

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-001633-ME

TROY KELLER

APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT  
HONORABLE ROBERT A. MILLER, JUDGE  
ACTION NO. 03-CI-00090

JENNIFER VINCENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOFF, JUDGES.

BUCKINGHAM, JUDGE: Troy Keller appeals from an order of the Meade Circuit Court giving Jennifer Vincent the right to continue as the primary residual custodian of the parties' child, Suzanne. We affirm.

Troy and Jennifer were never married, but they had a relationship and cohabited between May 1999 and May 2000. Suzanne was born on May 2, 2000, and the parties ended their relationship approximately two weeks later. Thereafter, in July 2001, the Meade Circuit Court approved a joint custody agreement

wherein Jennifer was awarded primary physical custody of Suzanne and Troy was awarded visitation rights every other weekend.

On March 3, 2003, Troy filed a petition for emergency custody in the Meade District Court based on allegations of dependency, neglect, and abuse. The allegations were based on Jennifer's arrest on February 26, 2003, on charges of possession of marijuana, possession of drug paraphernalia, and child endangerment. Following a hearing, Troy was granted emergency temporary custody of Suzanne.

On March 13, 2003, Troy filed a petition for custody in the Meade Circuit Court. As the criminal charges against Jennifer were pending, Troy continued having temporary custody of Suzanne. On August 28, 2003, the criminal charges against Jennifer were dismissed.

Troy's petition for custody was referred to a domestic relations commissioner (DRC) for hearing. On April 2, 2004, the DRC filed a report recommending that the parties continue joint custody of Suzanne with shared custody based on Troy having Suzanne for at least four out of every ten days. The court also ordered Troy to pay child support of \$65.54 per week and allowed Troy to claim Suzanne as a dependent for tax purposes in even numbered years and Jennifer to claim her in odd numbered years.

The DRC made specific findings that Troy had not cooperated in giving Jennifer visitation rights during the time

he was granted temporary custody of Suzanne. Further, the court found that Jennifer was now married and living in a three-bedroom, two-bath brick home near a city park and an elementary school. Both Jennifer and her husband were employed, and the DRC found that they had a close relationship with Jennifer's parents.

Further, the DRC found that Troy was single and that he relied on his sister or mother for help when he was unable to provide for Suzanne's needs. More specifically, the DRC found that Jennifer "is now stable in her residence and provides a good home for her children. She is involved with the Radcliff Presbyterian Church, is close to her family and her life is one that nurtures Suzanne and promotes her well being." Finally, the DRC made no finding of "serious endangerment" after considering the factors set forth in KRS<sup>1</sup> 403.340(4), and it concluded that Jennifer's earlier lifestyle had not negatively impacted Suzanne.

Troy filed exceptions to the DRC's report. In a nine-page order entered on July 16, 2004, the circuit court made findings of fact and conclusions of law. The court found that Jennifer had, at times, exposed Suzanne to situations not in her best interest. The court noted that Jennifer had filed numerous domestic violence orders against individuals who had been in her

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<sup>1</sup> Kentucky Revised Statutes.

home. However, the court further noted that Jennifer is now married and that the home is much more stable. The court also found that Troy had not acted in a manner most conducive to Suzanne's proper upbringing and that he had exhibited violence toward others. The court also found that Jennifer was more capable of providing for the child's financial needs.

The court concluded that Troy had failed to meet the criteria of KRS 403.340 and had not proven "serious endangerment" so as to justify a change of custody. The court ordered that Troy and Jennifer should continue to have joint custody of Suzanne and that Jennifer should remain the primary residential custodian, with Troy being granted visitation at least four in every ten days. This appeal by Troy followed.

Troy's petition for custody was filed within two years of the July 2001 joint custody order. As it relates to this case, the statute requires that no motion to modify custody shall be made earlier than two years after the custody order unless there is reason to believe that the child's present environment "may endanger seriously his physical, mental, moral, or emotional health." KRS 403.340(2). The court is directed to consider all relevant factors, including those set forth in KRS 403.340(4). Although Troy did not allege in his petition for custody that the child's environment seriously endangered her physical, mental, moral, or emotional health, the court

considered the petition and the evidence in light of the aforementioned statutes relating to custody modification within two years of an initial custody order.

Citing Powell v. Powell, 665 S.W.2d 312 (Ky. 1984), Troy argues that the court erred in granting Jennifer status as the primary residential custodian because Jennifer has a "propensity to drug use." Troy noted that, by ordering random blood and/or urine testing, the court was aware of Jennifer's propensity to drug use and was aware of the detrimental impact of such action on the child. Troy argues that the change of conditions mandated a modification of the prior custody decree.

Jennifer does not disagree with the holding in the Powell case. She also cites S v. S, 608 S.W.2d 64 (Ky.App. 1980), wherein the court notes that the statute requires only that the child's present environment may endanger the child, rather than requiring that the injury must have already occurred or be occurring at that time. Id. at 65. Jennifer also notes that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." KRS 403.270(3). In short, she concurs with the court's conclusion that Troy did not prove "serious endangerment" as was required by KRS 403.340(2)(a). We agree.

The court found that Jennifer now had a stable home environment with the support of her husband and her parents.

The court also found that she was more capable of providing for the financial needs of the child. Although the court remained concerned about Jennifer's past marijuana use, it concluded that the proof was insufficient to establish that Suzanne's present environment seriously endangered her health and well-being. In our opinion, the factual determinations of the court were not clearly erroneous and its conclusion was not an abuse of discretion.

The order of the Meade Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred R. Radolovich  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Douglas E. Miller  
Radcliff, Kentucky