

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000275-ME

SANDRA FAYE TOLLIVER (NOW JOHNSON)

APPELLANT

v.

APPEAL FROM HARLAN FAMILY COURT
HONORABLE HAROLD S. BURKS, JUDGE
ACTION NO. 02-CI-00542

RAY DEWAYNE TOLLIVER

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ACREE, JUDGE: Sandra Tolliver (now Johnson) appeals from an order of the Harlan Circuit Court modifying custody of her two minor children. Johnson argues that, under the best interests test found in KRS 403.270(2), the trial court improperly modified custody in favor of her ex-husband, Ray Tolliver. We disagree and affirm.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

At the time of the parties' 2002 divorce, their daughter, R.T., was ten years of age and their son, D.T., was only four. The trial court granted Johnson custody of the children and awarded visitation rights to Tolliver. Both parties have since remarried, and Tolliver and his new wife have a child together. Three and a half years after the divorce, Tolliver filed a petition for a modification of custody due to concerns over the welfare of the children. The trial court conducted a hearing on September 6, 2006, and ordered social services to perform evaluations of each parent's home. A second hearing was held after the evaluations were performed. Based on the record and the hearing, the trial court modified the original custody order and granted joint custody of the children to Johnson and Tolliver, designating Tolliver as the primary residential custodian. Johnson was granted visitation rights. This appeal followed.

Johnson argues that the trial court abused its discretion in finding that it was in the children's best interests to reside with Tolliver. In reviewing the decision to grant Tolliver's request for custody modification, "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)(citation omitted). Johnson focuses on the factors enumerated in KRS 403.270 which a trial court must consider when making the original determination of custody. However, Tolliver's motion was for custody modification.

When considering custody modification, a trial court is directed by KRS 403.340. This statute allows a trial court to modify custody if,

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.

KRS 403.340(3). The statute goes on to enumerate six factors to consider in determining whether custody modification is in a child's best interest, including “[t]he factors set forth in KRS 403.270(2) to determine the best interests of the child. . . .” KRS 403.340(3)(c).

So, while it is true that KRS 403.270 plays a role in the trial court's ruling on a motion to modify custody, there are other factors to consider. Those other factors relevant to this case are

- (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;
-
- (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[.]

KRS 403.340(3).

In this case, the trial court specifically found that the children were well-integrated into their father's home, having a loving and stable relationship with him, their stepmother, and their half-sibling. KRS 403.340(3)(b). Further, the trial court's order stated that Tolliver is able to meet all of the physical, emotional, and financial needs of the children.

The next factor, KRS 403.340(3)(c) requires the trial court to consider “[t]he factors set forth in KRS 403.270(2) to determine the best interests of the child. . . .” The best interests test contains nine factors, three of which deal with *de facto* custodians.

KRS 403.270(2)(g)-(i). The first six factors, however, are relevant in this case. KRS 403.270(a) and (b) direct the trial court to consider the wishes of the parents and the children. In this case, Tolliver wishes to remain primary residential custodian while Johnson is seeking to have that status returned to her. R.T. initially stated that she wanted to live with her father, then signed a letter stating that she wanted to live with her mother and, finally, advised social services that she wanted to live with her father. Her younger brother has always stated a preference for living with their mother. Though the trial court would ultimately find it in the best interests of the children to reside together with Tolliver, the record shows the trial court considered the wishes of both children.

Next, the trial court analyzed the children's "interaction and interrelationship . . . with [their] parent or parents, [their] siblings, and any other person who may significantly affect the [their] best interests. . . ." KRS 403.270(2)(c). Johnson expressed a concern that her daughter has an inappropriate interest in Mrs. Tolliver's teenage brother and that the two are not adequately supervised when he stays overnight at the Tolliver home. The trial court viewed the evidence otherwise, concluding that both children have a close relationship with their father, their stepmother, and their half-sibling. On the other hand, the trial court noted Johnson did not even know the nature of the disability for which her own daughter receives Supplemental Security Income benefits.

