

RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2008-CA-000616-ME

K.D.

APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
v. HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 04-CI-00125

E.J.

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON, LAMBERT, AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Henderson Circuit Court modifying an agreed custody order. For the reasons that follow, we will affirm.

BACKGROUND INFORMATION

Appellant, K.D. (hereinafter mother), and appellee, E.J. (hereinafter father), are the parents of A.J. A.J. was born on June 26, 2001, and resided with

both parties from July of that year until June of 2003. On July 5, 2005, the Henderson Circuit Court entered an order awarding joint custody of A.J. to mother and father. A.J. stayed with mother during the week and with father during the weekend. Father travels to Henderson County for his weekends with A.J. and stays with his parents during his visits due to the distance from Paducah.

Mother has a history of alcohol abuse and, during the time A.J. has resided with her, resided with several different people in several different areas. While mother had entered into a plan with the Cabinet for Health and Family Services regarding substance abuse education and treatment, there was no evidence presented that she had actually attended any classes or programs.

Father has a history of illegal drug use. On February 6, 2002, he was arrested on federal drug charges and was incarcerated from June 19, 2003, until April 16, 2004, and resided at a halfway house in Paducah, Kentucky, until October 15, 2004. He has been in recovery since February of 2002. He currently has employment with a law firm in Paducah.

On October 5, 2007, father filed a motion with the court for sole custody and on March 6, 2008, the trial court found that it would be in the best interests of A.J. to change her primary residence from mother to father. Mother now appeals that decision arguing that the trial judge abused her discretion in making that determination.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id.*; *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). “An abuse of discretion occurs when a ‘trial judge’s decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’” *Farmland Mutual Insurance Co. v. Johnson*, 36 S.W.3d 368, 378 (Ky. 2000), quoting *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000).

LEGAL ANALYSIS

If a parent brings a motion to modify custody within two (2) years of the date of the original custody order, the court must find that the child is in danger. The Henderson Circuit Court originally entered an agreed custody order in July of 2005. Thus, more than two (2) years have elapsed and, pursuant to Kentucky Revised Statutes (KRS) 403.340(3), a court may modify an existing custody decree 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.” In making a determination as to the best interests of the child, the court should consider:

- (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.

KRS 403.340(3).

KRS 403.270(2) lists the following factors which should be weighed in determining the best interests of the child:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;

- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

In this case, the trial judge made specific findings regarding the best interests of A.J. She cited the history of alcohol abuse mother had as well as the fact that no evidence had been presented which indicated an affirmative act on mother's part to seek treatment for her addiction. The trial judge also recited evidence of mother's many residences and the different individuals including three (3) adult males who had come in and out of A.J.'s life as a result of her living with mother, since entry of the decree in July of 2005. Further, the court noted that as many as eight (8) people were living in the three- (3) bedroom mobile home which is her current residence.

As to father, the trial judge set forth his history of illegal substance abuse. The evidence presented, however, indicated that since his release from prison he has been free of such substances. Father also has maintained gainful

employment, now owns a home in Paducah where he lives alone, and has consistently visited A.J. even though it meant travelling a distance to do so.

Finally, the trial judge evaluated the evidence regarding A.J.'s ability to adapt to new surroundings and found, based upon the testimony of those who knew the child, that she would easily adapt to a new school if her primary residence was moved to father.

We believe there was more than sufficient evidence set forth by the trial judge in making her decision that A.J.'s best interests would best be served if her primary residence were changed to father's. Consequently, there was no abuse of discretion and we will affirm the decision of the trial judge modifying custody.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kenneth S. Kasacavage
Henderson, Kentucky

BRIEF FOR APPELLEE:

Susie Moore
Henderson, Kentucky