

RENDERED: JANUARY 18, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000585-ME

DESTINY TENILLE SAWYERS-WATSON

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE RODNEY BURRESS, JUDGE  
ACTION NO. 14-CI-00533

JOSHUA DAVID LEHRING, SR.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JONES, NICKELL, AND TAYLOR, JUDGES.

JONES, JUDGE: The Appellant, Destiny Tenille Sawyers-Watson (“Destiny”) appeals the December 7, 2016, order of the Bullitt Circuit Court, granting sole custody to the Appellee, Joshua David Lehring, Sr. (“Joshua”), of the parties’ two minor sons. For the reasons set forth below, we affirm.

## I. BACKGROUND

The parties never married but lived together for several years prior to their separation in 2014. They are the parents of three minor children, one daughter and two sons. Initially, the parties agreed to share joint custody of their three children and equal timesharing with their sons. By agreement, the sons rotated their time with the parties week to week; the daughter's time with Joshua was to be based on the recommendations of her therapist.<sup>1</sup> This agreement was memorialized by an order of the circuit court entered on December 18, 2014.

Communication between the parties deteriorated after their agreement. After entry of a domestic violence order in a separate case, the circuit court ordered the parties to have no contact and to use a third party for communication regarding the children but left intact the parties' equal timesharing schedule. Though the circuit court subsequently issued orders altering the no-contact order to allow limited communication regarding the children, the parties filed numerous motions and responses indicating their inability to agree upon various issues, including after-school programming, telephone communication, medication, holidays, athletic activities, vacations, selection of counselors and provision of insurance information.

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<sup>1</sup> The daughter's custody and timesharing arrangement is not a part of this appeal.

On December 3, 2015, Destiny filed motions to relocate to Lexington, Kentucky, and to modify the parties' timesharing schedule, among other unrelated motions. On December 9, 2015, Joshua filed motions to hold Destiny in contempt and to modify timesharing so that the children would have time with Destiny on alternating weekends. While these motions were pending, Destiny petitioned for emergency custody of the children, but that case was dismissed. Destiny then filed a motion for sole custody of the children. Joshua filed a response stating that if the circuit court were to modify custody, it should be to grant him sole custody. The circuit court subsequently ordered Dr. Sally Brenzel to complete a custodial evaluation. On July 15, 2016, the circuit court denied Destiny's motion to relocate to Lexington, Kentucky. This order did not address the motions regarding modification of custody.

The circuit court heard eight days of testimony on the matters of custody and timesharing. Joshua testified on multiple occasions to having been the primary caregiver for the children since at least 2010 due to Destiny's out-of-state employment. The parties both testified to numerous conflicts, all of which occurred in the presence of the children, including Joshua "giving the finger" to Destiny at a baseball game, Destiny appearing at a baseball practice and screaming at Joshua about a child's medication, and Destiny denying the boys the opportunity to see Joshua on Father's Day. The court heard the testimony of several of the

parties' friends and family members regarding the animosity between the parties and Joshua's role as sole caregiver for the children when Destiny was out-of-state for months at a time. The court also interviewed each of the three children individually.

The court heard from two court-appointed counselors, a social worker, and a custody evaluator in this matter. Angie Arbaugh, a court-appointed counselor, testified to her observations that Destiny was unwilling to participate in the reunification of the parties' daughter with Joshua and that the children suffered from psychological symptoms because of Destiny's behavior. Shane Wilson, the family's previously appointed counselor who had been relieved of his duties in the case, testified to his concerns about Joshua's behavior. Abigail Davis, a social worker for the Cabinet for Health and Family Services, testified to the Cabinet's open case with the family and her recommendations that the children remain in therapy, the parties receive mental health assessments, and the parties have no contact. Dr. Brenzel, who completed a custodial evaluation, did not testify but submitted a report recommending the following: Destiny should have sole custody of the parties' daughter and Joshua should have sole custody of the parties' two sons, with Destiny having visitation every other weekend during the school year and every other week during the summer.

Subsequently, in an order entered on December 7, 2016, the circuit court ruled, in relevant part, as follows: Destiny was given sole custody of the parties' daughter with Joshua to have visitation at the daughter's discretion; and Joshua was given sole custody of the parties' two sons with Destiny to have visitation with them every other weekend from Friday evening to Monday morning. The circuit court also ordered the parties to have no contact and noted that these modifications of custody and timesharing were in the best interest of the children and resulted from the parties' inability to communicate and co-parent. The circuit court denied Destiny's subsequent CR<sup>2</sup> 59.05 motion to alter, amend or vacate. This appeal followed.

