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NOT TO BE PUBLISHED

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

NO. 2005-CA-000485-MR

DISSELL JAMES POINTER

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE CHARLES SIMMS III, JUDGE  
ACTION NO. 04-CI-00125

MARTHA NICOLE HALL

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: TACKETT AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>  
EMBERTON, SENIOR JUDGE: Disell James Pointer and Martha Nicole Hall are the parents of a son, Preston, born on May 16, 2003. Disell appeals from an order of the Nelson Circuit Court awarding the parties joint custody and designating Martha as the child's primary residential custodian. He alleges that the circuit court erred when it failed to record an *in camera* interview with a child witness; that it erred when it rendered a

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

final custody decision based on a pendente lite hearing; that the circuit court's award is not based on the best interests of the child; and that it erred when it relied on the opinion of an expert regarding Martha's psychological condition.

It appears from the Domestic Relations Commissioner's findings that hearings were held on May 18, 2004, on June 28, 2004, and the final hearing on September 13, 2004. Although the written record indicates that there are video tapes of the hearings, no transcripts or videos of the hearings are included in the appellate record and it appears that Disell failed to file a designation of record as required by CR 75.01.<sup>2</sup> It is the appellant's burden to ensure that the transcript or record of the hearing is included in the appellate record.<sup>3</sup> We recognize that when Disell filed his appeal he was not represented by counsel; absent an appellate record that affords this court full review, however, we must presume that the DRC accurately recited the facts and that the missing evidence supports the order.<sup>4</sup> And, perhaps because it would be of no avail since we do not have the video tapes available, neither party's statement of the case cites to any portion of the record. Although clearly this court has the discretion to strike the briefs for failure to

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<sup>2</sup> Kentucky Rules of Civil Procedure.

<sup>3</sup> Burberry v. Bridges, 427 S.W.2d 583, 585 (Ky. 1968).

<sup>4</sup> Miller v. Com., Dept. of Highways, 487 S.W.2d 931, 933 (Ky. 1972).

comply with CR 72.12(4), since this case involves child custody we will not impose such a harsh sanction and, to the extent possible, we will review the lower court's decision.

Disell and Martha met in August 2002, and spent considerable time together in Disell's Elizabethtown home. The parties never married and after the birth of their son, Disell moved to Indianapolis to work as a sales representative for Pfizer Pharmaceuticals. Martha and Preston moved to Bardstown to reside with her parents until late September or early October 2003, when they moved into the home Disell had purchased in Indianapolis. During the month of January 2004, the parties' relationship was turbulent and in late January Martha and Preston returned to Bardstown.

On February 19, 2004, Martha filed a custody petition in the Nelson Circuit Court seeking joint custody and child support with herself designated as the primary custodian. Following the filing of the petition and Disell's response, various motions concerning support and visitation were filed and resolved by separate court orders. On the date of the final custody hearing in September 2004, Disell had dismissed his counsel and was unrepresented.

When she was seventeen, Martha had given birth to another son, John Tyler, who, because of Martha's age, lived during the week with an aunt and uncle and spent the weekends

with Martha. This arrangement has continued. Martha has a large extended family in Bardstown many of whom testified at the various hearings and confirmed Martha as a loving and caring mother. Testimony from two of Martha's cousins, who are caregivers at the Little Angels Daycare where Preston attends, indicated that Preston is well adjusted and well behaved.

Martha is employed by the Cabinet for Families and Children as an investigator. She testified that she is the primary caregiver for Preston and that when she lived with Disell he rarely took care of Preston. She produced a calendar noting numerous out of town trips and night meetings Disell attended.

Disell, who is one of 11 children, had spent eight years in the military before receiving a BS in genetics and chemistry from Western Kentucky University. He testified that Martha is a heavy drinker, that she spent minimal time with John Tyler, and that she had threatened to kill herself. He also testified that he had regularly cared for Preston and had made arrangements for Preston's "whole life" and should be awarded custody. Although he has a large family, he has little contact with any of them. None live in Indianapolis. Disell suggested that there is a racist atmosphere in Nelson County and expressed his view that a biracial child such as Preston should be raised by a black male.

Dr. Abby Shapiro, a licensed clinical psychologist, evaluated Martha's mental health. She found Martha to be truthful and honest, but somewhat defensive. Clinically, she found no indication of any psychological problems such as depression or substance abuse.

The DRC's unrecorded *in camera* interview of John Tyler is an issue raised on appeal; it is, therefore, beneficial to include in its entirety that portion of the findings referring to that interview.

The Court did an "in camera" interview with John Tyler Hall, who stated that he loved his brother Preston very much. The witness told the Court that spending the week with his aunts and uncle, the Hites, and the weekends with his mother, gave him the best of both worlds. He appeared to be an extremely intelligent, outgoing, pleasant and well adjusted young man.

He testified that he visited his mom on approximately six occasions while she was living with Mr. Pointer. During these visits he was not permitted to sit on the furniture, was restricted from entering certain rooms of the house, had to make his bed in the mornings to suit the Respondent so that a quarter would bounce on it, and was made to "pee like a girl" to avoid making a mess in the bathroom. He stated that the Respondent was very demanding and controlling and that he felt uncomfortable being with him.

