

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2005-CA-002311-ME

PATTY LEE SALLAZ (NOW SNIPES)

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT  
HONORABLE BETH LEWIS MAZE, JUDGE  
CIVIL ACTION NO. 02-CI-00021

ROBERT B. SALLAZ

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; HENRY AND PAISLEY, SENIOR JUDGES.<sup>1</sup>  
PAISLEY, SENIOR JUDGE: Patty Lee Sallaz, now Snipes, (Patty) appeals from an order entered by Rowan Circuit Court in which the trial court modified custody over Patty's two children and granted sole custody to Patty's ex-husband, Robert B. Sallaz (Rob). On appeal, Patty argues that the trial court modified custody based on events that occurred prior to entry of the dissolution decree; that the trial court ignored the only

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<sup>1</sup> Senior Judges Michael L. Henry and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

psychological evaluation performed in the case; that the trial court shifted the burden of proof away from Rob and that the trial court considered inadmissible hearsay in resolving the modification issue. Finding that the trial court did not abuse its considerable discretion, we affirm.

Rob and Patty were married in December of 1994 in Rowan County, Kentucky. During the marriage, Rob and Patty had two children: Rebecca, born in December of 1994, and Cody, born in November of 1996. In January of 2002, after more than seven years of marriage, Rob filed with Rowan Circuit Court a petition for dissolution of his and Patty's marriage.

On January 23, 2002, Patty and Rob voluntarily entered into a property settlement, child custody, visitation and support agreement (custody agreement). In the custody agreement, Patty and Rob agreed to joint custody of the children and agreed to an equal division of parenting time with each one getting the children every other week. In addition, they agreed that neither would be designated as the primary residential custodian. On April 3, 2002, the trial court signed the decree of dissolution which was entered by the clerk of the court on April 4, 2002. In the dissolution decree, the trial court incorporated the custody agreement.

On April 4, 2002 the same day the decree was entered, Patty filed a motion to set aside the custody agreement. Patty

argued that she signed the custody agreement, even though she thought it was not in the best interest of the children, because Rob asserted "that he was going to allege in court that [Patty's] past conduct was such that she was not an appropriate custodian for the children[.]" In addition, Patty claimed that Rob was not Cody's biological father and asked the trial court to sever Rob's relationship with Cody.

Later, on April 15, 2002, Patty filed, pursuant to the Kentucky Rules of Civil Procedure (CR) 60.02, a motion to alter, amend or vacate the dissolution decree. In this second motion, Patty merely incorporated the arguments from her earlier motion. On May 10, 2002, after a hearing, the trial court denied both of Patty's motions. In its order, the trial court found that Rob had no prior knowledge regarding Cody's disputed paternity, and, by withholding this information until the day that the decree was entered and then by attempting to use it to sever Rob's ties with Cody, the trial court noted that Patty was acting deceptively and may have tried to perpetrate fraud upon the court. Noting that Patty freely signed the custody agreement acknowledging that Rob was Cody's father, the court determined that paternity testing would be detrimental to Cody's mental and emotional well-being and ordered that the issue of paternity was best left presumed.

After the trial court denied Patty's motions, she filed a timely notice of appeal from the trial court's May 10 order. However, subsequently, Patty filed with this Court a motion to voluntarily dismiss her appeal. In October of 2002, we granted that motion, but, in the same month, an individual named Richard Scott Ramey filed with Rowan Circuit Court a motion to intervene in Rob's and Patty's dissolution action. Ramey stated that he was Cody's biological father, and, to support this claim, Ramey had attached a DNA test result, which showed, with 99.95% probability, that Ramey was Cody's biological father. Despite this, the trial court denied Ramey's motion, holding that Rowan District Court was the proper forum in which to establish paternity. After his motion was denied, Ramey took no further action, and, for a while, all went quiet in the parties' dissolution action.