## **II. STANDARD OF REVIEW**

The standard of review for custody determinations has been established as follows:

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous,

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<sup>2</sup> Kentucky Rules of Civil Procedure.

whether it applied the correct law, or whether it abused its discretion.

*Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

### III. ANALYSIS

#### A. *Modification of Custody*

Under KRS<sup>3</sup> 403.340(3), a circuit court “shall not modify a prior custody decree unless after a 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),<sup>4</sup> in pertinent part, requires that a circuit court consider the following factors in determining whether a modification of custody is in the best interest of children:

- (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; [and]

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> KRS 403.340 was amended effective July 14, 2018. KRS 403.340(3) as quoted was in effect when this action was considered by the trial court.

- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him[.]

On appeal, Destiny argues that the circuit court erred in modifying its prior order of joint custody and granting Joshua sole custody of the parties' minor sons. She contends that the circuit court did not properly consider the factors of KRS 403.270(2). KRS 403.270(2),<sup>5</sup> in pertinent part, requires that the circuit court consider all relevant factors including the following when determining if a modification of custody is in the best interest of the children:

- (a) The wishes of the child's parent or parents . . . 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; [and]
- (f) Information, records and evidence of domestic violence as defined in KRS 403.720[.]

Specifically, Destiny claims that the circuit court should have given greater weight to past acts of domestic violence by Joshua; the children's adjustment to her home and their community; the wishes of the parties and children; and Joshua's past conduct. Additionally, she asserts the circuit court

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<sup>5</sup> KRS 403.270 was amended effective July 14, 2018. KRS 403.270(2) as quoted was in effect when this action was considered by the trial court.

should have given less weight to Joshua's acting as the children's sole caregiver for periods of time when she worked out-of-state.

First, Destiny argues that the court did not properly consider the history of domestic violence by Joshua. In reference to this history, the circuit court noted that three of the four domestic violence orders Destiny sought were dismissed without entry of protective orders. Furthermore, the circuit court noted that there have been multiple unsubstantiated allegations of abuse or neglect by Joshua and the testimony from social worker Abigail Davis, in which she stated that "she [did] not believe there was a threat from [Joshua]" in finding that there had been no showing that Joshua had been abusive toward the children. Having reviewed the record, it is clear that the circuit court did take the allegations concerning domestic violence into account prior to issuing its order. The circuit court made reasoned factual determinations regarding the credibility and seriousness of Destiny's claims. It is not our place to second guess those determinations. *See Reichle v. Reichle*, 719 S.W.2d 442, 444-45 (Ky. 1986).

Second, Destiny contends that the boys are well-adjusted to the homes of both parties and relies upon *Somerville v. Somerville*, 306 S.W.2d 301 (Ky. App. 1957), in arguing that, where children are adjusted to the homes of the parties and living arrangements are satisfactory, it is in the children's best interest not to disturb the arrangements. However, in *Somerville* this Court acknowledged that a



court may modify a custody order when the interest of the children require such modification. *Id.* at 303.

In explaining its determination, the circuit court adopted the following portion of the comprehensive custody evaluation report of Dr. Brenzel:

When challenged during this evaluation about their respective actions and the part each played in the conflict Destiny and Josh could both identify less destructive options that they have not and will not choose to take, because from their perspective it would mean they had capitulated to the other and that outcome was less acceptable to them than the damage caused. That damage has included but not been limited to [daughter's] loss of a father, the modeling of aggression which [sons] have learned and are displaying with one another and peers, all three children being confused, hurt, torn, and becoming manipulative in both homes in team settings, misuse and waste of mental health, social service and court resources, and severe financial and emotional strain for the . . . parents these children are dependent on. The parents concur there is no co-parenting possible now or in the foreseeable future no matter the intervention, and separation between them in the children's lives in both homes is probably necessary.

The circuit court clearly considered the possibility of maintaining the children's living arrangements but found that, because of the inability of the parties to communicate and their deliberate and repeated choosing to put their own desire for control ahead of their children's needs, no matter the consequences, such an arrangement had become too damaging for the children.

Third, Destiny argues that neither she nor Joshua or the children wanted a modification of their joint custody agreement. However, both parties reported to Dr. Brenzel that co-parenting was not possible at present or in the foreseeable future. Furthermore, the circuit court did interview each of the three children and took their opinions into consideration. Although the wishes of parents and children are two factors a court must consider when determining what is in the best interest of the children, their wishes are not controlling. The fact that the circuit court may have made a finding contrary to the wishes of one or both parties, or those of the children, does not rise to the level of an abuse of discretion.

Fourth, Destiny contends that the circuit court did not properly consider Joshua's actions and gave too much weight to the periods in which he acted as the sole caregiver for the children when she was working out-of-state.