The DRC considered all the factors set forth in KRS 403.270 and applied the best interests of the child test. The DRC concluded that Martha had been Preston's primary caretaker

and that Disell's primary goal is to keep control of Preston. Any suggestion of racial bias toward Preston was dismissed as unfounded. Also given little credibility was Disell's suggestion that Martha was unfit. He offered no proof other than accusations that she is incapable of caring for the child and offered no evidence to contradict Dr. Shapiro's assessment. Additionally, the DRC citing the preference to keep siblings together noted John Tyler's strong attachment to Preston.<sup>5</sup> Considering Preston's adjustment to his home, school, and community, the DRC found Martha's familial and community support to be preferable to Disell's lack of such support.

Disell contends that it was reversible error for the DRC to conduct an *in camera* interview of John Tyler without making a record of the interview.<sup>6</sup> We agree. In Schwartz v. Schwartz,<sup>7</sup> the court held that when a child is determined to be a qualified witness his testimony should be given in the presence of the parties or their counsel if it is made a part of the court's decision. "A further right of the parties . . . is to have the testimony of the children, where it may be used as a basis for the court's decision, reported so that it may be

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<sup>5</sup> Howard v. Howard, 307 Ky. 452, 211 S.W.2d 412 (1948).

<sup>6</sup> Although Disell state that he objected to an *in camera* interview of John Tyler, unfortunately it is impossible to determine if the objection was made and Disell makes no serious argument on appeal that the child should not have been interviewed *in camera*. Both parties agree, however, that the interview was not recorded.

<sup>7</sup> 382 S.W.2d 851 (Ky. 1964).

preserved for appellate review.”<sup>8</sup> Following the decision in Schwartz, the legislature enacted KRS 403.290(1) that states:

The court may interview the child in chambers to ascertain the child’s wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

The statute refers only to the parties’ child in a custody dispute. In such cases the courts have taken the view that the parents have a constitutional right to hear all of the evidence offered in the case. As stated in Couch v. Couch:<sup>9</sup>

In an action concerning custody or visitation, any procedure whereby the trial court prohibits disclosure of the transcript of a child’s interview to the parties raises significant due process questions. The parties are entitled to know what evidence is used or relied upon the trial court, and have the right generally to present rebutting evidence or to cross-examine, unless such right is waived. If a trial court accepts and acts upon statements made by the child during the *in camera* interview, it is manifestly unfair not to record and disclose the contents of the interview in order to provide an opportunity for rebuttal.

Although the interviewed child in Couch was at the center of the custody dispute, we believe the logic is equally applicable in

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<sup>8</sup> Id. at 853.

<sup>9</sup> 146 S.W.3d 923, 925-926 (Ky. 2004)(citations omitted); See also Holt v. Chenault, 722 S.W.2d 897 (Ky. 1987).

this case. The testimony of John Tyler, while not the exclusive basis for the custody decision, was significant enough that it made a favorable impression not only as to Martha's parenting skills but also left a clear negative impression as to Disell's skills. Repeatedly in the findings, the DRC commented on Disell's controlling nature, a trait the DRC found undesirable, and specifically stated that the finding was supported by not only Disell's testimony but also John Tyler's. Additionally, John Tyler's expression of love for Preston was a stated finding that supported the custody decision.

The irony of Disell's argument that the interview should have been recorded is that ultimately he failed to include any of the recorded hearings in the record. Even had there been a recording, it in all likelihood would not have been before this court for review. Nevertheless, we believe that the constitutional rights implicated when a child is taken from a parent, even if only for custodial purposes, are significant enough that the trial court must record or make available the testimony of any witness, whether a child or otherwise, if it relies on that testimony when making a custody determination. This is the only means by which a parent can rebut such evidence and preserve the record for appellate review. Based on the findings of the DRC we find that the interview should have been recorded and Disell given the opportunity to review that

testimony and offer rebuttal evidence. The failure to do so constitutes reversible error.

Our review of the remaining issues raised is limited by the lack of a record of the hearings. Disell objects to the consideration of the testimony of Dr. Shapiro but fails to point in the record where the issue was preserved for review. Moreover, he relies on Dr. Shapiro's testimony to which this court has no access. We find on this issue there was no reversible error.

Finally, he claims that the DRC's recommendation was based on hearings on pendente lite motions and not on a motion for permanent custody. He then cites to the testimony at an October 20, 2004, hearing concerning his motions to hold Martha in contempt, to strike Dr. Shapiro's testimony and for emergency custody when alleged references were made to pending "temporary motions". Again, this court has no reasonable means of deciphering Disell's argument. From the state of the record it appears that the hearing was on Martha's petition for permanent custody and that all parties understood that to be the matter under consideration.

Because we are remanding the case for the court to conduct another *in camera* interview with John Tyler we do not reach the issue of whether the custody award is supported by the record. However, Disell is not entitled to a *de novo* hearing.

There having been no other errors that this court finds reversible, the action taken on remand is limited to a recorded *in camera* interview with John Tyler and an opportunity given Disell to rebut that testimony. The court shall then enter written findings of fact, conclusions of law and an order based on that interview, any rebuttal evidence offered, and the evidence presented at the prior hearings.

ALL CONCUR.

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