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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000789-MR

JULIE A. COUCH (NOW RIGGS)

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 01-CI-01689

DAVID MICHAEL COUCH

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Julie A. Riggs (formerly Couch) appeals from the decision of the Hardin Circuit Court, which awarded a change of primary residential custodianship of the parties' minor child Andrew to her former husband David Michael Couch. Andrew was fourteen years old at the time of the order. Julie argues on appeal that the court applied the wrong standard in granting change of custody, and failed to follow the statutory

requirements in that it did not make a required finding of a change in the circumstances of the parties which would warrant a change in custody. We agree, and vacate the order of the court and remand the case for further proceedings.

The parties initially divorced in 1992 when Andrew was under four years old. The parties agreed upon a custody arrangement then, with Julie having primary custodianship and liberal visitation with David. About five years later, David moved to Alabama, and visitation continued, with Andrew spending sixteen of seventeen school breaks with David. Julie states that she first noticed a change in Andrew's behavior after Christmas 2001, around his thirteenth birthday, when he "seemed distant." Shortly after that, Julie was served with David's motion to modify custody.

Andrew initially expressed a preference to live with his father in confidential hearings held in chambers with the commissioner. Later, in open court, Andrew retreated from expressing a preference. Each party made some allegations of the other's lack of cooperation recently, with Julie referring to an overseas trip with David in which Andrew was out of contact with her for almost two weeks and failure to cooperate fully with medical treatment, and David making reference to Julie's husband Larry as being "a problem" with visitation. Overall, however, the evidence showed that both parties were fit

parents and that Andrew was a reasonably well-adjusted and well cared-for child. The commissioner held that the factor of the child's expressed preference swung the balance, and therefore the best interest of the child would be served by modifying custody to make David the primary custodian. The circuit court adopted the commissioner's findings, and this appeal followed.

During the pendency of this appeal, the issue of the sealed interview with the child in which the child expressed a preference to live with his father was taken up by the Kentucky Supreme Court after this Court denied Julie's motion to unseal the record of the interview. The Supreme Court ordered the record unsealed, holding that it was manifestly unfair for the record to remain sealed, since the Commissioner's recommendations were based on the evidence taken during the *in camera* interview. Couch v. Couch, 146 S.W.3d 923 (Ky. 2004).

The issue upon which this appeal turns is whether the court below failed to properly apply the statutory standards found in Kentucky Revised Statute (KRS) 403.340. Julie's argument is that before a change in custody can be granted, the court must first find that there has been a change in the circumstances of the parties that warrants reconsideration of the custodial arrangement. David responds that Julie has waived this argument by failing to file exceptions to the commissioner's March 19, 2002, recommendations, which determined

that the standards for holding a hearing under KRS 403.340 had been met and recommended a hearing on the change of custody.

In Graham and Keller's Domestic Relations Law, §21.30, the authors note that the 2001 amendments to KRS 403.340 left the courts with "a confusing mixture of standards and factors, some facially similar to the high threshold formerly needed for custody modification and others that indicate the possibility that custody could be modified on a less stringent set of facts." The procedure apparently suggested by David's counsel would seem to be some sort of bifurcated proceeding where first the court determines whether a change in circumstances exists, then assigns the case for a hearing where the only applicable standard is the best interest of the child, in a de novo hearing, which is apparently what was done in this case. By contrast, Julie's position is that the statute still requires a finding of a change in the circumstances of the parties affecting the child in order to modify custody.

We hold that the court misapplied the new standards in apparently reviewing custody on a de novo basis. Even with the liberalization of the threshold for a change in custody, the General Assembly did not intend that upon a change in the circumstances of the parties, a court could completely reconsider the custody arrangement. Instead, given that many elements of the strict prior standards still remain in the

statute, including that of KRS 403.340(3)(d), which requires that the child's present environment seriously endangers the child's physical, mental, moral or emotional health and that the harm likely to be caused by the change of environment is outweighed by the advantages to the child. At best, the statute now allows a modification of custody if there is a change in the child's or custodian's circumstances making it necessary to change custody to achieve the child's best interest. Arguably, this is a mere semantic difference from what the court did, but we do not see it that way. The court completely re-evaluated the custody arrangement, giving no deference to the present arrangement and how well it was working. There was no finding that a change in custody was necessary to achieve the child's best interest due to a change in the circumstances of the parties. We believe that this statutory language was intended by the legislature to prevent the endless re-litigation of custody matters and to provide some stability to the child. Even though the new statute, as observed by Graham and Keller, "lacks the clear-cut weight given to the status quo in its predecessor, courts might still find that the party seeking modification has the burden of proof under general rules applying to litigation." Id., see also Kentucky Rule of Civil Procedure 43.01. And indeed we do find that this is the case; the party seeking change should bear the burden of proving that

the change in circumstances necessitates a change in custody. Since the court below applied the new statute incorrectly, its order must be vacated and this matter remanded for a new hearing.

For the foregoing reasons, the judgment of the Hardin Circuit Court is vacated and the matter remanded for a new hearing.

ALL CONCUR.

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