Some nineteen months later, Rob filed a motion to modify custody as set forth in the dissolution decree. In support of his motion, Rob attached his own signed affidavit in which he alleged that, after the hearing regarding Patty's motions, Patty told Cody that Rob was not his father even though the trial court had ordered her not to do so. In addition, Rob alleged that Patty told the children that, when Patty was fourteen years old, Patty had murdered her maternal grandmother; had shot her own mother and had been sentenced to 30 years in

prison for the crimes. According to the affidavit, while the parties were married, they had agreed that it would be in the children's best interest for them not to reveal this information to the children. Lastly, Rob alleged that, during those weeks in which the children were with Patty, they would experience greater difficulties at school. Based on these allegations, Rob requested the trial court to grant him sole custody of the children.

After Patty responded to Rob's motion, the trial court set the matter for an evidentiary hearing. And, on August 11, 2004, the trial court conducted a hearing regarding Rob's motion. After speaking with children on the record and hearing numerous witnesses, the trial court decided to hold the hearing in abeyance and ordered both Patty and Rob to be psychologically evaluated at the University of Kentucky. After the first hearing but before the evaluations were performed, the trial court, upon its own initiative, sought to obtain records from various state agencies regarding Patty's murder conviction and regarding her past mental health records. After receiving those documents, the trial court reviewed them, gave both parties' attorneys an opportunity to review them and then forwarded the records to the evaluators at the University of Kentucky. After Patty and Rob were evaluated, the trial court conducted another evidentiary hearing on July 14, 2005.

During both hearings, both Patty and Rob testified about numerous issues. Patty testified about the circumstances leading up to and surrounding the murder of her grandmother. She also testified about Cody's paternity and claimed that Rob knew about Cody's paternity before Cody was born. And she testified about the children's performance at school claiming that they performed well at school while in her care.

Rob testified that he knew, before he and Patty married, that Patty had killed her grandmother. He also testified about Cody's paternity and claimed that, after Patty had told Cody about the boy's biological father, Cody's demeanor changed. Rob further testified that both Cody and Rebecca questioned Rob numerous times about Cody's paternity. Rob also testified about the children's school performance and claimed that Rebecca's home work performance suffered when she was with Patty.

Also numerous witnesses testified on both Patty's and Rob's behalf regarding various issues. Patty's mother testified and contradicted Patty's testimony about the circumstances leading up to and surrounding the murder. In addition, one of Rebecca's teachers testified that, when Rebecca was with Patty, Rebecca did not do her homework as consistently as when Rebecca was with Rob. Rebecca's teacher also testified that Rebecca appeared more withdrawn at school when Rebecca was staying with

Patty. The teacher also testified that, during the school year, she tended to interact with Rob more than Patty, and she opined that, while Patty was not uninterested in Rebecca's school performance, Rob appeared to be more interested than Patty. One of Cody's teachers testified that Cody maintained good grades no matter where he was staying, but the teacher testified that Cody appeared to act out more when he was staying with Patty. This teacher also testified that she found in Cody's desk several pictures he had drawn that were of a sexual nature. According to this teacher, the picture incident occurred during one of Patty's weeks.

After hearing all the testimony presented at both hearings, the trial court modified the custody agreement and granted Rob sole custody of both children. In addition, the trial court granted standard visitation to Patty. Feeling that the trial court focused too much on her criminal past and on the issue regarding Cody's paternity, Patty now appeals to this Court presenting numerous assignments of error for our consideration.

**A. USE AND CONSIDERATION OF FACTS THAT AROSE PRIOR TO THE ENTRY OF THE DECREE**

In her appellate brief, Patty contends that the trial court modified custody granting Rob sole custody based on the fact that, when Patty was fourteen, she murdered her

grandmother, and, based on the fact that, while married to Rob, she had an extramarital affair that resulted in her getting pregnant with Cody.

