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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002602-MR

KAREN HUNINGHAKE BUNDY
(NOW DANIELS) APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 88-CI-00037

BOBBY LEE BUNDY APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Karen Daniels (formerly Bundy) appeals from an order of the Campbell Circuit Court, entered October 5, 2000, switching custody of Karen's then sixteen-year-old daughter, Jessica, from Karen to Bobby Lee Bundy, Jessica's father and the appellee herein. Karen contends that the trial court's findings do not support its conclusion that, for the purposes of KRS 403.340, Jessica has been integrated into Bobby's family. We agree. We are obliged, consequently, to reverse and remand.

Karen and Bobby married in November 1979. Three children were born to them: two sons, born in December 1980 and February 1982, and a daughter, Jessica, born in August 1984.

Bobby petitioned for dissolution of the marriage in January 1988. As part of the dissolution decree, entered December 1, 1988, Karen was awarded custody of the children subject to Bobby's visitation rights. The decree accorded Bobby about five-and-a-half days' visitation every two weeks. When Bobby moved to Ohio about a year later, the parties' visitation schedule became somewhat inconvenient. To accommodate Bobby's visitation, Karen consented to his keeping the children an extra day or two each two-week period. The parties thus cared for and enjoyed the companionship of the children on a roughly even basis. This arrangement continued when Bobby returned to Kentucky.

The statute at issue, KRS 403.340, which has been held to establish standards for the modification of all Kentucky custody decrees,[1] provides in pertinent part that the trial court

> shall not modify a prior custody decree unless 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 interest of the child. In applying these standards, the court shall retain the custodian appointed pursuant to the prior decree unless:
> (a) The custodian agrees to the modification;
> (b) The child has been integrated into the family of the petitioner with the consent of the custodian; or
> (c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him . . . .

[1]Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485 (1990).

Bobby first petitioned for a change of custody under this statute in September 1995. He urged the court to make formal the parties' informal arrangement and to change the award from sole to joint custody. Referring implicitly to KRS 403.340(2)(c), the circuit court summarily denied the motion. "Petitioner has failed," the court stated, "to present sufficient facts by way of affidavit to indicate that the present environment of the children seriously endangers their physical, mental or emotional health."

In February 2000, Bobby renewed his motion, this time alleging that the second son, then newly turned eighteen, had moved in with him and that Jessica, who already lived with him half the time, wished to move as well. The trial court granted the motion with respect to the son, but again denied it with respect to Jessica. "The requirements of KRS 403.340(2) have not been met," the trial court ruled, in that petitioner "has failed to allege facts which indicate that her [Jessica's] present environment seriously endangers her physical, mental, moral or emotional health." Bobby moved, thereupon, for the court to reconsider its order, and attached to his motion letters from his sons voting, in effect, for him. On June 1, 2000, the court vacated its prior order, without explanation, and referred the matter of Jessica's custody to a commissioner.

Following a hearing, the commissioner found that, by virtue of Karen's having consented, several years before, to Jessica's visiting Bobby a day or two every two weeks more than the decree provided, Jessica had become "integrated" into Bobby's

family for the purposes of KRS 403.340(2)(b) and that the decree could therefore be modified to award Jessica's sole custody to Bobby, Karen limited to visitation on alternate weekends.

The commissioner candidly explained that he based his recommendation on Jessica's testimony before the parties' attorneys and upon her remarks to him *in camera*. It seems that for several reasons Jessica had come to prefer living at Bobby's home. The attractions there, aside from Bobby himself, included Bobby's wife, with whom Jessica had developed a close relationship; Jessica's brothers, who apparently had moved in with Bobby; and several pets. On the other hand, Jessica expressed resentment about Karen's seeming to devote so much of her attention to Jessica's six-year-old half-brother, and impatience with having her things divided between two places. The trial court concurred in both parts of the commissioner's report: it agreed that Bobby had overcome KRS 403.340's presumption against modification of custody orders by showing that Jessica had become integrated into his family, and it agreed that the recommended modification comported with Jessica's best interest. It is from this ruling that Karen has appealed. She argues that the trial court clearly erred in that it misconstrued the formidable threshold finding required by KRS 403.340(2) before a custody award may be modified. Reluctantly, we agree.

