

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002163-ME

JONI WISER ALLEN WOLFORD

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
CIVIL ACTION NO. 03-CI-00209

DAVID KEVIN ALLEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

MINTON, JUDGE: The custody decree gave Kevin Allen sole legal custody of his five-year-old son. Four months later, Joni Wolford, the boy's mother, moved to modify the decree to transfer sole custody of the child to her. The affidavits in support of Joni's motion alleged that Kevin had turned the boy over to Kevin's parents, David and Judy Allen, who were acting as de facto custodians. The trial court denied the motion,

noting that the decree required Kevin to raise the child in the home of his parents. We affirm.

Joni and Kevin Allen were divorced by decree entered May 24, 2004. The custody of their young son, Austin, was the only contested issue in the divorce proceeding. After hearing testimony presented by each side, the trial court awarded Kevin "the absolute custody, care[,] and control of the minor child of the parties" but required that the child "be raised in the home" of David and Judy Allen. In comments made from the bench explaining the court's reasoning, the trial judge noted that the child had been living with Kevin in David and Judy's home since his birth. The judge also noted that Kevin was a trucker and that David and Judy cared for the child while Kevin was away from home on the road. Under the trial court's custody arrangement, David and Judy would be able to continue to provide care in Kevin's absence as they had been doing. Joni did not appeal from the custody decree.

Joni filed the motion to change custody on September 27, 2004. In support of the motion, Joni submitted her own affidavit and one from her new husband, Keith Wolford. The affidavits provided the trial court with no new facts except that Joni and Keith, whose relationship had been the subject of testimony at the custody hearing, had married in the interim and that they were now able to provide "a stable home for Austin."

Both affidavits repeated the statement that “[Kevin] Allen is now driving a truck, and is gone for extended durations of time, leaving the child solely in the care of David Allen, Sr. and Judy Allen.” Joni did not present any facts to support a finding that Kevin’s or Austin’s circumstances had changed in any respect since the entry of the decree. Addressing the fact that Kevin was leaving his parents to tend to Austin while he was on the road, the trial court responded that “[h]e’s doing exactly what I said to do” The trial court denied Joni’s motion to modify. She then filed this appeal.

KRS¹ 403.340 governs modification of a custody decree. The legislature significantly changed that statute in 2001.² Before the amendment, a change in custody required a finding that (1) substantial harm would result to the child’s physical, mental, or emotional health without a change in the custodial arrangement; and (2) any harm caused by the change would be outweighed by its advantages.³ By amending the statute, the General Assembly not only relaxed the standards for modification of custody; but it also expanded the factors to be considered when modification is requested.⁴ The statute now permits

¹ Kentucky Revised Statutes.

² See Fowler v. Sowers, 151 S.W.3d 357 (Ky.App. 2004).

³ *Id.* at 359.

⁴ *Id.*

modification "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" if "a change has occurred in the circumstances of the child or his custodian" and if "the modification is necessary to serve the best interests of the child."⁵

In the case at hand, the trial court rather quickly determined that Joni had not sufficiently shown the court facts indicating a change in Kevin's or Austin's circumstances in the four months that had elapsed since the entry of the custody decree. Absent such change in circumstances, the trial court concluded that further litigation of the issue of modification was not warranted. The trial court did not abuse its discretion in denying the motion. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew B. DeHart
Jamestown, Kentucky

BRIEF FOR APPELLEE:

Theodore H. Lavit
Joseph R. Stewart
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⁵ KRS 403.340(3).