Based on this contention, Patty avers that Kentucky Revised Statutes (KRS) 403.340(3) mandates that a prior custody decree may only be modified on facts that arose since the entry of the prior decree or that were unknown to the trial court at the time the decree was entered. So, based upon KRS 403.340(3), Patty argues that the trial court erred since it modified custody based on facts that arose well before Rob even sought dissolution and since the trial court was aware of these facts prior to entry of the dissolution decree.

Also, Patty insists that, during the hearings, the trial court focused almost exclusively on the facts and circumstances surrounding her grandmother's murder. And, according to Patty, the trial court's consideration of Patty's criminal past tainted the trial court's willingness to even consider her testimony and her arguments against modification.

When we review a circuit court's child custody decision, we will not reverse unless its findings of fact are clearly erroneous or its decision reflects a clear abuse of the considerable discretion granted trial courts in custody matters. Kentucky Rules of Civil Procedure (CR) 52.01. See also Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).



The modification of custody decrees is controlled by KRS 403.340(3), which states in pertinent part:

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. (Emphasis added.)

As can be seen, Patty is correct that a court cannot modify a prior custody decree unless facts have arisen since the prior decree that show a change in circumstances warranting modification or facts that were unknown to the court at the time it entered the decree have been uncovered warranting modification.

Patty, in essence, contends that the trial court modified custody based solely on the facts that she murdered her grandmother, an event that occurred well before the dissolution decree was entered. Despite this contention, the record shows, and the trial court's order reflects, that the trial court heard testimony about events that occurred before the entry of the decree and heard testimony about events that occurred after the decree was entered. And, as the record reflects, the trial court had no knowledge, prior to entry of the decree, regarding

any event that occurred prior to entry of the decree. A cursory reading of KRS 403.340(3) reveals that a trial court can consider events that occurred prior to entry of the decree if the court did not know of the events at the time it entered the decree. The record shows that the trial court considered events that occurred after the decree was entered and considered an event that occurred before entry of the decree. Since KRS 403.340(3) permits this, the trial court neither violated KRS 403.340(3) nor abused its discretion when it modified custody.

In addition, Patty contends that Rob based his motion to modify custody on Patty's murderous past and on Cody's disputed paternity. And, citing KRS 403.340(3), Williams v. Williams, 290 S.W.2d 788 (Ky. 1956), and Ward v. Ward, 407 S.W.2d 709 (Ky. 1966), Patty argues that Rob could not use these facts as the basis for his motion since they arose before the dissolution decree was entered.

Despite Patty's contention to the contrary, Rob did not base his modification motion upon the murder or Cody's disputed paternity. As the record shows, Rob based his motion on allegations that Patty had told the children about murdering her grandmother, which Rob felt to be harmful to them; on allegations that Patty had told Cody that Rob was not the little boy's father and on allegations that the children's school performance suffered during the weeks that they stayed with

Patty. Since these alleged events arose after the entry of the dissolution decree, there was no violation of KRS 403.340(3).

**B. FAILURE TO CONSIDER THE EVALUATION PERFORMED AT THE UNIVERSITY OF KENTUCKY**

In her second assignment of error, Patty reminds us that, according to KRS 403.340(4)(b) and KRS 403.270(2)(e), a trial court must consider the mental health of all individuals involved in a custody proceeding. And she points out that the trial court did in fact order both she and Rob to be evaluated at the University of Kentucky. The record reflects that, pursuant to the trial court's order, Mr. Lane Veltkamp and one of his associates did evaluate Patty and Rob. Since Mr. Veltkamp's evaluation was the only one performed in the present case, Patty opines that it was the only one that shed any light on her and Rob's mental health. Furthermore, Patty argues that Mr. Veltkamp's evaluation clearly supported her arguments since Mr. Veltkamp opined that she was free of debilitating mood or anxiety symptoms, that she and Rob were both adequate parents, and that the children were more comfortable with her. However, Patty insists that the trial court ignored Mr. Veltkamp's evaluation, yet, since it was the only one, Patty argues that the trial court was bound under KRS 403.340(4)(b) and KRS 403.270(2)(e) to consider it. And, since the trial court ignored the evaluation and focused solely on the state of

Patty's mental health when she was fourteen, Patty reasons that the trial court violated both KRS 403.340(4)(b) and KRS 403.270(2)(e) and committed reversible error.

