

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001816-MR

SHONN CHAPMAN

APPELLANT

APPEAL FROM FRANKLIN FAMILY COURT  
v. HONORABLE REED RHORER, JUDGE  
ACTION NO. 97-CI-01103

PATRICIA CHAPMAN (A.K.A. TINCHER)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: Shonn Chapman appeals from an order of the Franklin Family Court denying his motion to modify a custody arrangement with his ex-wife, Patricia Chapman, concerning the parties' minor son, Lance. In his motion, Shonn requested appointment as Lance's primary custodian. Upon reviewing the record and the applicable law, we affirm.

Shonn and Patricia were married on December 31, 1993. Lance was born on November 25, 1994. Shonn and Patricia's marriage was marred by several periods of lengthy separation and

allegations of domestic violence. Eventually, Shonn filed a petition for dissolution of marriage on July 17, 1997. In this petition, Shonn requested that the parties be granted joint custody of Lance. In June 1998, the trial court entered a decree dissolving their marriage. Thereafter, the trial court awarded the parties permanent joint custody of Lance.

Patricia's home was designated as Lance's primary residence, with Shonn being granted time-sharing periods with Lance.

Unfortunately, communication between the parties concerning the joint custody arrangement collapsed. Since the trial court's award of joint custody, the parties have appeared before it numerous times because of their failure to abide by the trial court's orders concerning visitation and custody arrangements.

In 1998, Patricia and Lance moved to Jackson County, Kentucky. The record indicates that Patricia and Lance lived in six different locations in Jackson County over a period of approximately three years. While in Jackson County, Patricia purchased a mobile home with Anthony Davidson and resided with him. In February 2001, Patricia obtained an emergency protective order (EPO) against Davidson, which was dismissed at her request. Patricia obtained another EPO against Davidson in November 2001. At all times, Lance was aware of the relationship between his mother and Davidson as well as the domestic violence that had occurred during that relationship.

In January 2002, Shonn learned that Patricia and Lance had been evicted from their Jackson County mobile home. Shonn also discovered that Patricia was still living with Davidson despite obtaining a domestic violence order. Finally, Lance informed his father that Patricia and Davidson fought constantly, causing him to hide in a closet. Based upon this information, as well as testimony from Shonn and two Jackson County social workers<sup>1</sup>, the Jackson District Court found that Patricia had no permanent residence and continued to reside with Davidson, a perpetrator of domestic violence. Thus, on January 26, 2002, the Jackson District Court removed Lance from Patricia's care and granted temporary custody of Lance to the Cabinet for Families and Children. The Cabinet placed Lance in Shonn's custody immediately thereafter.

On February 19, 2002, Shonn filed a motion to modify custody with the trial court. In his motion and affidavit, Shonn argued that designating him as Lance's primary custodian would be in Lance's best interests. In support of his argument, Shonn noted that Lance was removed from Patricia's care and placed with him by the Cabinet. Further, Shonn alleged that

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<sup>1</sup> We note that the transcript of the evidence heard before the Jackson District Court was not included in the record before us. However, the emergency protective orders, the domestic violence orders and the order removing Lance from Patricia's care and granting temporary custody of him to the Cabinet are contained within the record.

Patricia failed to exercise her visitation rights on a regular basis. Lance also had been regularly attending elementary school in Franklin County<sup>2</sup>. Finally, Shonn asserted that Lance appeared to be comfortable living with him in Franklin County.

The trial court held an evidentiary hearing in this matter on June 10, 2002. During this hearing, Patricia testified that she moved from Jackson County to Franklin County. Patricia stated that she was renting a house in Frankfort and was working as an unlicensed, self-employed babysitter. Patricia admitted, however, that she only babysat four kids and earned, at most, \$75.00 per week per child. During her testimony, Patricia conceded that her babysitting earnings did not adequately cover the rent payment. Thus, to meet her basic living expenses, Patricia receives financial assistance from her mother. Patricia also receives child support from Davidson in the amount of \$378.00 per month<sup>3</sup>.

