RENDERED: AUGUST 5, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000026-ME

WILLIAM YEAPLES — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
FAMILY COURT, DIVISION II
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 04-CI-00021

LINDA GOLDEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND HENRY, JUDGES.

GUIDUGLI, JUDGE: In this domestic action, William Yeaples has appealed from the Clark Family Court's December 3, 2004, order denying his motion for modification of child custody. We affirm.

William and Linda Golden, who were never married, are the biological parents of Dillon and Kaitlyn Yeaples, born November 19, 1996, and November 9, 1997, respectively. The couple's relationship ended in late December 1997, shortly after

Kaitlyn's birth. William originally filed a petition for custody and child support on November 27, 2000, in Fayette Circuit Court.[1] On September 11, 2001, the court awarded joint custody to William and Linda, designated Linda as the primary residential parent, ordered William to pay child support in the amount of $361.83 per month, and allowed him liberal visitation with the children. The case was briefly transferred to Bourbon Circuit Court[2] on William's motion in October 2003, in which court he filed a motion to modify custody to have himself designated as the primary residential custodian. By an agreed order, the matter was transferred to Clark Family Court on January 12, 2004.

In his motion to modify custody and in the supporting affidavit, William claimed that he was not receiving liberal visitation pursuant to the original custody decree, that Linda provided an unstable environment, that the children had been moved to different schools during one school year, and that they were habitually truant. In contrast, William alleged he could provide a stable environment, as he had a home and sufficient income to provide for Dillon and Kaitlyn. The family court held a hearing in September and entered a Final Order on December 3, 2004, denying William's motion to modify custody, as follows:

[1] Action No. 00-CI-04227.
[2] Action No. 03-CI-00313.

1. The Petitioner, William Yeaples, resides in Bourbon County, Kentucky, and owns a construction company with his current wife, Marsha Yeaples. Ms. Yeaples has two children from a previous relationship. These children attend school in Fayette County and stay with the Yeaples every other week. The Petitioner has two pit bull terriers that live inside, thirty chickens, eight of which are fighting roosters, and three pit bull puppies that live out doors on his fifty-acre farm.

2. The Respondent, Linda Golden, is employed by McDonalds in Barbourville, Kentucky where she also resides with her mother, the two minor children, and her fiancé, Danny Smith. Mr. Smith is employed at an antique tool store in Corbin, Kentucky.

3. There are two minor children born to the parties, Dillon Yeaples, born November 19, 1996, and Kaitlyn Yeaples, born November 9, 1997.

4. Pursuant to a custody order set by the Fayette County Circuit Court, the parties were awarded joint custody of the minor children and the Respondent was named primary residential custodian. The Petitioner was ordered to pay a child support obligation of $361.83 per month; however, he has failed to pay on a timely basis. The day before this hearing, Petitioner paid $2600.00 towards his arrearage, leaving an approximate balance of $658.00.

5. The children are currently enrolled in the Barbourville Independent School System, although they have changed school districts at least four different times within the last few years. Dillon is now in the second grade, while Kaitlyn is in the first grade.

6. Petitioner filed a Motion to Modify Custody in January 2004. The parties are in dispute as to the custody and control of both minor children. The Petitioner [is] alleging that Respondent has failed to properly care for the children.

7. The Petitioner called several witnesses. Witness, Edward Sulzer is the store manager of a Speedway located in Winchester, Kentucky. Mr. Sulzer testified that Respondent Linda Golden was previously employed with Speedway and was terminated for mishandling money/inventory.

8. Witness, Robert Raisor, a retired Alcohol & Beverage Control officer, testified for the Petitioner. He had not seen the children in over two years.

9. Witness, Monica Hendren, Petitioner's sister-in law testified that she has observed the Petitioner interact with the children on several occasions and that he and his wife, Marsha, do a lot for the children.

10. The last witness for the Petitioner was Rose Zellephor, a neighbor. She testified that she has known the Petitioner for approximately two years and since that time she has observed nothing but positive interaction between the children and Petitioner.

11. The Respondent called a total of four witnesses including Respondent herself. Witness, Stacey Reed, best friend of Respondent, testified that she accompanied Respondent to Petitioner's house during drop offs. She testified that Respondent was a good parent and took very good care of the children.

12. Witnesses Sharon Smith and Donna Cole, both friends of Respondent, testified that they had known Respondent for many years and had always observed Respondent taking good care of her children.

13. Both parents appeared to be concerned about the minor children. There has been some confusion and communication failures as related to Kaitlyn's medical care during a period of time when the parties were unsure how to contact one another. While Respondent has been the primary caregiver of the minor children, they have missed excessive days of school and have apparently suffered with a rather severe case of head lice. While these issues raise concerns about Respondent's parenting ability, the Court is equally concerned with the Petitioner's parenting ability. He has failed to timely pay his child support, has taken the children to a pool room for entertainment, and will not communicate with the Respondent.

