

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002596-MR

ARVIN JOEL EDWIN BELL

APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE VERNON MINIARD, JR, JUDGE
ACTION NO. 97-CI-00217

CRYSTAL DAWNLEE BELL (NOW LYONS)

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND DIXON, JUDGES.

ACREE, JUDGE: Arvin Bell appeals from an order of the Wayne Circuit Court denying his motion to modify custody of his two minor children. Crystal Lyons, Bell's ex-wife and mother of the children, was awarded custody in the divorce decree. Bell sought to obtain custody of the children after Lyons remarried and disputes arose concerning the children's desire to attend Bell's church while they were in their mother's physical custody. The trial court refused to modify custody. However, the order did require Lyons to take the children to Bell's church on any Sunday they were not attending church

services with her. Bell argued that the children's expressed wishes to reside with him required custody modification. We disagree and affirm the trial court.

Bell filed his custody modification petition almost seven years after the original divorce decree. In a supporting affidavit, he alleged domestic violence between his ex-wife and their son, C.B., who was almost fourteen. The conflict between mother and son centered on C.B.'s desire to attend church with his father every Sunday, even on the weekends he spent with his mother and stepfather. Bell alleged that Lyons became violent with their son when C.B. stated that he wanted to be baptized at his father's church. He claimed that C.B. and his younger sister, A.B., wanted to live with him, rather than with their mother and stepfather.

The trial court held a hearing. Both parents were permitted to testify, and the children were interviewed by the court privately in chambers. Bell told the court that Lyons whipped C.B. with a belt buckle, leaving bruises on his body, and swung a belt at his head when he stated his desire to be baptized. C.B. said that his mother speaks disparagingly of his father's pastor and other church members and restricts his access to his Bible and religious radio broadcasts to punish him for exercising his faith. Both children told the court they wished to live with their father.

For her part, Lyons denied ever being violent toward her son. She expressed a wish for the children to remain in her custody. Regarding their ability to make religious decisions, she admitted to a concern that her children were too young to understand the commitment they were purporting to undertake. As specific examples, Lyons told the court that C.B. enjoyed watching television at her house and reading the Harry Potter books. According to Lyons, the spiritual leaders of Bell's church discourage

such activities as unbiblical. Lyons believed C.B.'s lack of understanding of that church's teachings was demonstrated by his failure to recognize that those teachings conflicted with his personal predilections.

A month after the hearing, the trial court issued a one-page order denying Bell's motion for custody modification. There were no findings relating to the allegations of domestic violence by Lyons against C.B. The order read, in relevant part,

. . . after a lengthy hearing in this case and after the Court reviewing the file, the Court finds that the major problem with the custody as it now stands is the children wish to attend church with their father, Arvin Joel Edwin Bell, and they are only allowed to do this on the week-ends of the father's visitation.

Therefore, it is the ORDERS of this Court that the motion for modification in custody is hereby over-ruled, but the children shall be permitted to attend church with their father on Sunday mornings. If the mother does not take the children to [her church] on the Sunday's [sic] that she has the children, then they shall be permitted to attend church with their father and the mother shall drop them off at the church and the father shall return them home after said church services.

Bell appealed from the denial of custody. Lyons did not cross-appeal from the portion of the order compelling her to allow the children to attend church with their father on Sundays when they are in her physical custody.

In our review of the decision to deny Bell's request for custody modification, “the test is not whether we would have decided differently but whether the findings of the trial judge were clearly erroneous or he abused his discretion.” *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974). The trial judge determined that the children's church attendance was the major problem fueling the parties' custody dispute. Bell does not disagree with this language and even states in his brief, “Certainly, much of the

problem existing between [C.B.] and [Lyons] is regarding the child's religious practices.” Nor does Bell complain of the trial court's failure to make findings regarding the allegations of domestic violence, choosing instead to rest his entire argument on the court's disregard of the children's expressed wishes to live with Bell.

According to Bell, the overriding and controlling factor in this case is C.B.'s expressed wish to live with his father. As support, he cites KRS 403.270(2)(b) which states that one of the relevant factors in determining custody is “The wishes of the child as to his custodian.” Noting that at the time of the hearing C.B. had less than a month to go before his fourteenth birthday, Bell also quotes the Kentucky Supreme Court which said, “It is recognized that a boy past his thirteenth birthday is nearing the age when he should have a lot to say about his custody.” *Mayfield v. Haggard*, 490 S.W.2d 777, 780 (Ky. 1972). Oddly enough, in *Mayfield* the appellate court reversed an award of custody to the maternal grandmother in favor of the father – despite the fact that both children expressed a desire to continue living with their grandmother. *Id.* at 779-80. Clearly, C.B.'s wish to live with Bell is not the sole determinative factor.

Lyons, arguing that the trial court did not abuse its discretion by considering the children's wishes but only in the context of the evidence as a whole, urges us to uphold the order. She points out that KRS 403.270, the statute cited by Bell, governs initial custody determinations. Bell's motion was for custody modification governed by KRS 403.340, not KRS 403.270. The modification statute allows a trial court to modify custody if,

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.

KRS 403.340(3). While the statute incorporates the nine “factors set forth in KRS 403.270(2)[,]” KRS 403.340(3)(c), it supplements those factors with five others. KRS 403.340(3)(a)-(b), (d)-(f). The child's wishes is but one of these factors.

There is no dispute that the children told the trial court they would rather live with Bell than with Lyons and her husband. However, the trial court was not required to give those wishes the dominant factor in the consideration. We agree with Lyons that presenting evidence favorable to a change in custody as to only one factor – in this case the children's wishes regarding their custodian – is simply not enough to require the trial court to grant Bell's petition. Consequently, we perceive no abuse of discretion in the trial court's order.

For the foregoing reasons, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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