Patricia acknowledged that her relationship with Davidson was marred by domestic violence. During her testimony, Patricia denied that Lance witnessed any acts of domestic

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<sup>2</sup> School records from Tyner Elementary School show that, while Lance was in Patricia's custody from August 2001 until January 2002, Lance was absent six times and tardy thirteen times. On nine (9) occasions, Lance was taken to school after the noon hour. The school records provide no reason for those nine tardies.

<sup>3</sup> The relationship between Davidson and Patricia produced a daughter.

violence and asserted that she shielded Lance from the violence. Patricia opined that Lance has not been affected by the domestic violence because his grades at Tyner Elementary School were good. Patricia also asserted that she met the case plan established by social services in Jackson County and became independent of Davidson, as evidenced by her move to Frankfort. She also received domestic violence counseling in both Jackson and Franklin counties. Patricia informed the trial court that she had no intention of ever residing with Davidson again.

Shonn also testified during the hearing. Shonn testified that he was employed as a full-time electrician for Art's Electric and earned \$16.75 per hour, with medical, dental, and retirement benefits. According to Shonn, Lance admitted witnessing the domestic violence between Davidson and Patricia. After speaking with Patricia and confirming that she was still residing with Davidson, Shonn filed his motions with the courts. Shonn further testified that he rents a farmhouse in Franklin County and provided Lance with his own room in the home. Lance also completed the first grade in Franklin County prior to the hearing and performed satisfactorily. Shonn noted that he participates in recreational activities with Lance, primarily little-league baseball and doing farm-related activities.

During their testimony, Shonn and Patricia argued extensively over which parent allowed Lance to develop a large

cavity in a baby tooth. Also, the parties argued over the numerous disputes that occurred over Lance's visitation and Lance's participation in religious activities. Each party also alleged that the other threatened to physically harm Lance's pet dog. Both parties also confirmed they put Lance in the middle of their dispute by using him to communicate with each other.

Angela Harris, a social worker with the Department for Community Based Services in Franklin County, testified that she conducted evaluations on the current residences of both parties. Concerning Shonn's home, Harris testified that this residence was an appropriate placement for Lance and noted that she detected no problems during her visit. Harris also stated that nothing during her visit indicated that Shonn would be a poor custodial parent. As for Patricia's home, Harris testified that Patricia resided in a "nice home" and there was room for Lance in the residence. Harris stated that, although Patricia was unemployed at the time of her visit, Patricia's home was an appropriate placement for Lance provided that there is no contact with Davidson. Despite her findings, Harris expressed concern about the animosity between Shonn and Patricia.

Based upon the evidence introduced at the hearing, the trial court found that the domestic violence perpetrated upon Patricia by Davidson did have a negative impact on Lance. However, the trial court determined that Patricia, by moving to

Franklin County, took steps to ensure that neither she nor Lance would have any further contact with Davidson. Thus, after considering KRS 403.340 and the best interests of the child test, the trial court accepted Harris' testimony concerning Patricia's home as an appropriate placement for Lance and denied Shonn's motion to modify custody. Further, the trial court ordered Patricia to allow Shonn his visitation periods, ordered both parties not to communicate with each other through Lance and required Lance and Patricia to complete domestic violence counseling. Finally, the trial court prohibited Patricia from allowing Lance to reside with or have anything other than incidental contact with Davidson.

On June 17, 2002, Shonn moved the trial court to amend, alter or vacate its order of June 12, 2002, arguing that the trial court used the wrong criteria in making its findings. The trial court's order states: "3. Pursuant to KRS 403.340(2) the modification requested by Mr. Chapman would not serve Lance's best interests." At Shonn's request, the trial court made additional findings of fact, specifically that Patricia lived a nomadic lifestyle in Jackson County, was found by the Jackson District Court to have neglected Lance, did not have full time employment, was subjected to domestic violence by Davidson and that she obtained an EPO on Davidson in November 2001. However, despite these additional findings of fact, the

trial court on July 30, 2002, amended its order to show that it considered both KRS 403.340(3) and KRS 403.270(2) and found that Shonn's requested modification of custody would not serve Lance's best interests. This appeal followed.