The circuit court found:

[T]here has been an inability and bad faith refusal on the part of both parents to cooperate with the other parent for the best interests of the children. The family environment created by the parent's inability to communicate effectively is nothing less than toxic to individuals who are involved in the relationship, most especially their children.

The circuit court attributed the breakdown in communication and the resulting negative impacts on the children to *both* parties. However, in finding that it was in the sons' best interests for Joshua to be granted sole custody, the court did consider

the extended periods of time in which Joshua acted as sole caregiver to the parties' sons, as well as Destiny's inability to resolve even the most minimal issues for the benefit of the children. The court also cited the testimony of counselor Angie Arbaugh that the children "suffered from emotional and psychological issues and feared emotional repercussions" from Destiny in finding that Destiny's behavior was detrimental to the children's emotional and psychological well-being. Finally, the circuit court noted the "escalating behavioral challenges" of the boys and relied on the recommendation of Dr. Brenzel that Joshua better understood the needs of his sons and had the stronger parenting style and skills to meet those needs.

Furthermore, as required by KRS 403.340(3), the circuit court satisfactorily considered "whether the child's present environment endangers seriously his physical, mental, moral, or emotional health" and "whether the harm likely to be caused by a change of environment is outweighed by its advantages to him." In its December 7, 2016, order the circuit court stated, in part:

The Court further finds that the inability of [Destiny] and [Joshua] to communicate seriously endangers the physical, mental and emotional health of the children and that the harm is likely to be caused by a change of environment is outweighed by the advantages of a change where the parents have no communication with each other. The Court further finds that there i[s] absolutely no prospect that the parties will be able to put their animosity for each other aside and effectively communicate on what is in the best interests of any of their children.

The circuit court found that the parties' bad faith refusal to cooperate was having ongoing detrimental effects on the children.

Although the Kentucky Supreme Court has held that cooperation is not a condition precedent to joint custody, the Supreme Court distinguished between situations in which sole custody is granted from the outset because of antagonism at the time of divorce and those in which joint custody is modified based upon a party acting uncooperative or in bad faith. *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993). Furthermore, we have previously held that KRS 403.340(2) and KRS 403.340(3) support the circuit court's authority to *modify* joint custody in situations where parties are unable to cooperate. *Scheer v. Zeigler*, 21 S.W.3d 807, 814 (Ky. App. 2000) (emphasis added). When parents have demonstrated a longstanding inability to reach joint decisions regarding the children to such a degree that it negatively impacts their children, a court may find it necessary to modify custody from joint to sole.

The circuit court made extensive factual findings and sufficiently applied KRS 403.340(3) in its decision to modify custody of the parties' two minor sons. The court was clear and well-supported in its finding that the toxic environment created by the parties' inability to communicate about even minor issues endangered the children's physical, mental, and emotional health and that

granting sole custody of the parties' sons to Joshua was in the children's best interest considering the circumstances.

### ***B. Modification of Timesharing***

Modification of timesharing is determined pursuant to KRS 403.320(3), which provides that “[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral, or emotional health.” The Kentucky Supreme Court has explained that in modification cases “the judge has several factors to consider in making the determination of what the best interests of a child are, which are partially listed in KRS 403.270, but include all relevant *facts*.” *Anderson v. Johnson*, 350 S.W.3d 453, 455 (Ky. 2011).

In this matter, the circuit court modified the parties’ timesharing schedule from alternating time with the boys weekly to Destiny having the boys every other weekend and Joshua having them at all other times, except for specific holidays and vacation time each year. As explained above, the circuit court went into a detailed analysis of the facts in applying KRS 403.270(2) and finding that modification of the family’s custody and timesharing arrangement was in the

children's best interest. The circuit court considered a great deal of evidence in finding that, because "even the most routine, day to day issues regarding the children created[d] a conflict between the parents which result[ed] in a stressful environment for the children," modification of timesharing was necessary to limit contact between the parties. Furthermore, the circuit court found, based upon the testimony presented, that the physical, mental, and emotional health of the children was endangered seriously by the inability of the parties to set aside their anger with one another and cooperate for the best interests of the children. The circuit court sufficiently applied KRS 403.320(3) in finding that it was in the best interest of the children for Destiny's visitation to be restricted because of the threat to the children's health and well-being caused by the toxic environment created by the parties.

#### **IV. CONCLUSION**

For the foregoing reasons, the December 7, 2016, order of the Bullitt Circuit Court is hereby affirmed.

**ALL CONCUR.**

**BRIEF FOR APPELLANT:**

John E. Spainhour  
Shepherdsville, Kentucky

**BRIEF FOR APPELLEE:**

Allison Russell  
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