In Quisenberry v. Quisenberry[2] and Wilson v. Messinger,[3] our Supreme Court endorsed the idea that the provisions of KRS 403.340(2) "intend to inhibit further litigation initiated simply because the noncustodial parent, or the child, or both, believe that a change in custody would be in the child's best interest."[4] The purpose of KRS 403.340(2), said the Court in Quisenberry, "is to provide stability and finality to a custody decree."[5] Given this purpose, our Supreme Court has upheld the trial court's refusal to consider modification where a fourteen-year-old expressed a desire to live with the noncustodian,[6] and where the custodian intended to move away from Kentucky but the child wished to stay.[7]

While it is true that these cases were directly concerned with subsection (c) of KRS 403.340(2), the subsection permitting a reconsideration of custody if the existing regime seriously endangers the child, their holdings apply to subsection (b) as well. The goal of finality would be oddly and inconsistently served if subsection (c) established a high threshold around the right to modification, but subsection (b) a

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[2]*supra,*

[3]Ky., 840 S.W.2d 203 (1992).

[4]*Id.* at 204 (internal quotation marks and citations omitted).

[5]785 S.W.2d at 488 (citations and internal quotation marks omitted).

[6]Quisenberry, *supra.*

[7]Wilson, *supra. See also* Wilcher v. Wilcher, Ky. App., 566 S.W.2d 173, 175 (1978) ("KRS 403.340 reflects a strong legislative policy to maximize the finality of custody decrees without jeopardizing the health and welfare of the child. The statute creates a presumption that the present custodian is entitled to continue as the child's custodian.").

low one. As we read these precedents, therefore, under either subsection, absent a truly compelling reason to revisit an existing custody arrangement, that arrangement is not to be disturbed.

Such a reason was found under subsection (b) in Carnes v. Carnes.[8] In that case, soon after entry of the decree the custodian found herself temporarily unable to care for her child. She left the child with the noncustodian and about six months later, having reordered her life, sought to resume custody. The noncustodian objected, and the trial court ruled that custody should be switched. Although for apparently good reasons, the initial custodian had abdicated her responsibilities under the original decree with the result that the child had become integrated within the noncustodian's family. At that point, the goals of finality and stability could best be served by recognizing in a modified decree the *de facto* status quo. This result, our Supreme Court held, comported with subsection (b).

Carnes thus illustrates some typical features of a modification under that subsection. First, the custodian relinquished both her rights and responsibilities under the original decree and someone else assumed the responsibilities. That state of affair continued for a significant length of time. And finally the court found that what had begun as an ad hoc arrangement was working well for the child so that the child's interest in stability would be served by formally adopting it.

[8]Ky., 704 S.W.2d 207 (1986).

In the present case, although Karen's consent to Bobby's slightly increased visitation with Jessica is now of long standing, the other elements are missing. Indeed, it would be a travesty to characterize Karen's consent as in any sense an abdication of her responsibilities under the decree. On the contrary, she testified, without contradiction, that she consented to the adjustment in the visitation schedule to accommodate Bobby and to ensure that he and Jessica maintained their relationship. This is precisely the cooperation one hopes to see between divorced parents. To hold that Karen had thus jeopardized her rights would be unreasonable. Also missing from this situation, unlike the one in Carnes, was a *de facto* stability the modified decree could be said to preserve. Here, instead, the trial court invoked subsection (b) in order to overhaul a custody arrangement that had worked reasonably well for a long time, upsetting rather than furthering the stability that subsection (b) has been held to protect.

In sum, although we sympathize with the parties and with Jessica, we are constrained to conclude that the trial court erred. As that court ruled initially, Bobby did not satisfy the threshold requirements under KRS 403.340 for a modification of custody. The modification, therefore, was improper, notwithstanding the fact that the modified arrangement might well have served Jessica's best interest. Perhaps the law should not be so.[9] Certainly there is tension between the rule of KRS 403.340(2) as it has evolved and the broad discretion accorded

[9]*See* the dissenting opinions in Quisenberry and Wilson.

trial courts with respect to other domestic matters. Nevertheless, until the General Assembly or our Supreme Court tells us otherwise, we, and the trial court, are obliged to adhere to the law as it has come to be. We trust the parties, whose mutual concern for their children is apparent, to fashion a living arrangement responsive to Jessica's maturing desires as well as to her abiding needs.

For the reasons stated, we reverse the October 5, 2000, order of the Campbell Circuit Court and remand for additional proceedings consistent herewith.

BUCKINGHAM, JUDGE, CONCURS IN RESULT.

McANULTY, JUDGE, CONCURS.

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