

RENDERED: June 17, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-002525-ME

RACHEL LABELLE KISER

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 00-CI-00336

ROBERT RALPH KISER

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Rachel Labelle Kiser appeals from an order of the Letcher Circuit Court granting appellee Robert Ralph Kiser's motion to modify custody and awarding him primary residential custody of the parties' minor child. We affirm.

The parties were married on May 7, 1998. They had one child during the marriage, Robert Ralph Kiser, II, born August 23, 1998. On August 31, 2000, Rachel filed a petition for dissolution of marriage.

On May 2, 2001, the circuit court entered a final decree dissolving the marriage which, among other things, granted the parties joint custody of the child with Rachel designated as primary residential custodian.

On October 3, 2001, Robert filed a motion to modify custody pursuant to Kentucky Revised Statute (KRS) 403.340. The motion alleged that Rachel had developed a serious substance abuse problem which endangered the physical, mental, moral, and emotional health of the child.

Following a hearing on the matter, on August 20, 2003, the circuit court entered an order modifying custody so as to designate the appellee as primary residential custodian of the infant. On November 17, 2003, the circuit court entered an order denying Rachel's motion to alter, amend or vacate. This appeal followed.

In reviewing a child custody determination, we review the factual findings of the circuit court pursuant to the clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01; Riechle v. Riechle, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967). Since the circuit 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 circuit court. Reichle, 719 S.W.2d at 444.

Ultimately, a circuit court's decision regarding custody will not be disturbed absent an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion implies that the circuit court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994). In reviewing the decision of the circuit court, therefore, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. Cherry, 634 S.W.2d at 425.

In Scheer v. Zeigler, 21 S.W.3d 807 (Ky.App. 2000). this Court held that the same criteria apply for a modification of joint custody as apply to a modification of sole custody. Thus, in order for there to be a modification of joint custody, as in all custody cases, the party seeking modification must first meet the threshold requirements for modification contained in KRS 403.340.

For a proposed modification occurring earlier than two years following the initial custody decree, KRS 403.340(2) provides as follows:

No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

(b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

KRS 403.340(4) provides as follows:

In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

(a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;

(b) The mental and physical health of all individuals involved;

(c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis of which parent is more likely to allow visitation or pay child support;

(d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the

domestic violence and abuse has affected the child and the child's relationship to both parents.

The circuit court's August 20, 2003, Findings of Fact, Conclusions of Law, and Order included the following:

FINDINGS OF FACT

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(3) That Petitioner, Rachel Labelle Kiser, subsequent to the Decree has engaged in conduct that endangers the minor child's physical, mental, moral, and emotional health and welfare, as shown by clear and convincing evidence.

(4) That the Court is convinced that the danger of the child is ongoing and finds Petitioner's testimony to the contrary to lack credibility.

CONCLUSIONS OF LAW

(5) The Respondent has sustained his burden of proof under KRS 403.340, and is entitled to modification of custody.

During the hearing on the appellee's motion to modify custody, substantial evidence was presented to support the circuit court's finding that the child's environment while in Rachel's custody endangered seriously his physical, mental, moral, or emotional health. For example, Tonya Addington, a close neighbor of the appellant, testified regarding occasions when the child was left alone and unattended in the breezeway of the apartment while the appellant was asleep or passed out on the couch in the apartment.

Witnesses also related numerous instances when the child was in the apartment while "loud partying" was going on and individuals were carrying in beer and using bad language. Further, the resident manager of the apartments testified that the appellant has received two warning letters for disturbing the peace and quiet of neighbors, and that the apartment was one of the worst in terms of cleanliness and damage.

The key word in KRS 403.340(2) is the word "may." S v. S, 608 S.W.2d 64, 65 (Ky.App. 1980). This word does not connote that the injury to the "physical, mental, moral or emotional health" must have already occurred or be occurring at the present time. Id. "The potentiality for such danger is the test and the courts are not required to wait until the damage is done." Id.

There is substantial evidence in the record to support the proposition that Rachel was pursuing a lifestyle which, if not already, certainly had the potential of endangering the physical, mental, moral, or emotional health of the child. The record demonstrates that Rachel was following a "partying" lifestyle, which included loud music, drinking, and inappropriate language. Further, there was testimony that the child had been left unattended in the breezeway of the apartment structure, which is not appropriate in the case of a child of such a young age. In light of the record, we will not disturb

the finding of the circuit court that the criteria of KRS 403.340(2) and KRS 403.340(4) were met by clear and convincing evidence and that, consequently, custody should be modified so as to designate the appellee as the child's primary residential custodian.

For the foregoing reasons the judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Craft, II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Samuel P. Chandler
Whitesburg, Kentucky