

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001788-MR

KELLEY HOUSE

APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE REED RHORER, JUDGE  
NO. 92-CI-01137

STEVEN CASTANIS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

KNOPF, JUDGE: Kelley House appeals from an order of the Franklin Circuit Court modifying custody of the parties' thirteen year-old daughter, Tessa. The order appointed Tessa's father, Steven Castanis as her primary residential custodian. Kelley alleges that the trial court abused its discretion by making insufficient findings of fact and conclusions of law to support its decision as required by KRS 403.340 and 403.270. Because the trial court made adequate findings of fact and

conclusions of law regarding the relevant statutory factors, we affirm.

Kelley and Steven were divorced in 1994. The circuit court ordered a joint custody arrangement wherein Steven had possession of his daughter on days he was not required to work and on days when Kelley was required to work. The issue of permanent custody of Tessa was reserved for further orders of the court. The court entered an amended timesharing order on September 24, 1999, which stated that Kelley would serve as the primary residential caregiver for Tessa. Steven was allowed to have Tessa every other weekend from Friday evening until Sunday evening, and on Wednesday evenings. Kelley also had living with her a daughter, Meghan, from a previous relationship, and another child, Erica, who was conceived during Kelley's marriage to Steven although Erica's father is Tom Roberts.

On March 17, 2001, Kelley married Russell House (Russell). The present conflict arose when Russell's job required that he relocate his family to St. Louis, Missouri. When Steven learned of the impending move, he filed a motion in circuit court in January 2002 for a modification of the custody order so that Tessa could stay with him in Kentucky. After lengthy hearings, the Court decided to modify custody and to designate Steven as Tessa's primary residential custodian. Kelley's counsel filed motions to admit new testimony, amend the

findings of fact and conclusions of law, and to alter, amend or vacate. These motions were denied. This appeal followed.

KRS 403.340 sets forth the grounds to modify a custody decree, and KRS 403.270(2) lists the factors to be considered in determining the best interests of the child in such a situation. Kelley argues that in making its findings of fact and conclusions of law, the trial court abused its discretion by failing to address every provision of these statutes. She asserts that when a trial court is considering the statutory criteria for modifying a custody order, the court is required to make written findings of fact and conclusions of law pertaining to every factor listed in the statutes, whether it is relevant to the case at hand or not. Furthermore, Kelley implies that the court must make a negative finding regarding the custodial parent under each factor, or at least under a majority of the factors, in order to justify a modification of custody. We can find no authority to support this view. While the court must consider all the statutory factors, it need make specific findings only regarding those it determines are relevant.<sup>1</sup>

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<sup>1</sup> See McFarland v. McFarland, Ky. App., 804 S.W.2d 17, 18 (1991) ("In child custody cases, the trial court must consider all **relevant** factors including those specifically enumerated in KRS 403.270(1)[now 2] in determining the 'best interests of the child.' In so doing, it is mandatory under CR 52.01 that the facts be so found specifically.") (Citation omitted; emphasis added.)

Furthermore, there is no maximum or minimum number of factors which must be present in order to justify a modification of custody.<sup>2</sup> “[W]e are not prepared to define precisely the quantum of proof necessary to justify awarding the care, custody and control of a minor to one parent over the other.”<sup>3</sup>

Kelley also argues that the findings of fact and conclusions of law that were made by the trial court are not supported by the evidence in the record. In reviewing a child custody determination, the standard of review is whether the factual findings of the trial court are clearly erroneous.<sup>4</sup> Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence.<sup>5</sup> Since the trial 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 trial court.<sup>6</sup> Ultimately, a trial court’s decision regarding custody will not be disturbed absent

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<sup>2</sup> See e.g. Sherfrey v. Sherfrey, Ky. App., 74 S.W.3d 777 (2002)(custody awarded to grandparents primarily on the basis of child’s strongly-stated desire to continue living with them.)

<sup>3</sup> Cherry v. Cherry, Ky. 634 S.W.2d 423, 425 (1982).

<sup>4</sup> See CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

<sup>5</sup> See Wells v. Wells, Ky., 412 S.W.2d 568, 570 (1967).

<sup>6</sup> See Reichle, supra.

an abuse of discretion.<sup>7</sup> Abuse of discretion implies that the trial court's decision is unreasonable or unfair.<sup>8</sup> In reviewing the decision of the trial court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion.<sup>9</sup> We will review the court's findings first, then address those factors for which the court did not make specific findings.

The court's first substantive conclusion of law states that "Tessa has been integrated into Mr. Castanis' home and family by reason of the timesharing he has exercised with her." This finding is clearly responsive to KRS 403.340(3)(b), which establishes as one of the factors a court shall consider in modifying custody "[w]hether the child has been integrated into the family of the petitioner with consent of the custodian." In its findings of fact, the circuit court supported its conclusion by stating that Steven has had liberal periods of timesharing with Tessa, that Tessa resided primarily with Steven and he provided most of the caretaking responsibilities during her second and third grade school years while Kelley was working as a flight attendant, that Steven had visitation with Tessa every

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<sup>7</sup> See Cherry supra.

