

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000761-ME

TANDY WELLMAN NASH

APPELLANT

v. APPEAL FROM BOYD FAMILY COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 03-CI-01309

JOHN WILLIAM WELLMAN

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: ACREE AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ACREE, JUDGE: Mary Tandy Wellman (now Nash) appeals from an order of the Boyd Circuit Court modifying custody of her minor son, T.W., by changing the primary residential custodian from herself to her ex-husband, John Wellman. Nash argues the trial court applied an inappropriate standard in considering Wellman's custody modification petition. We disagree and affirm.

The parties' settlement agreement, which was adopted by the trial court on July 9, 2004, provided that they would share custody of their two minor children, with Nash being the primary

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

residential custodian. In January, 2006, Wellman filed a motion alleging a change in Nash's living situation (her marriage to Denny Nash) and asking to be made primary residential custodian of T.W. The parties' other child was, by this point, no longer a minor. Nash filed an objection, citing KRS 403.340(2)(a), because less than two years had elapsed since the original custody decree was entered and Wellman's motion was not supported by the requisite affidavits. Nevertheless, the trial court interviewed T.W. in chambers on the record to ascertain the boy's wishes regarding his primary residence.

Wellman waited until the two-year period had elapsed and then re-noticed his motion. The motion was heard on September 27, 2006. The trial court heard testimony from witnesses called by both parties and considered the previous interview with T.W. Six months later, the trial court entered an order finding that a change of circumstances had occurred and that T.W.'s best interests required a custody modification. Wellman was named primary residential custodian, and Nash was given, at a minimum, visitation consistent with the Boyd County guidelines. This appeal followed.

In reviewing the decision to grant Wellman'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 (Ky. 1974) (citation omitted). A motion for custody modification is governed by KRS 403.340. This statute allows a trial court to modify custody if,

after 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). Nash argues that the trial court's decision was arbitrary and an abuse of its discretion. She contends the trial court ignored the mandate of KRS 403.340(3) by making a custody decision that was contrary to T.W.'s best interests. Her argument has two focuses. First, she claims that this case is really about Wellman's unsuitability as a custodian. Second, she claims the prior custody arrangement was working well and that it would be in her son's best interests to maintain it.

Shortly before a scheduled hearing in this case, Nash made allegations that Wellman was mentally unstable. She requested discovery of the treatment records from Wellman's psychiatrist who had diagnosed him with bipolar disorder. The trial court sustained the order, reviewed the records itself, and noted that Wellman's psychiatrist specifically said that his diagnosis did not imply unfitness as a parent and that Wellman appeared to be psychologically stable. Nash further insinuates that Wellman was improperly using narcotics because he has had a prescription for opiate-based pain medication for his migraines. Wellman responds that he uses no more than eight to ten Oxycodone tablets per month and that he holds down a highly technical job for an employer who conducts random drug testing on employees. The trial court's order demonstrates that it

considered all of these factors before reaching the conclusion that Wellman is able to provide a suitable home for his son.

Next, Nash claims that the custody arrangement between the parties at the time of the hearing was working for everyone. The parties were essentially splitting T.W.'s time in their residences on an equal basis. T.W. would spend three days each week with one parent and four with the other, with Nash and Wellman alternating the four-day weeks. She urges us to adopt her conclusion that her son was "thriving" under that arrangement and, thus, there was no reason to change it.

KRS 403.340(3) enumerates six factors for the trial court to consider in determining whether custody modification is in a child's best interest. They are

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a *de facto* custodian.

KRS 403.340(3). Nash does not agree with the trial court's application of these factors. The factors upon which the trial court relied were T.W.'s best interests, endangerment from his present environment, and the advantages of a change of custody

outweighing the harm resulting from a change. KRS

403.340(3)(c)-(e).

