

RENDERED: FEBRUARY 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000558-ME

JEREMY B. LYNN

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JUDY A. HALL, JUDGE
ACTION NO. 03-CI-01472

SUSAN PEPPERS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
VANMETER, JUDGE: The Christian Circuit Court, Family Division,
denied appellant Jeremy B. Lynn's motion seeking to modify child
custody. We are not persuaded by appellant's contention that
the trial court made erroneous findings of fact and abused its
discretion by failing to grant the requested modification. We
therefore affirm the trial court's order.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

After hearing many witnesses during a two-day custody hearing, the trial court made the following findings of fact:

1. The child, Tyler Nicholas Lynn ("Tyler") born October 12, 1996 is the subject of this action.
2. [Appellant], Jeremy B. Lynn, is the father of Tyler and [appellee], Susan Peppers, is the mother.
3. Pursuant to Order of the Cumberland County District Court, North Carolina, Civil Action No. 01-CVD-6041, entered on August 14, 2001, Susan Lynn (now Peppers) was awarded "primary physical and legal custody" of Tyler subject to "liberal and reasonable visitation" defined as summer and four day weekends by [appellee]. [Appellant], Jeremy Lynn seeks to modify the North Carolina custody order.
4. [Appellant] is married to Ginger Lynn and resides in Centreville, Alabama. [Appellee] is married to William Peppers and resides at Ft. Campbell, Kentucky. William Peppers has orders for a tour of duty in Germany and [appellee] plans to accompany her husband with Tyler.
5. [Appellant] claims that the home provided by the [appellee] has seriously endangered the physical, mental, moral, or emotional health of Tyler. Specifically, [appellant] alleges that [appellee] has engaged in infidelity and been absent from the home frequenting bars during her husband's deployment to Iraq from February to October, 2003. During the two day hearing, the Court heard a number of witnesses including neighbors, school personnel, psychologists, spouses, and Tyler. The Court has also considered the testimony of [appellant] and his spouse regarding statements made by Tyler during last

summer visitation. The testimony regarding [appellee's] conduct was conflictual and largely hearsay [consisting] of inferences, mistake and admitted deliberate lies based [on] self interest. The only fact which this Court finds reasonably certain is that the [appellee's] neighbors have been drawing entertainment from this melodrama. The Court finds that the [appellant's] allegations are not supported by the whole of the evidence in that [appellant] has failed to prove inappropriate conduct by [appellee] occurred or that [appellee's] conduct adversely affected Tyler.

6. Tyler has exhibited acting out behavior or tantrums because he did not want to go to school and Tyler has exhibited anger toward his mother. [Appellee] sought treatment for Tyler's behavior at the Blanchfield Army Hospital and Tyler has received six months counseling through the CAPS program and Ray Weinberg, licensed social worker. Mr. Weinberg and Mrs. Grizzard, Tyler's first grade teacher, testified that Tyler's behavior has greatly improved in recent months. [Appellee] testified that Tyler was upset because his stepfather, William did not come home from Iraq in six months as he had promised and that at school Tyler heard about soldiers wounded in the war.
7. Tyler is an excellent student. Mrs. Grizzard, Tyler's first grade teacher, testified and the principal of Tyler's school testified that they had no concern about Tyler's home environment.
8. There is insufficient evidence that the planned relocation of the [appellee's] home to Germany by reason of her husband's tour of duty will adversely affect Tyler.

9. Pursuant to K.R.S. 403.340, having considered the evidence of record the Court finds that the [appellant] has failed to meet the burden of proof in support of a modification of custody. The Court specifically finds that the child's present environment does not endanger seriously his physical, mental, moral or emotional health and a modification of custody is not in the best interests of the child.

The court denied the motion to modify custody. After directing that Tyler should continue to receive counseling, the court modified the terms of visitation pertaining to the payment of transportation costs. This appeal followed.

KRS 403.340 provides in pertinent part:

(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.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

- (a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;
- (b) The mental and physical health of all individuals involved;
- (c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis of which parent is more likely to allow visitation or pay child support[.]

A trial court's findings of fact may be set aside only if clearly erroneous, with the dispositive question being "whether or not those findings are supported by substantial evidence."² Substantial evidence is defined as

² *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted).

"[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.³

As stated in *Cross v. Clark*,⁴ "[t]he determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of" the trier of fact, who "may believe any of the witnesses in whole or in part, and may accept the testimony of one set of witnesses to the exclusion of that of another or the testimony of one witness as against the testimony of a number of witnesses."

Here, our review of the entire record, including the videotapes of the hearing, clearly shows that substantial evidence supports the trial court's findings. Although

³ *Id.* at 354 (footnotes omitted) (quoting *Black's Law Dictionary* 580 (7th ed. 1999), *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62, 64 (Ky. 1970), CR 52.01, and 7 Kurt A. Phillips, Jr., *Kentucky Practice*, CR 52.01, note 55, comment 8 (5th ed. 1955)).

⁴ 308 Ky. 18, 213 S.W.2d 443, 446 (1948).

appellant alleged numerous instances of misconduct by appellee, those allegations primarily were based on statements made to appellant by third parties rather than on his own personal knowledge or observations. Moreover, a number of the people who apparently told appellant of appellee's alleged misconduct specifically recanted those allegations during depositions and/or to the trial court, in some instances openly admitting that they had lied when making their original statements. While other witnesses made statements during the hearing to support appellant's claims, many of those statements also were based on hearsay and/or conjecture rather than on personal observations or knowledge, and the impact of many of the witnesses' statements was lessened by their responses during cross-examination. In the long run, few if any statements made against appellee were not either recanted by their makers or contradicted by other evidence. Given the state of the conflicting evidence adduced, we cannot say that the trial court clearly erred when making its findings, or that it then abused its discretion by denying appellant's motion to modify custody.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Julia T. Crenshaw
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BRIEF FOR APPELLEE:

Sands M. Chewning
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