<sup>8</sup> See Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

<sup>9</sup> See Cherry, supra.

other weekend and one day a week, that he moved to Franklin County to be close to his daughter and that he presently resides with his parents in Frankfort where he has had timesharing with her almost every weekend. The court also found that the parties had cooperated with each other in regard to their schedules and Tessa's needs.

Kelley argues that the only time Tessa has spent with Steven has been during the court-ordered visitation periods and by agreement of the parties. Consequently, she asserts that the court's finding would indicate that parents who cooperate in increased timesharing could unwittingly be laying the groundwork for a modification of custody. Furthermore, Kelley notes that physical transfer alone is insufficient under the statute for the court to make a modification of custody. The statute also requires a finding of integration.<sup>10</sup> Kelley maintains that even if there had been consent to physical transfer, there is no evidence of Tessa's integration into Steven's family.

We disagree. In the course of her interview with the court, "Tessa expressed . . . to the Court her extreme opposition to the proposed move to St. Louis. She has indicated

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<sup>10</sup> See Carnes v. Carnes, Ky., 704 S.W.2d 207, 209 (1986) (holding that "consent of the custodian" pursuant to KRS 403.340(3)(b) is required only for the physical transfer of the child, not the integration.)

that she does not want to leave the home, school and community to which she has grown accustomed [sic]."

The court also relied on Tessa's statements to reach its second conclusion of law which is clearly responsive to KRS 430.270(2)(b) which directs the court to consider the "wishes of the child as to his guardian." The court found that "Tessa wishes to live with Mr. Castanis and that her residence not be moved to Missouri." Tessa's own statements, therefore, support the court's conclusion that she has been integrated into her father's family.

Kelley maintains, on the other hand, that although Tessa expressed "some apprehension" about moving to St. Louis, the court erred in finding that she wanted to stay with her father because she did not explicitly say she wanted him to be her primary custodian. Kelley has interpreted Tessa's sentiments as being indicative merely of the natural reluctance of a child to move to another city.

The wishes of the child, particularly a child as old as Tessa, are significant in modifying custodial arrangements.<sup>11</sup> The statute does not, moreover, require an explicit statement from the child that she prefers one parent to another. Tessa's statement to the court that she strongly prefers to stay in the

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<sup>11</sup> See Stafford v. Stafford, Ky. App., 618 S.W.2d 578, 581 (1981) (disapproved on other grounds); Sherfey, supra.

home to which she has become accustomed is sufficient. In any event, the trial court's interpretation of Tessa's statement is not so clearly erroneous as to convince us that we should adopt Kelley's interpretation instead.

We turn now to a brief consideration of the statutory factors for which the court did not make specific findings. Under KRS 403.270(2), the factors not explicitly addressed by the court which Kelley claims are crucial are (1) 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 interest; (2) the child's adjustment to his home, school and community; and (3) the mental and physical health of all individuals involved. The record indicates that Tessa has positive relationships with her father, her paternal grandparents, and her father's brother. Evidence in the record shows that they enjoy playing with Tessa and helping her with her schoolwork. Kelley claims, however, that she has always had the most significant relationship with Tessa because she has exercised primary residential custodianship. Kelley does not, however, explain in any detail how her interaction and relationship with Tessa has affected or will affect Tessa's interests. In regard to the second factor, there is evidence in the record that Tessa has adjusted well to home, school, and community in her father's custody. Although it is

possible as Kelley states that Tessa could adjust equally well to life in St. Louis, the evidence in the record such as Tessa's own statements that she wants to stay in Frankfort and her participation in the cheerleading and soccer teams at her school support the circuit court's decision. Finally, the mental and physical health of the individuals involved was simply not a decisive factor in this case, and it was not necessary for the circuit court to make findings on this issue. Some testimony was offered during the course of the hearings that Kelley had been consulting a psychologist and had been taking antidepressants, but the circuit court chose not to consider this factor in its decision.

Next we turn to the two factors under KRS 403.270 which Kelley alleges the court failed to address: 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 regard to the first factor, there is no requirement that the court must make a finding of potential or actual danger to the child in order to modify custody. Furthermore, the circuit court found evidence of serious instability in Tessa's life when she was residing with Kelley. In September 1999, for example, a domestic disturbance took place involving Kelley and her eldest daughter, Meghan. The

court also found that Kelley is severely estranged from her biological mother, who evicted Kelley, Russell, and their children from her residence and has obtained a warrant for their arrest in Shelby County for damaging and removing property from her house. In regard to the second factor, Kelley has misinterpreted its meaning by analyzing the change of environment in terms of the move to St. Louis. The change of environment refers to the change of custody to Steven as the primary residential custodian. There was no requirement for the court to find that the move to St. Louis would be harmful to Tessa in order to justifying granting custody to Steven. Furthermore, the record indicates that Tessa has already spent considerable amounts of time in Steven's custody with no harmful effect.

Ultimately, the circuit court determined that the decisive factors in this case were Tessa's integration into her father's household and, most importantly, her own clearly-expressed wishes. Having reviewed the record, we hold that the circuit court's findings are based on substantial evidence and are not clearly erroneous. In regard to the statutory factors for which the circuit court did not make specific written findings, we hold that even if such findings had been required, the evidence in the record suggests that the court's failure to make them would have resulted in harmless error. See CR 61.01.

The circuit court did not therefore abuse its discretion in awarding primary residential custody of Tessa to Steven.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

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