On appeal, Shonn brings forward two arguments for our review. First, Shonn asserts that the trial court abused its discretion in denying his motion to modify custody by failing to employ the proper standards in rendering its decision. We reject this argument.

As an appellate court, we shall not set aside a circuit court's child custody decision unless such decision was clearly erroneous or constituted an abuse of discretion. See Squires v. Squires, Ky., 854 S.W.2d 765 (1993); Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982). Guided by this standard of review, we address the merits of this matter before us.

According to this Court's opinion in Scheer v. Zeigler, Ky. App., 21 S.W.3d 807 (2000), any modification of custody is subject to the custody modification statutes found in KRS Chapter 403. Since jurisdiction is not at issue herein, the trial court was required to consider the factors listed in KRS 403.340(3) to determine whether to modify the custody decree. KRS 403.340(3) states:

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall

not modify a prior custody decree unless after hearing it 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

(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.

The best interest of the child standard is codified in KRS 403.270(2). This statute states, in pertinent part:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all

relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Contrary to Shonn's assertions, there is no evidence in the record before us that the trial court reached its

conclusion by not applying the standards listed in KRS 403.340(3) and KRS 403.270(2). In its written findings of fact, the trial court clearly considered Lance's best interests, as Kentucky law requires. While the trial court did not provide specific findings as to every factor enumerated in KRS 403.270(2), the record shows that the trial court extensively considered evidence of domestic violence between Patricia and Davidson, the effect that domestic violence had upon Lance and Lance's interactions with Shonn, Patricia, and Patricia's other children. Patricia testified that she desired to eliminate domestic violence from her life and minimize Lance's exposure to the unwholesome effect of domestic violence. Patricia's move to Franklin County shows that she wanted to minimize Lance's exposure to Davidson. Additionally, Patricia's move from Jackson County satisfied the Cabinet's case plan that she no longer be dependent on Davidson. Moreover, since moving to Frankfort from Jackson County, Patricia has not suffered from any incidents of domestic violence.

The record also reveals evidence concerning the home environments to which Lance would be subjected. Social worker Angela Harris noted that Shonn's home would be an appropriate placement for Lance. Yet, Harris also testified that Patricia's home would also be an appropriate placement for Lance, provided there is no contact with Davidson. Harris's testimony provides

evidence that the court considered the mental and physical health of all parties herein, as well as the environments in which Lance would be living.

Finally, the trial court considered the employment histories of both parties and gave some weight to the fact that, despite earning an inadequate income from babysitting and child support payments, Patricia could rely upon her mother for financial assistance. Thus, since there is no evidence in the record that Lance is being subjected to domestic violence or that his physical, mental and emotional health was threatened by his mother's actions at the time of the hearing, we cannot conclude that the trial court failed to consider whether Lance's residence with his mother would seriously endanger his physical, mental, moral, or emotional health. Like the trial court, we cannot conclude that, based upon the evidence produced during the June 10, 2002, hearing, Lance will be subjected to any potential harm if he is returned to the primary custody of his mother. Accordingly, we must find that the trial court did not abuse its discretion in denying Shonn's motion to modify custody.

Shonn also argues that the trial court's denial of his motion to modify custody was based upon a gender bias in favor of Patricia. The record, however, demonstrates that the trial court thoroughly considered Shonn's motion after holding a

thorough hearing. The trial court's written findings of fact and conclusions were based upon KRS 403.340 and KRS 403.270, which are the statutes that must be used to analyze motions to modify custody arrangements. Hence, based upon our review of this matter, we believe that the trial court provided equal consideration to each parent concerning this custody dispute. Accordingly, we are satisfied that this contention is without merit.

In view of the entire record before us and from the trial court's findings after hearing the evidence, we cannot conclude that the court abused its discretion by ordering that Shonn and Patricia continue to share custody. CR 52.01. Rather, the record reflects that there was sufficient evidence for the court to conclude that, at the time of the hearing, the child's best interest would not be served by granting Shonn's motion to modify custody.

For the aforementioned reasons, the judgment of the Franklin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Catherine C. Staib  
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BRIEF FOR APPELLEE:

Stephen C. Sanders  
Hobson and Bowman  
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