14. The Court finds that it is in the best interest of the minor children to award the parties joint custody and allow Respondent to remain primary residential custodian.

IT IS HEREBY ORDERED, AND ADJUDGED, as follows,

1. That this action for modification of custody was filed more than two years after the date of the original action. Pursuant to KRS 403.340, the standard to be applied is that the circumstances must have changed since the original custody decree and that the modification is necessary to serve the best interests of the child.

2. That considering the evidence presented the best interest[s] of the children are

> served by awarding Petitioner and Respondent joint custody of the minor children. Respondent shall continue to serve as primary residential custodian. Petitioner shall exercise the following visitation with the minor child: . . . .
>
> 3. That both parties are to refrain from illegal drugs and alcohol while the children are in their care.
>
> 4. That both parties are to maintain appropriate employment.
>
> 5. That Respondent shall not change the children's school district within a school year except for good cause shown. Petitioner shall be notified of any potential move at least thirty (30) days in advance.
>
> 6. That both parties shall supervise the minor children when said children are around guns, knives, or any other such type of device.
>
> 7. That both parties shall consult the other party regarding medical issues of both minor children.
>
> 8. That Respondent will ensure that the minor children have no unexcused absences from school.
>
> 9. Failure to abide by this order may result in the Court modifying the primary residential custodian.

This expedited appeal by William followed.

In his brief, William argues that the family court failed to take into consideration the economic and educational opportunities he could offer the children, failed to consider the children's adjustment to their home, school and community

pursuant to KRS 403.270(2)(d), and failed to give equal consideration to both parties. Linda, on the other hand, contends that the family court's decision was not clearly erroneous, and should not be overturned.

Our standard of review is set forth in CR 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In Moore v. Asente,[3] the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact,

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those 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

[3] 110 S.W.3d 336, 354 (Ky. 2003).

> 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. (Citations omitted.)

With this standard in mind, we shall review the family court's decision in this matter.

The applicable statute in this case is KRS 403.340, which details the modification of custody. The statute provides, in pertinent part, as follows:

> (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;[4]

(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; [and]

(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

[4] The factors listed in KRS 403.270(2) include the wishes of the parent or parents as to the child's custody; the child's wishes; the interaction of the child with parents and siblings; the child's adjustment to his home, school and community; and the mental and physical health of everyone involved.

> orders shall not be made solely on the basis of which parent is more likely to allow visitation or pay child support[.]

In the present matter, the family court tacitly found that a change in circumstances existed. Linda does not appear to dispute this finding. Therefore, the only issue before this Court is whether the family court's decision not to modify the primary residential custodian is in the children's best interest.

It is clear that the family court's decision to deny William's motion to modify custody is not clearly erroneous. The findings of fact are supported by substantial evidence of record, and the family court properly applied the laws applicable to the modification of custody to those facts to determine that it would be in the children's best interest for Linda to remain the primary residential custodian. We disagree with William's assertions that the family court failed to consider the economic and educational opportunities he could provide. Even after the hearing in this case, William failed to stay current on his child support payments to Linda. As to the children's education, the family court considered and addressed William's allegations that Linda transferred the children to new schools too often and that they were habitually truant. In its order, the family court stated that Linda could not change the

children's school district during the school year in the absence of good cause, and that William must be informed in advance of any potential move. Furthermore, the family court ordered Linda to ensure that the children did not have any further unexcused absences from school. The family court then indicated that any violations of those portions of the order could result in a change of the primary residential custodian.

We also disagree with William's argument that the family court did not take into account the children's adjustment to their home, school and community. He argues that Linda's unstable lifestyle has deprived the children of that opportunity. Other than the undisputed fact that Linda has moved several times, there is nothing in the record to reflect that the children have not adjusted to either their home, their school or their community. We also note that the last move reflected in the record, to Barbourville, Kentucky, took place in the summer months, presumably outside of the school year.

Finally, we must also disagree with William's argument that the family court did not give equal consideration to both of the parties. The family court's Final Order clearly reflects Linda's shortcomings, including her termination from Speedway, the children's missing excessive days of school, their case of head lice, as well as the family's multiple changes in residence. By the same token, the family court also noted

William's failure to timely pay child support, his lack of communication with Linda, and his taking the children to a pool room for entertainment, although at the time the establishment contained an arcade for minors.

The family court's determination that it would be in the children's best interest for Linda to remain the primary residential custodian is supported by substantial evidence of record, and therefore is not clearly erroneous. In making this determination, the family court properly considered all of the applicable statutory requirements for modification of custody.

For the foregoing reasons, the Clark Family Court's Final Order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Deaidra L. Douglas Paris, KY	Ira D. Newman Richmond, KY