Apparently, Patty assumes that if the trial court had considered Mr. Veltkamp's evaluation, then the evaluation would have persuaded the trial court to rule in her favor. This, however, is specious reasoning. As the fact-finder in the present case, the trial court had the sole responsibility to weigh the probative value and credibility of all the evidence presented to it and to choose which evidence it found most convincing. Commonwealth, Dep't of Highways v. Dehart, 465 S.W.2d 720, 722 (Ky. 1971). This applied to Mr. Veltkamp's evaluation. Moreover, the trial court's order clearly demonstrates that the court considered Mr. Veltkamp's evaluation and found it unpersuasive. This too was in the trial court's discretion since it was not bound to accept as true any testimony from any witness, including Mr. Veltkamp who testified via report. Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941). Since the trial court considered Mr. Veltkamp's evaluation, it did not violate either KRS 403.340(4)(b) or KRS 403.270(2)(e).

### **C. BURDEN OF PROOF**

In her brief, Patty points out that, during the custody proceeding, the trial court entered seven orders on its

own initiative seeking to obtain Patty's past mental health records and records regarding Patty's criminal history. According to Patty, the trial court sought these records in order to resolve the conflict between Patty's testimony and her mother's testimony regarding the murder.

Now, on appeal, Patty argues that because the trial court entered these seven orders, it shifted the burden of proof from Rob, who moved for modification, to herself, or, in the alternative, the trial court assumed the burden of proof, thereby, relieving Rob of his burden. Either way, Patty insists that the trial court committed reversible error.

According to Wilcher v. Wilcher, 566 S.W.2d 173, 175 (Ky. App. 1978), the party seeking modification of a custody decree bears the burden of proof. In this case, since Rob was the party seeking modification, he bore that burden. In her brief, Patty contends that the trial court shifted the burden of the proof from Rob to her, but she fails to expound upon that argument. Instead, she argues that because the trial court, on its own initiative, entered seven orders seeking records regarding Patty, the trial court assumed the burden of proof. Patty cites neither statute nor case law to support her argument, and we fail to see how the trial court, by obtaining these records, relieved Rob of his burden of proof.

#### **D. HEARSAY EVIDENCE**

As previously mentioned, the trial court obtained, on its own initiative, records regarding Patty's past. Patty points out that the trial court did not file these documents in the record; instead, the court ordered the records sealed. Even though the trial court sealed the records, it considered them in resolving Rob's motion to modify custody. Since the trial court considered the documents but never filed them in the record, Patty contends that documents constituted hearsay evidence pursuant to Kentucky Rules of Evidence (KRE) 801(c). Furthermore, none of the recognized hearsay exceptions applied to the documents since the trial court never identified the specific documents upon which it relied. Since the trial court relied on hearsay, Patty insists that the order modifying custody must be vacated.

In Patty's reply brief, she insists that she properly preserved the hearsay issue; however, while Patty points to instances where she objected to the trial court's use of the documents during the second hearing, in those instances, Patty objected to the documents on the grounds of relevancy not hearsay. Thus, she did not preserve the issue of hearsay for our review. And, while we will not address the merits of Patty's hearsay argument, we note that the documents obtained by the trial court tended to fall under one of the three following

hearsay exceptions: statements for purposes of medical treatment or diagnosis pursuant to KRE 803(4); records of regularly conducted activity pursuant to KRE 803(6) or public records and reports pursuant to KRE 803(8).

**CONCLUSION**

Finding that the trial court did not abuse its discretion, the order modifying custody is affirmed.

ALL CONCUR.

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