

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001789-MR

KELLEY HOUSE

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 99-CI-00291

TOM ROBERTS

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE AND HUDDLESTON,
SENIOR JUDGE.¹

EMBERTON, CHIEF JUDGE. Kelley House is the mother of Erica Roberts born on May 11, 1993. She and Erica's father, Tom Roberts, the appellee, have never married. In April 1999, joint custody of Erica was awarded and Kelley designated as the primary residential custodian. At that time Kelley worked as an airline hostess and as a consequence of her hours, Erica resided

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

approximately twelve to fourteen days per month with Tom. In March 2001, Kelley married Russell House and her impending move to St. Louis, Missouri, prompted Tom to move the court to modify the custody order and be designated as Erica's primary residential custodian. The court granted Tom's motion and this appeal followed.

In addition to Erica, Kelley has two other daughters, Meghan Castanis, age 19, and Tessa Castanis, age 12, who were born from a marriage between Kelley and Steve Castanis.² There was evidence adduced at the hearing that Tessa and Erica have resided together for most of their lives and are emotionally bonded. Tom is employed as a truck driver, owns a home in Frankfort, and has a family in Frankfort with whom Erica shares a familial bond. Although Erica stated her love for both of her parents, she does not want to leave her school, home, and community to live in St. Louis. She indicated that she does not have a good relationship with Kelley's new husband.

In 1980, KRS³ 403.270(3)(now subsection 5) was enacted giving the trial courts authority to award joint custody to a child's parents. By definition it is "an arrangement whereby both parents share the decision making in major areas concerning their child's upbringing, a role traditionally enjoyed by both

² Steve, who resides in Frankfort, Kentucky, sought and obtained custody of Tessa which is the subject of a separate appeal.

³ Kentucky Revised Statutes.

parents during the marriage, but which is usually reposed solely in one parent following dissolution.”⁴ Since that time, the courts have struggled with the basic question of when, and under what circumstances, a joint custody order can be modified. In Scheer v. Zeigler,⁵ this court outlined the history of joint custody in Kentucky and ultimately overruled Mennemeyer v. Mennemeyer,⁶ and those cases holding that as a threshold requirement to joint custody modification, a party must show an inability or bad faith refusal of one or both of the parties to cooperate.⁷ In Scheer we held that there is no threshold requirement for modifying joint custody other than those provided for in KRS 403.340 and KRS 403.350.

KRS 403.340(3) and (4) provide factors for the court to consider when determining whether a change of custody is in the child’s best interests. There is no finding by the trial court that leaving residential custody with Kelley seriously endangers Erica’s mental, emotional, moral, or physical health. Although Erica has expressed the desire to remain in Frankfort and has had some difficulty in her relationship with her new stepfather, neither of these circumstances seriously endangers

⁴ Burchell v. Burchell, Ky. App., 684 S.W.2d 296, 299 (1984).

⁵ Ky. App., 21 S.W.3d 807 (2000).

⁶ Ky. App., 887 S.W.2d 555 (1994).

⁷ Scheer, supra, at 812.

her wellbeing. Kelley has not agreed to a modification of custody nor placed Erica with a de facto custodian. Thus, the only plausible factors applicable to the present case are subsections (b) and (c). The trial court found that Erica had been integrated into Tom's family and that Erica desired to remain in Frankfort.

Subsection (b) states that the trial court shall consider whether the child has been integrated into the family of the petitioner with the consent of the custodian. In Scheer, as in the present case, the nonresident custodian spent a great deal of time with the child which this court concluded was a sufficient basis to seek modification of a joint custody award. We reaffirm that holding but note that the integration must be viewed under the totality of the circumstances. By its nature, if the parents are working harmoniously to raise their child, integration will occur into the households of both parents. As its name implies, joint custody envisions each parent having an equal role in the child's life. Unfortunately, since the same statutes apply to sole custody and joint custody situations, the courts have the difficult task of applying the same law to two fundamentally different situations. Under the facts of this case where it appears that for the most part both parents have played an equal role in the child's life, the integration factor has little determinative value.

Although this court finds in this case the issue of integration into either household to be a minor consideration, we agree with the trial court that under subsection (c) of KRS 403.340(3), the court is required to consider the factors set forth in KRS 403.270(2), and that a modification of joint custody is warranted. It is undeniable that Kelley, for no reason other than her desire to be with her new husband, wants to move Erica from her father, her extended family, her school, community, and all that she considers stable in her life. Erica has stated her objection to the move and indicated some difficulty in dealing with her stepfather. These facts undeniably weigh in favor of modification.

In conclusion, both parties involved appear to be loving, capable parents whom Erica loves. However, Kelley's choice to move with her new husband to another state does not justify the drastic disruption to Erica's life caused by such a move. It is noted that Kelley, under the court's order, is given liberal timesharing with Erica and that joint custody remains in effect. Under the circumstances, we affirm the trial court's order.

ALL CONCUR.

BRIEF FOR APPELLANT:
J. Scott Mello
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BRIEF FOR APPELLEE:
Stephen C. Sanders
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