KRS 403.340(3)(c) requires the trial court to consider "[t]he factors set forth in KRS 403.270(2) to determine the best interests of the child[.]" The best interests test contains nine factors, but only the first five factors are relevant in this case. KRS 403.270(2)(a) and (b) direct the trial court to consider the wishes of the parents and the child as to who should have custody. Wellman's wishes are to remain T.W.'s primary residential custodian. Nash urges us to reinstate the previous custody arrangement between the parties. However, the record contains a troubling incident during which she stated her intention in front of T.W. to have her attorney draw up papers giving custody to Wellman because she felt conflict between herself and her son was ruining her marriage to Denny. During his in-chambers interview with the judge, T.W. clearly stated that he wanted to discontinue the previous "fifty-fifty" custody arrangement and have one home where he would spend the majority of his time. While he was firm that he wanted to see his mother frequently, T.W. expressed discomfort with her husband and a lack of closeness that resulted from Nash's focus on her romantic relationship to the detriment of the bond with her son. T.W., at the age of twelve, articulated his reasons for preferring to reside primarily with his father, and the trial court gave that preference due consideration.

Next, the trial court analyzed T.W.'s "interaction and interrelationship . . . with his parent or parents, his

siblings, and any other person who may significantly affect [his] best interests[.]” KRS 403.270(2)(c). At the hearing, Wellman testified that Nash had spent very little time with their son while she was dating her current husband. In addition, when T.W. is staying with his father, his older sister often visits and the siblings have become closer since weathering their parents' divorce. Nash and her husband both denied the existence of any problems between themselves and T.W. However, the trial judge observed that T.W. felt emotionally neglected by his mother since the divorce and that the child is uncomfortable around and feels threatened by her current husband. In fact, the trial court specifically cited KRS 403.270(2)(c) in considering the flawed relationship between T.W. and his stepfather.

Finally, the trial court considered T.W.'s "adjustment to his home, school, and community" and "[t]he mental and physical health of all individuals involved[.]” KRS 403.270(2)(d) and (e). At the hearing, Wellman testified that when T.W. was at his home, he assisted him with homework and that his son is on the honor roll and plays soccer at school. Further, Wellman told the trial court that T.W. has his own bedroom and computer and his friends are able to visit him at home from time to time, factors that militate in favor of the change. KRS 403.270(2)(d). As discussed above, the trial court considered Wellman's health and mentioned the report from his psychiatrist who felt that Wellman was a safe parent whose primary concern was the wellbeing of his children. Wellman's

additional physical health problems—diabetes, high blood pressure, and migraines—had no significant impact on his fitness for custody because they were adequately controlled with medication. KRS 403.270(2)(e).

The trial court's order found that a custody modification was in T.W.'s best interests, and we are unable to discern any abuse of discretion or arbitrariness in this decision. *Eviston* at 507 S.W.2d 153 (Ky. 1974).

Having determined that a change of custody was in T.W.'s best interests under KRS 403.270(2), the inquiry returns to additional factors under KRS 403.340(3). First, the trial court must consider “[w]hether the child's present environment endangers seriously his physical, mental, moral, or emotional health” and, second, “[w]hether the harm likely to be caused by a change of environment is outweighed by its advantages to him.” KRS 403.340(3)(d) and (e). The trial court noted that Peggy Wyatt, a long time friend of the family, testified to a significant change in both children when Nash began dating an older, married man after her divorce. Further, Wyatt observed this same negative effect when Nash began dating her current husband. Although Nash and Denny denied it, the trial court specifically found that Wyatt was telling the truth about a heated confrontation she had with them, during which Denny stated that T.W. would never be at their house again. Although the trial court did not specifically find Nash's home to be a dangerous environment, its order noted T.W.'s feeling of emotional neglect by his mother, as well as his discomfort

around his stepfather. KRS 403.340(3)(d). Further, the trial court specifically found T.W. was "obviously well adjusted to his father's home[.]" Consequently, the advantages of a custody change clearly outweigh any harm from a change in environment. KRS 403.270(2)(e).

Considering the evidence of record and the trial court's order, we are unable to agree either with Nash's claim that the order ignored her son's best interests or that it was based on Wellman's "disingenuous allegation of some problem with the current custodian." Appellant's brief at pg. 7.

For the foregoing reasons, the custody modification order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, Kentucky

BRIEF FOR APPELLEE:

Richard W. Martin
Ashland, Kentucky