the designation of the primary custodial parent, the time-sharing schedule, child support, and the residence of the child when she begins school.
>
> On April 19, 2012, Kyle filed a Petition for Custody requesting joint custody and asking that he be designated as the primary residential parent. On April 23, 2012, April filed a Response which reflects that an Emergency Protective Order (EPO) gave her custody of

the child and that the EPO had been dismissed. April sought temporary and permanent custody. She also filed a Motion for Temporary Custody and Child Support at that time.

Lengthy and quite protracted proceedings followed, including an order of the court that each party undergo psychological testing. April filed successive motions to compel Kyle to respond to her requests for discovery and to provide contact information. At one point during the course of the litigation, the Cabinet for Health and Family Services became involved.

On July 31, 2014, Jolene Blevins, a social worker for the Cabinet, received a phone call on an after-hours hotline. Mrs. Blevins testified at the trial about the allegations that the caller leveled at Kyle; *i.e.*, that he was "antigovernment" in his social/political orientation; that the house he was building in rural Casey County had no plumbing or electricity; that the son of his girlfriend had acted in a sexually inappropriate manner with the child; that the child appeared to be dirty and too thin after visitations with Kyle.

Mrs. Blevins followed up with law enforcement officials and undertook a visit and investigation concerning the allegations. Ms. Blevins did not see anything out of the ordinary, any indication that the child was afraid of Kyle, or any evidence that she had been sexually abused. Following the investigation and consultation with her supervisor, a joint decision was made that the matter was unsubstantiated and the case was closed.

More than two years after Kyle initiated his petition for custody, the trial court entered an order on August 8, 2014, directing the parties to continue the time-sharing arrangement already in place pending further orders of the court.

> Numerous contested issues arose during deposition testimony and at trial concerning living arrangements for the child. Among them were: fitness of the house being built by Kyle, his alleged inattention to her medical and dental care, and the proper avenue for her education (*i.e*, either homeschooling or public schools). April testified that she has carefully tended to the child's medical care and educational and cultural needs, including the child's attendance at a Montessori school that goes through kindergarten.
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> At the conclusion of trial, the court directed the parties to submit proposed findings of fact and conclusions of law. April filed hers on May 11, 2015; Kyle's were filed on May 18, 2015.
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> On October 9, 2015, the court awarded joint custody, holding that it would be in the best interest of Daughter that she reside primarily with Father in Casey County, Kentucky, and that she attend the county's public schools.
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> On October 19, 2015, April filed a Motion to Alter, Amend, or Vacate; she filed an amended Motion on October 26, 2015. By Order of October 26, 2015, the trial court granted the Motions in part and denied them in part. By agreement of the parties, the court amended its October 9, 2015, Order to continue the alternating two-week time-share schedule until Daughter begins kindergarten in the Fall of 2016. It also amended the date for April to pay child support to August 1, 2016. The rest of April's Motions and her requests for specific and/or additional findings of fact were denied. On November 23, 2015, April filed Notice of Appeal from the October 9, 2015, and October 26, 2015, orders.

Retherford v. Monday, 500 S.W.3d 229, 230-31 (Ky. App. 2016). The Court of Appeals then held as follows:

> Having reviewed the record, we agree with appellant that many concerns indeed exist: the stability of Kyle's living arrangements; his sporadic income; where Daughter would actually be living and attending school if Kyle were the primary residential parent; whether Kyle would, in fact, insure that Daughter receives appropriate medical and dental care and treatment; and the fact that Kyle has no family in Kentucky while April has family and an established support system in Indiana (where both of Kyle's parents also live). These are, however, factors to be addressed independently and conscientiously by the trial court when it reassesses all of the trial testimony and makes its own impartial findings and conclusions on the ultimate substantive issue before it.
>
> We vacate the trial court's order of October 9, 2015, and remand with instructions that the trial court make its own findings of fact from the evidence and its own conclusions of law in accordance with the mandate of *Keifer* [*v. Keifer*, 354 S.W.3d 123 (Ky. 2011)], CR [Kentucky Rule of Civil Procedure] 52.01, and the factors set forth at KRS [Kentucky Revised Statute] 403.270(2). We refrain from reaching the other issues raised by appellant.

Retherford, 500 S.W.3d at 233.

Upon remand, the Casey Circuit Court made additional findings of fact. On October 14, 2016, the circuit court entered its second findings of fact, conclusions of law, and judgment, again in favor of Kyle. On November 3 of that year, April filed a motion pursuant to CR 59.05 to alter, amend, or vacate the October 2016 judgment. Six days later, April filed two motions, namely, a motion pursuant to KRS 26A.015(2)(a) requesting that Judge Vance be disqualified and a

motion to modify the parenting schedule. April also requested that a hearing be held.

On September 15, 2017, the Casey Circuit Court entered its ruling denying both of April's post-judgment motions; no hearing was held. April filed her timely notice of appeal, challenging the judgment and the order denying her CR 59.05 and KRS 26A.015(2)(a) motions and her request for a hearing.

April first argues that the circuit court erred in failing to make specific and independent findings of fact regarding the child's education and health care. April contends that the circuit court merely retained its original judgment and added only two more findings of fact (namely, paragraphs 40 and 41) and one additional conclusion of law (paragraph 15). However, the circuit court, in its September 17, 2017, order, finally addressed the substance of the litigation when it made the following specific findings regarding Daughter's education and health care:

> Photographs of [Kyle's] home, produced at trial, illustrate a modest vinyl-sided home with electricity, running water, a working bathroom, etc. This Court did hear [April's] allegations of a shack in the woods with no utilities. But that is not what this Court saw. Likewise, [April] alleged that [Kyle] didn't appropriately tend to the child's medical and dental needs. Conversely, [Kyle] testified about taking the child for medical care, and having to pay out of pocket, due to [April's] refusal to provide the child's medical card information. [April's] allegations were unfounded. With all other things being equal, this Court could not overlook the educational

> stability this child would have in the Casey County School System, versus . . . a Montessori School, or maybe private Christian school (on $1733.00 per month income), or, well, we're just not sure yet, Judge. Notably, both parties informed the Court that Kokomo, Indiana public schools are not up to par. Additionally, this Court had to consider the fact that [Kyle] is able to care for the child every day, and night. Conversely, [April] was leaving the child with someone else every night.

An appellate court may set aside a lower court's findings made pursuant to CR 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted). In order to determine whether findings of fact are clearly erroneous, the reviewing court must decide whether the findings are supported by substantial evidence:

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. at 354 (footnotes omitted). "[W]ith regard to custody matters, 'the test is not whether we would have decided differently, but whether the findings of the trial

judge were clearly erroneous or he abused his discretion.'" *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010) (citing *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)).

The circuit court's findings are supported by substantial evidence in the record and are therefore not clearly erroneous. *Moore*, *supra* at 354. We find no abuse of discretion in the circuit court's decision to adjudge Kyle the primary physical custodian of Daughter. *Miller*, *supra* at 141.

April next contends that the circuit court should have been disqualified because the same law firm employed by Kyle had represented the circuit judge in her dissolution of marriage action. However, the record reflects that April was apprised of this fact and waived the issue. *See Alred v. Commonwealth*, 395 S.W.3d 417 (Ky. 2012).

We lastly hold that April's final issue (namely, that her motion to modify the parenting schedule should have been granted) was not properly preserved for appellate review. We thus decline to address it on the merits.

The judgment and order of the Casey Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Allen McKee Dodd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Cameron C. Griffith
Lebanon, Kentucky