

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-001670-ME

EUGENIA ROBINSON

APPELLANT

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT  
HONORABLE WALTER F. MAGUIRE, JUDGE  
ACTION NO. 04-CI-00088

ROBERT DALE ROBINSON

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE AND STUMBO, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: This child custody dispute between Eugenia Sue Wynn Robinson (Gina) and Robert Dale Robinson (Dale), returns to this court after remand. *Robinson v. Robinson*, 211 S.W.3d 63 (Ky.App. 2006)(hereinafter *Robinson I*). In *Robinson I*, this court reversed the result of an improper *de novo* hearing to determine custody, as the trial judge went outside the bounds of statutory authority in doing so. On remand, there was a series of competing motions. On December 21, 2006, Dale filed a motion to modify custody under the endangerment standard. On December 27, 2006, Gina filed a

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<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

motion seeking entry of an order consistent with the opinion of this Court. On January 9, 2007, the trial court ruled that an order consistent with the Court of Appeals opinion would be entered, and scheduled another hearing for January 19, 2007.

On January 19, 2007, the trial court cited this court's earlier opinion of December 1, 2006, and entered an order making Gina the primary residential custodian of the couple's two younger children, the twin boys, and by agreement allowing the parties' daughter to stay with her father, Dale, until the end of the school year. Affidavits from Dale followed in February. Special Judge Overstreet determined that those affidavits sufficiently alleged endangerment. He ordered a final hearing to take place to determine whether modification of custody, pursuant to KRS 403.340(2), was appropriate. That hearing was conducted in front of Judge Walter Maguire.

It is especially noteworthy that Judge Maguire determined that only events and conduct occurring after March 15, 2006, would be considered since the Court of Appeals had already considered the record up to that date in its prior decision. Judge Maguire made findings of fact and conclusions of law based upon application of the endangerment standard of KRS 403.340(2) and ruled in favor of Dale.

Kentucky Rules of Civil Procedure (CR) 52.01 provides that "[f]indings 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." Based upon this and upon the well-reasoned opinion of the trial court, we affirm.

Gina relies heavily on a statement by this court in *Robinson I*, which reads, "Furthermore, we have thoroughly examined the record and see no substantive basis for preventing Gina from relocating with her children to the Memphis area."

*Robinson I* at 71. The appellant's reliance on this statement is misguided. *Robinson I* was not based on the substantive issue of endangerment. That issue never arose because the trial court had erroneously based its decision on the best interests of the child standard of KRS 403.270(2) alone. The statement upon which Gina relies is at the least *dicta*, and at most a reflection of the factual record at that point in time only. In any event, in light of the subsequent proceedings, it carries no weight in our current review.

The pertinent section of KRS 403.340 reads as follows:

No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that: (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health.

KRS 403.340(2).

If we are to take the statute to mean what it says, as we must, the statute does not admit of any other method to alter a custody decree, other than by its own provisions. Disregard of this statute was the basis of reversal in *Robinson I*.

Compliance with this statute is why the trial court's decision now under review will be affirmed. In both *Robinson I* and the matter before us, less than two years elapsed from the initial custody decision, meaning that KRS 403.340 must be and was applied. The trial court below followed the dictates of the statute, examined Dale's affidavits, and determined they provided sufficient basis to conduct a hearing. The trial court, applying KRS 403.340(3), then determined that changes had occurred in the circumstances and environment of the children such that custody modification was appropriate. KRS 403.340(3) imposes its own requirements, but also incorporates the best interest of the child factors from KRS 403.270(2). The trial court's order contained a list of those

factors, accompanied by a proper legal analysis, based upon the testimony presented at the hearing.

Even if this court's earlier statement regarding Gina's relocation were not *dicta*, it still would be entitled to no consideration in this appeal. The trial court's order specifically states that no information covered by the time period of *Robinson I* was considered in its decision, and the new evidence does indicate substantive occurrences not present at the time *Robinson I* was decided. Such circumstances give ample justification for a change of custody. The record contains testimony from psychologists, teachers, family members, and the children themselves, indicating that the environment to which Gina's custody exposed the children presented a danger to their physical, mental, moral, or emotional health. The trial court's determination on this point is not contrary to this court's earlier opinion, but reflects a considered analysis of changed circumstances.

The other points raised by Gina do not justify disturbance of the trial court's ruling. Gina asserts an objection to the report of the family court counselor, Harold Tokle, since he was not available for cross examination. Judge Maguire stated that he would disregard the report. There is no reason to proceed further, since, unlike material that mistakenly comes up in front of a jury, we trust that judges have the ability to disregard evidence improperly before them.

The lack of a transcript from the *in camera* interview with the parties' daughter is a more serious matter, but in the end amounts to harmless error, CR 61.01, as the weight of the evidence is almost entirely in Dale's favor, and his daughter's testimony is only a very small part of the whole. Even if her testimony had been entirely

disregarded, it likely would not have changed the trial court's decision since the information she provided to the trial court was cumulative of other testimony. Because there were no surprises in the testimony, it is difficult to conceive how it could have been prejudicial to Gina's case, considering the weight of the other evidence.

For the foregoing reasons, the August 7, 2007, order of the Rockcastle Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Scott W. Webster  
London, Kentucky

BRIEF FOR APPELLEE:

James Walter Baechtold  
Richmond, Kentucky