

RENDERED: February 18, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000719-ME

PATRICIA EDWARDS

APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 00-CI-00069

DANIEL RAY COX

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.¹

TACKETT, JUDGE: Patricia Edwards appeals from the judgment of the Carter Family Court which modified custody by granting her ex-husband, Daniel Cox, sole custody of their five minor children. Edwards argues that the trial court failed to give sufficient consideration to the children's stated wish to live with their mother. We find that the trial court gave

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

consideration to the children's wish, but that its decision awarding custody to their father was not clearly erroneous. Therefore, the judgment of the Carter Family Court is affirmed.

Cox and Edwards were divorced in March 2000. The decree of dissolution gave Edwards sole custody of their five children, and they lived with her until January 2002. A year prior to that time, Edwards had lost her job due to a layoff. She then took the children and moved in with her boyfriend in Batavia, Ohio. While they were all living together, Edwards argued with her boyfriend and he pulled a handgun in the presence of at least one of her children. Criminal charges were filed against Edwards' boyfriend, and she was left homeless. Consequently, she asked her ex-husband to allow their children to live with him.

When the children moved in with Cox, three of them had to have their heads shaved due to recurring head lice. While they had been living with their mother, Edwards pled guilty to truancy-related charges and the children received mostly Ds and Fs on their report cards. After they came to live with Cox, they had no problems with either attendance or grades. Edwards admitted that she only visited the children about fifteen times during the two years they lived with Cox. Further, there was a ten-month period where Edwards had absolutely no contact with the children. In October or November

2003, Cox began receiving KTAP benefits for the children, and the state sought a contribution from Edwards. At this time, she apparently expressed an interest in having the children return to live with her. Edwards took three of the children to Alabama with her at Thanksgiving 2003 without telling their father. She only returned them after she was threatened with prosecution because the juvenile court had given Cox temporary custody.

Cox filed a motion with the family court seeking a custody modification that would award him sole custody of the children. A hearing was held on February 27, 2004. At that time Edwards was remarried, living in Alabama in a two-bedroom apartment, with her husband and a child from a previous relationship. She worked full time, earning \$12.04 an hour. Edwards testified that she had always intended the children residing with Cox to be a temporary arrangement, and that she would obtain a bigger home if the children returned to live with her. Cox, also remarried, lived in a model mobile home with a built-on addition that provided three more bedrooms. The home was on twenty-two acres near Carter Caves. Cox worked thirty-two hours per week, earning \$5.75 an hour, and was working on his GED. The trial court interviewed all five children who stated that they preferred to live with their mother. Their reasons included the fact that she had more financial resources, could help them with their schoolwork, and could take them out

more, and that they live in a very rural area with their father. The children also stated that Cox was a good father, that their lives in his house were normal, and that they attended school daily. At the conclusion of the hearing, the trial court entered an order sustaining Cox's motion to modify custody, awarding him sole custody of the children, and awarding Edwards visitation. This appeal followed.

On appeal, Edwards argues that the trial court failed to give due consideration to the children's stated wishes. Kentucky Revised Statute (KRS) 403.340(3) forbids the modification of 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child . . .

The statute further directs the trial court to consider a list of factors in determining the children's best interest, including the factors enumerated in KRS 403.270(2). The latter statute lists as a relevant factor to be considered the children's stated wish as to their custodian. KRS 403.270(2)(b). The children in this case all stated that they would prefer to live with their mother.

The trial court found that there had been a change in the parties' circumstances and that modification was in the best interests of the children. While it acknowledged that the children wished for Edwards to be their custodian, the trial court found that other factors outweighed their desires. First, while Edwards clearly had the greater income, her living situation (a two-bedroom apartment shared with her husband and another child) was less appropriate than Cox's. Second, while the children stated that Edwards would be able to help with their schoolwork, the trial court refused to overlook that Edwards had pled guilty to a truancy-related charge while she had the children and that their grades had been poor. Finally, the trial court concluded that the children "desperately [missed] their mother who has made so little effort to be involved in their lives in any meaningful way."

The trial court's order indicates that it did, in fact, take into consideration the children's wish to live with their mother. Furthermore, the children's wishes are not binding on the court. Bowman v. Bowman, 233 S.W.2d 1020 (Ky. 1950). The standard of review is whether the trial court's findings of fact were clearly erroneous. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky. 1964). Given the evidence that Edwards had been without a home, chosen for the children to live with their father for almost two years, moved repeatedly, and

failed to maintain regular contact with the children, the trial court appropriately found custody modification to be in their best interests.

For the foregoing reason, the order of the Carter Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
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BRIEF FOR APPELLEE:

Daniel H. Mason
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