The trial court also considered the children's "adjustment to [their] home, school, and community." KRS 403.270(2)(d). Johnson and her husband resided in a 12' x 30' mobile home. Due to its small size, the children had to sleep in the living room which Johnson had divided into two spaces using a wooden divider and curtains. The

Tollivers resided in a two bedroom mobile home; however, they had arranged to move into a three bedroom mobile home next door if the children came to live with them.

Social services was able to evaluate the larger home and pronounced it suitable.

Some of the more troubling findings concern the children's school situation.

The trial court's order referenced records showing the children had attended three different schools within the same school year due to their mother's frequent changes of residence. While Tolliver and his family had moved several times as well, they had remained within the same school district. Furthermore, the children's school records did not indicate they were making the most of their educational opportunities.

During the 2005-2006 school year, the children had a total of 12 unexcused absences between the two of them and 22 tardies, with 9 of the tardies being unexcused. In addition, the child [D.T.] was suspended from school on two (2) separate occasions, with one suspension being for distributing medication on the school bus. Neither child was involved in any extracurricular activities at any school during the 2005-2006 school year, and neither child is involved in any extracurricular activities in the current school year.

[Johnson's] testimony at the hearing revealed that when [D.T.] entered the third grade for the 2006-2007 school year, he could not read or spell.

(Trial court's order of December 18, 2006).

The trial court analyzed “[t]he mental and physical health of all individuals involved. . . .” KRS 403.270(2)(e). Johnson has never been employed and receives SSI benefits, as do both children. At the first hearing Johnson testified that she had been taking Xanax and Lortab for the past ten years. However, when questioned at the second hearing regarding her failure to mention these medications during the social services

evaluation, she testified that she had not taken them in years. D.T. receives SSI benefits for a learning disability.

Johnson pointed out to the trial court Tolliver's two prior convictions for driving under the influence, which occurred during the marriage, and one for public intoxication that occurred in 2004. She urged that this was an indication of Tolliver's lack of suitability as a custodian. Tolliver asserts that he no longer consumes alcoholic beverages. Further, the trial court noted that Tolliver had obtained employment with the school board as a janitor and substitute bus driver. This employment required him to undergo a criminal background check and submit to drug testing.

Finally, the trial court considered “[i]nformation, records, and evidence of domestic violence.” KRS 403.270(2)(f). The trial court found that medical records indicated Tolliver had taken the parties' daughter to the emergency room after she arrived for visitation with obvious bruising and complaining of a headache. R.T. reported that her injuries were caused by Johnson's husband striking her with a belt. The medical records included photographs of the bruises.

Based on all of the evidence before it, the trial court found that a custody modification was in the children's best interests, and we are unable to discern any abuse of discretion or arbitrariness in this decision. *Clary v. Clary*, 54 S.W.3d 568, 570 (Ky.App.2001)(“The test for abuse of discretion in reviewing the trial court's decision is whether the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”).

Having determined that the best interests test was met, the inquiry returns to additional factors under KRS 403.340(3). First, the trial court must consider “[w]hether

the child's present environment endangers seriously his physical, mental, moral, or emotional health” and, second, “[w]hether the harm likely to be caused by a change of environment is outweighed by its advantages to him.” KRS 403.340(3)(d) and (e). We have already noted the problems with the children's performance in school while they resided with their mother. Further, the evidence of domestic violence indicates that, at least, R.T. is in physical danger while she resides with her mother and stepfather. The trial court noted that Johnson's frequent moves led to disruption of the children's education. Further, the trial court specifically found both children were well-integrated into Tolliver's home. Consequently, the advantages of a custody change clearly outweigh any harm from a change in environment. KRS 403.270(2)(e).

Considering the evidence of record and the trial court's order, Johnson fails to persuade us that the trial court ignored her children's best interests when it modified custody. For the foregoing reasons, the custody modification order of the Harlan Circuit Court is affirmed.

ALL CONCUR.

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