

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001109-ME

JUSTIN B. BEST

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE THOMAS O. CASTLEN, JUDGE  
ACTION NO. 08-CI-00268

MEGAN E. PACKMAN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

STUMBO, JUDGE: Justin B. Best appeals from an Order of the Daviess Circuit Court denying his motion to modify a prior custody Order. Best contends that the circuit court failed to properly examine the child's best interest and that its Order was not supported by substantial evidence. For the reasons stated below, we affirm the Order on appeal.

Child “B.B.” was born in 2003 to parents Justin B. Best and Megan E. Packman. At the time of the child’s birth, Best was 21 years old and Packman was 16. They were not married.

Best, Packman and the child moved in with Best’s parents, where they continued to live for approximately three years. In early 2006, Best and Packman separated. Best initiated a paternity action which ultimately resulted in an Order establishing a joint custodial arrangement with Packman serving as primary residential custodian. It is uncontroverted that the parties ended up sharing time with B.B. about equally. B.B. would often move between the residences of Best and Packman on a daily or almost daily basis.

In February 2008, Best filed the instant action in Daviess Circuit Court seeking to be designated as B.B.’s primary custodian. As a basis for the proposed change in custody, Best noted that B.B. was entering kindergarten and that the current arrangement was not suitable for a school - aged child. Packman responded *pro se*, and the Domestic Relations Commissioner conducted evidentiary hearings in June 2008. Best alleged that Packman was not suitable to be primary custodian of B.B. In support of this contention, he pointed to a 2005 Domestic Violence Order (“DVO”) and a 2007 shoplifting charge involving Packman. After taking proof, the Commissioner made findings and rendered a recommended Order that the parties continue to have joint custody of B.B. and that Packman be designated as primary custodian. In reaching this conclusion, the Commissioner noted that the DVO was more than two years old, and that Packman

had explained what occurred during the shoplifting incident and that it was not grounds for denying custody.

The matter proceeded in circuit court, with an Order rendered on June 11, 2009, restraining each party from being within 1000 feet of the other except as required for visitation and school events. The court also ordered the parties to tender for the court's consideration any proposed findings of fact, conclusions of law and judgment. A preliminary custody Order was rendered on September 4, 2008, to which both parties filed motions to alter, amend or vacate. On November 25, 2008, an Order was rendered wherein the court adopted the Commissioner's Recommended Order of July 2, 2008, upon finding it to be supported by substantial evidence. The court noted that Best was seeking a change in custody occurring more than two years after the original custody Order, thus invoking Kentucky Revised Statutes (KRS) 403.340(3). It noted that in order to justify a change in custody, KRS 403.340 required a finding of a change in circumstances and an analysis of the child's best interest. The court stated that the primary change in circumstances relied on by Best was that B.B. was about to enter kindergarten, that Packman had moved several times since the parties stopped living together, and the 2007 shoplifting allegation. After noting that the other grounds relied upon by Best were known to him when he consented to the original custody decree, it found that B.B.'s age and Packman's changes of living arrangements did not create such a change in circumstances as to justify a modification of custody.

Best then moved for a new trial, and a hearing on the motion was conducted on January 6, 2009. A resultant Order was rendered on January 13, 2009, referring the matter back to the Commissioner to review the record and make specific findings of fact and amended recommendations, if any, as to the custodial arrangements which would serve B.B.'s best interest. In response, the Commissioner rendered additional findings and conclusions on February 4, 2009, and recommended that it would be in B.B.'s best interest to have Packman remain as the primary custodian.

Best filed exceptions to the February 4, 2009 Recommended Order, and Packman moved to reopen the record to take additional proof to support the February 4, 2009 Recommended Order. On May 4, 2009, the court again set out various findings and conclusions relating to Best's original motion to change custody. It denied the motions for a new trial and to reopen the record, and reaffirmed its July 2, 2008 Order adopting the Commissioner's recommendations as supported by substantial evidence. This appeal followed.

Best argues that the circuit court improperly failed to make essential findings regarding B.B.'s best interest as required by KRS 403.270 and KRS 403.340. He also maintains that the court and the Commissioner incorrectly concluded that the consideration of any evidence in support of B.B.'s best interest is limited by statute to that which occurred only in the last two years. Best goes on to argue that the best interest standard includes consideration of the risk of mental,

emotional or physical harm, and maintains that the award of primary custody to Packman is not supported by substantial evidence.

KRS 403.340(3) states that,

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.

Thus, in order to prevail on a motion to change custody, Best must demonstrate using facts that have arisen since 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. Best alleged in relevant part that B.B. was now at an age where the current time-sharing arrangement was not suitable; that Packman had mental health and violent outburst issues; and, that Packman had entered a guilty plea to a charge of shoplifting. The substance of his argument was that these factors combined to demonstrate that he should be designated as the primary residential custodian.

We are not persuaded by Best's contention that the circuit court improperly failed to make findings of fact related to these issues specifically or to KRS 403.340 generally. As to Best's contention below that Packman had mental health issues and had engaged in violent outbursts, the court noted that "these conditions existed at a time when the parties lived together and for several years prior to the filing of the Petition for custody" and therefore did not warrant consideration as to whether Packman was unfit for custody. This finding is supported by the record and the law, in that KRS 403.340 requires the movant to rely on "facts that have arisen since the prior decree . . . ." Packman's alleged mental health issues and violent outbursts pre-dated the entry of the prior decree, and we find no error on this issue.<sup>1</sup>

The court also expressly addressed Packman's shoplifting conviction. While stating that, "[t]he Court may not agree with the Commissioner on that one point," i.e., the Commissioner's implicit determination that the conviction was of

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<sup>1</sup> It merits noting that Packman's testimony was not recorded, and neither party has introduced a narrative statement to supplement the record.

little consequence in the custody analysis, the court noted that “both parties have lacked maturity in their decision-making processes in the past.” In any event, it cannot reasonably be argued that the court failed to consider Packman’s shoplifting conviction as part of its broader custody analysis.

Similarly, we are not persuaded by Best’s broader contention that the Court failed to make sufficient findings of fact or that its conclusions were not supported by substantial evidence. We also do not agree with Best’s assertion that the Court refused to consider any evidence occurring more than two years prior to his motion to amend custody. On January 13, 2009, the court referred the matter back to the Commissioner for additional findings of fact in support of the Commissioner’s conclusion that it was in B.B.’s best interest not to modify custody. These findings subsequently were adopted and reiterated by the court. As noted above, the findings addressed Best’s contention specifically and KRS 403.340 generally. The burden of proof, however, does not rest with the circuit court to demonstrate that the original custody decree was proper. Rather, the burden rests with Best to demonstrate that custody should be modified in conformity with KRS 403.340(3). In reviewing decisions in a child custody case, the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The court’s findings are not clearly erroneous, and the correct legal standard was applied to the facts as set out in KRS 403.340(3). We find no error.

For the foregoing reasons, we affirm the May 4, 2009 Order of  
Daviness Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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