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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000025-ME

PENNY FOSTER ENGLAND — APPELLANT

v.

APPEAL FROM LARUE CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 04-CI-00165

SAMUEL ENGLAND — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

DIXON, JUDGE: Penny England appeals from an order of the LaRue Circuit Court denying her motion to modify joint custody of one of the parties' minor daughters. Because we believe that the trial court properly determined that Penny did not meet the statutory requirements to warrant a change in custody, we affirm the trial court.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Penny England and Sammy England were married on February 17, 1984. They had three children during their marriage, Kim, Cynthia, and Rachel; however only the later two were minors at the time of the action herein. The parties separated in September 2004, and a separation and property agreement was executed in October 2004.

Pursuant to the agreement, the parties agreed to share joint custody of the two minor daughters, with Sammy having primary residential custody and Penny having visitation rights. The residential custody arrangement was based upon Penny's belief that she could not provide adequate housing following the marital separation.

In March 2005, the parties entered into an oral agreement whereby Sammy retained primary custody of Rachel and Penny became the residential custodian of Cindy. This oral agreement was incorporated into the Agreed Findings of Fact, Conclusions of Law, Judgment and Decree that were subsequently entered by the LaRue Circuit Court on October 3, 2005.

On October 5, 2005, Penny filed a motion to modify custody of Rachel, claiming that Rachel's grades had declined and that Sammy was not providing proper supervision. Penny also stated that she had established a stable home and was entitled to become the residential custodian of both girls. Following a

hearing in November 2005, the trial court denied Penny's motion. This appeal ensued.

This Court noted in *Crossfield v. Crossfield*, 155 S.W.3d 743,745 (Ky. App. 2005), that the change in the primary residential custodian amounts to a modification of the joint custody arrangement. *See also Scheer v. Zeigler*, 21 S.W.3d 807 (Ky.App. 2000)(sitting en banc). Thus, any change is subject to the provisions of KRS 403.340, which provides, in pertinent part:

> (2) 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; or
>
> (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.
>
> (3) 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.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

(a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;

(b) The mental and physical health of all individuals involved;

(c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child . . .[.]

Our standard of review on an appeal from a custody determination is whether the trial court's findings were clearly erroneous. *Day v. Day*, 347 S.W.2d 549 (Ky. 1961). And findings of fact are clearly erroneous only if there exists no substantial evidence in the record to support them. *V.S. v. Commonwealth*, 706 S.W.2d 420 (Ky.App. 1986). Because we are of the opinion that the trial court engaged in a lengthy and comprehensive application of the applicable statutes, we incorporate the court's findings herein as follows:

> When determining if a change has occurred and whether a modification of custody is in Rachel's best interest, this Court is required to consider the factors contained in KRS 403.340(2). . . .
>
> The first factor is whether the custodian agrees to the modification. KRS 403.340(2)(a). Not only is Sammy opposed to any modification, but he contends that it is in Rachel's best interest to remain at the family residence.
>
> The second factor is whether Rachel has been integrated into Penny's family with the consent of Sammy. KRS 403.340(2)(b). Sammy has resisted any integration of Rachel into Penny's family and, as a result, Penny has been limited to alternate weekends with Rachel.
>
> The third factor is contained in KRS 403.270(2) for determining the best interests of the child. KRS 403.340(2)(c). This Court will now make findings pursuant to said statute. First, each parent wishes to be Rachel's primary caretaker. KRS 403.270(2)(a). Second, neither party called Rachel as a witness, and as a result, this

Court is unsure as to her wishes. KRS 403.270(2)(b). Third, Rachel and her father presently live alone while Penny resides with her boyfriend, . . . his daughter, . . . and Cindy. However, no evidence was presented as to Rachel's interaction and interrelationship with Penny's boyfriend and his daughter. KRS 403.270(2)(c). Fourth, although Penny demonstrated that Rachel's grades had declined, neither party submitted any proof as to Rachel's adjustment to her home, school, and community. KRS 403.270(2)(d). This Court would note, however, that Rachel would be required to transfer from the LaRue County Middle School upon a custody modification since Penny resides in Marion County, Kentucky.

The fourth factor is whether Rachel's present environment endangers seriously her physical, mental, moral or emotional health. KRS 403.340(2)(d). Although this Court is of the opinion that Sammy could obviously improve his parenting skills, it is unable to find that Rachel's physical, mental, moral or emotional health is being seriously endangered. This Court would note that Rachel's poor academic performance could be attributed to any of the following: (1) Sammy has failed to properly monitor her progress, (2) school has become more difficult for Rachel, and as a result, she needs greater assistance, and/or (3) Rachel is distraught be her mother abandoning the family for her boyfriend. . . . At the present time, however, this Court would strongly suggest that Sammy obtain a tutor for Rachel, and that he improve his supervision over her.

The fifth factor is whether the harm likely to be caused by a change of environment is outweighed by its advantages to her. KRS 403.340(2)(e). This Court has thoroughly reviewed the evidence, and it is unable to find any significant advantages for modifying custody. Although Penny

> contends that Rachel's grades would improve with her, this Court is not convinced based upon the following: (1) Penny allowed Cindy to miss approximately three consecutive weeks of school last year, (2) Penny allowed Cindy to drop out of school, and (3) from the date of the separation until the fall of 2005, Penny made virtually no effort to monitor Rachel's academic progress. . . .
>
> In conclusion, this Court does not find sufficient proof to justify a custody modification. This finding is based upon the statutory presumption and the Court's consideration of all relevant factors contained in KRS 403.340(2). . . .

Without question, the trial court thoroughly considered whether a modification of custody was in Rachel's best interests. In fact, because Penny's motion was made earlier than two years after the date of the custody decree, the trial court was only required to determine whether Rachel's present environment "may endanger [her] physical, mental, moral, or emotional health." KRS 403.340(2)(a). Notwithstanding, the trial court engaged in a full-blown evaluation of all factors enunciated in KRS 403.340.

Finally, we are not persuaded by Penny's contention that the trial court erroneously interpreted KRS 403.340(2) by finding only that Rachel's living arrangement did not currently endanger her physical, mental, moral, or emotional health. Penny argues that the proper inquiry is whether a minor *may* be endangered by his or her environment. Indeed, KRS 403.340(2)

states that no modification can be made under said statute unless there is reason to believe that "the child's present environment may endanger seriously his physical, mental, moral, or emotional health [.]" However, the trial court's reference to Rachel's current situation was made in the context of evaluating the factor's set forth in KRS 403.270(2) to determine the best interests of the child. And one such factor does, in fact, consider "[w]hether the child's present environment endangers seriously his physical, mental, moral, or emotional health [.]"

Nevertheless, the trial court found no reason to believe that Rachel was or could be endangered by her present environment. Clearly, the trial court determined that Penny had produced insufficient evidence to warrant a change of physical custody. The trial court was in the best position to evaluate the witnesses and the evidence presented. The court's findings are supported by substantial evidence in the record and, as such, we cannot conclude that it erred in denying Penny's motion. *See V.S. v. Commonwealth, supra.*

The decision of the LaRue Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Samuel Todd Spaulding Lebanon, Kentucky	Dawn L. Blair Elizabethtown, Kentucky