

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000394-ME

RHONDA A. SANTOS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 04-CI-501170

DOUGLAS J. SANTOS

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

EMBERTON, SENIOR JUDGE: The single issue in this appeal is whether the trial judge erred in granting appellee Douglas Santos' motion to modify the child custody order and parenting schedule regarding the parties' eight-year-old son Nicholas. Appellant Rhonda Santos alleges the existence of two procedural impediments to the trial judge's decision. We affirm.

Incorporated into the December 3, 2001, decree dissolving the parties' marriage was a settlement agreement

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.

executed on September 24, 2001, which contained the following provisions concerning the custody and support their child:

2. There was one child born of this marriage; namely, Nicholas T. Santos, born October 16, 1997. The Respondent [Rhonda] shall have the care, custody and control of the parties' child, with the Petitioner [Douglas] having reasonable visitation rights.
3. The parties have agreed that there will [be] no child support paid on behalf of the parties' minor child. During the period of this marriage, the Petitioner has assisted with the financial support of the Respondent's two children from a previous marriage. Therefore, the Respondent is not requesting payment of child support.

On June 3, 2003, the trial court entered an agreed order modifying the custody portion of that settlement agreement to provide for "shared residency" and adding more structure to the parenting schedule. The parties agreed that Nicholas would reside with Rhonda during the school year and Douglas during all vacations, with Rhonda retaining the right to claim Nicholas as a dependent for tax purposes. The order also specifically provided that there was to be no restriction on daily phone calls or visitation by either parent while Nicholas was in the custody of the other parent.

Douglas filed a motion to modify custody on February 20, 2004, supported by his affidavit alleging that he had serious concerns about the child's safety because Rhonda failed

to live up to her agreement to change her work schedule in order to provide more care for Nicholas, age seven at the time. Due to the fact that Rhonda worked most nights from 7 p.m. to 7 a.m., Douglas alleged that Nicholas had been spending the night with babysitters or people whom he did not know; that he had little or no supervision; and that he spends little time with Rhonda because of her work schedule and the fact that her off time is spent either sleeping or partying.

After conducting a hearing at which oral testimony was received and considering other evidence submitted by deposition, the trial judge entered extensive findings to support his conclusion that a modification of custody was in Nicholas's best interest:

By her own admission, Respondent has used illegal drugs within the past three years. Respondent was placed on probation for admitting to her employer that she had abused cocaine, ecstasy, and marijuana. Although this was not at a time when she had possession of Nicholas, it was at a time when she was experiencing stress or depression in her life, a situation that may reoccur (sic) in the future when Nicholas is with her.

Further, Respondent is currently living with her boyfriend and allowing him to provide a significant amount of care for Nicholas, including overnights when she is working. There have been serious allegations in the past relating to both his sexual misconduct, and that of his son, who also lives in the home. Respondent's boyfriend also admitted to two instances that resulted in the removal of his children

from his care and their placement in foster care. His parental rights to the two younger children were eventually terminated. Respondent did not seem concerned about these allegations.

In addition, it appears that the[re] may have been medical neglect on the part of Respondent towards Nicholas. Respondent acknowledged that she did not take Nicholas to a dentist until Petitioner had taken Nicholas, who was complaining of a toothache, to the dentist and filed a subsequent motion relating to the dental problems. When he did go for the first time, at age six, he had four cavities and had to have a tooth pulled. Respondent continues to smoke in the presence of Nicholas, despite the knowledge that he has breathing problems and has been diagnosed with restrictive breathing disorder.

The trial judge also relied upon the opinion of Dr. Paula Berry, the court-appointed custodial evaluator who recommended that Douglas receive primary custody of Nicholas. Based upon her interviews with Douglas and his wife, Rhonda and her boyfriend Ed, and Nicholas, Dr. Berry concluded that a change in custody was warranted, setting out the following factors which the trial judge cited in support of his decision: 1) that there is a wide gap between the parenting skills of Douglas' wife and Rhonda's boyfriend; 2) that Rhonda's refusal to relocate to Maine where her two other children reside demonstrates that she places her own needs above those of her children; 3) that Rhonda has a history of serious drug abuse problems and mental health issues for which she has not sought treatment; 4) that Rhonda has

failed to facilitate telephone conversations between Nicholas and his father; and 5) that Rhonda is out of the home for Nicholas' bedtime at least four nights a week.

In this appeal, Rhonda first objects to the trial court's characterization of the agreed order entered June 3, 2003. The precise terms of that order which was styled "Property Settlement Amendment" provide in pertinent part:

1. The parties (now living in separate states) have agreed to **shared residency** of their child; namely, Nicholas T. Santos, born October 16, 1997.
2. The Respondent shall have the care, custody and control of the parties['] child during a normal school year, in the state in which she resides, with the Petitioner having the care, custody and control in the state in which he resides, during all school vacations. (Emphasis added.)

The agreement also provided that Rhonda would continue to claim Nicholas as a dependent for tax purposes. We agree with the trial judge that a fair reading of this document confirms that the parties' execution of the agreement was for the purpose of "changing and providing more structure to the parenting schedule." Because the trial judge did not err in concluding that the agreed order did not constitute a change in custody as contemplated in KRS 403.340, Douglas's motion was filed outside the two-year limitation contained in the statute. The "best

interest" standard was therefore applicable and the trial court correctly utilized that standard in ruling on the motion.²

Citing Lewis v. Lewis³ and Bond v. Bond⁴, Rhonda next complains of the failure to strictly comply with KRS 403.300(3), which requires court-appointed evaluators in custody matters to make available, at least 10 days prior to the hearing, a report including the investigative file of underlying data, diagnostic reports and names of persons the investigator interviewed or consulted. Dr. Berry provided her report seven days prior to trial without including the supporting data.

Although Rhonda now argues that the failure to strictly comply with the ten-day time limitation requires reversal of the judgment, we are convinced otherwise. The cited cases explain that the intent of the statute is the preservation of the parties' right to effectively cross-examine the evaluator. It is clear that Rhonda was afforded this opportunity through the taking of Dr. Berry's deposition. The trial judge specifically held open the taking of proof to comply with the intent of the statute and Rhonda's counsel availed himself of the opportunity to cross-examine the evaluator in the course of that deposition. In his opinion, the trial judge made

² KRS 403.340(3).

³ 534 S.W.2d 800 (Ky. 1976).

⁴ 887 S.W.2d 558 (Ky.App. 1994).

clear that he relied upon Dr. Berry's deposition, not merely her report, in reaching his decision and thus gave effect to the spirit, if not the letter, of the statute. Unlike the litigants in Lewis and Bond, Rhonda was not deprived of information which would have benefited her argument against the motion. We are therefore convinced that she suffered no prejudice as a result of the deviation from the statutory time frame.

The judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Russell Lloyd
Louisville, Kentucky

BRIEF FOR APPELLEE:

Harold L. Storment
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