

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2005-CA-000961-MR

ANTOINETTE SURDO PALLADINO

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JO ANN WISE, JUDGE
ACTION NO. 00-CI-04502

DARRELL A. PALLADINO

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * * *

BEFORE: BARBER AND KNOPF,¹ JUDGES; EMBERTON, SENIOR JUDGE.²

KNOPF, JUDGE: Antoinette Surdo Palladino appeals from an order of the Fayette Circuit Court, entered March 15, 2005, denying her motion for visitation with her son Nicholas. Antoinette's former husband, Darrell Palladino, has moved to dismiss Antoinette's appeal as moot. We reject both parties' contentions. Antoinette's claim remains viable, but because substantial evidence supports the trial court's ruling she is

¹ Judge William L. Knopf concurred in this opinion prior to his retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

² 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.

not entitled to relief. Accordingly, we shall deny Darrall's motion to dismiss and affirm the trial court's no-visitation order.

The parties' dispute has a lengthy history which we shall not attempt to recount in detail. They were married in New York sometime before Nicholas's birth in August 1987. Nicholas was born with a congenital heart defect, hypoplastic left heart syndrome, that required several cardiac surgeries and catheterizations during his first few years of life. This extraordinary treatment seems to have succeeded in large measure, as Nicholas's physical condition stabilized and he became capable, with monitoring and precautions against over exertion, of a fairly normal physical existence. Unfortunately, however, Nicholas was also rendered severely developmentally disabled and continues to suffer from significant emotional and communicative deficits.

Antoinette and Darrell divorced in 1992. Although they were awarded joint custody of Nicholas, Darrell soon moved to Kentucky and the burden of Nicholas's care fell to Antoinette. Apparently Antoinette relied upon her mother for assistance, so that the mother's illness and death in 1996 precipitated a crisis. Nicholas's school attendance became sporadic prompting a neglect action in the New York courts. Investigators found that the nearly ten-year-old child was not

yet toilet trained and that he would not communicate with them verbally. An evaluating psychiatrist also found that Antoinette exhibited symptoms of a serious mental illness. Based on those reports and on Antoinette's admission of educational neglect, a New York court in 1997 removed Nicholas from Antoinette's custody, granted Darrell temporary custody, and ordered that Antoinette have no contact with Nicholas until she obtained treatment for her psychiatric problems. Nicholas came to live with Darrell in Kentucky, and in December 2000 Darrell initiated this action by petitioning the Fayette Circuit Court for an award of sole, permanent custody. That same day the circuit court, in the person of Judge Noble, granted Darrell's emergency motion for temporary custody and adopted the New York order prohibiting Antoinette from contacting Nicholas, his caregivers, Darrell, his family, or his employer.

In November 2001, Darrell moved to have the temporary order made permanent. Antoinette opposed the motion and moved for visitation. The court ordered an independent evaluation of the parties and of Nicholas. The evaluator found that although Nicholas had improved since his removal to Kentucky, he remained significantly developmentally delayed and psychologically very fragile. He also found that although Antoinette's symptoms had apparently abated somewhat since 1997, she remained in need of psychological therapy that would enable her more consistently to

distinguish Nicholas's extraordinary needs from her own. Based on this report and its recommendations, the court, by order entered September 3, 2002, denied visitation for the time being and ordered Antoinette to engage a qualified therapist. The court ruled, however, that Antoinette could begin to lay the foundation for a visit by sending to Nicholas, through his therapist, cards, small gifts, and eventually short video tapes of herself.

Soon thereafter Judge Wise succeeded Judge Noble. By order entered July 9, 2003, the court awarded Darrell sole, permanent custody of Nicholas and modified the September 3, 2002, order by abandoning that order's fixed schedule for bringing about visitation and ruling instead that visitation would be considered merely a goal of Nicholas's treatment. In April 2004, Antoinette again moved for supervised visitation. She had satisfied the conditions imposed by the September 2002 order, she maintained, and was, after more than six years of separation, entitled to see her son. The court conducted an evidentiary hearing in February 2005, after which it found that visitation with Antoinette would not be in Nicholas's best interest. The court emphasized the testimony by Nicholas's therapist to the effect that Nicholas expressed a desire not to visit with Antoinette and that he remained extremely susceptible to emotional stress, being apt, when confronted by strong or

painful emotions, either to engage in destructive behaviors or to regress into muteness and infantility. The court also emphasized Antoinette's history of violating the order that she not contact Nicholas, his caregivers, and Darrell. Recent violations involving Nicholas's graduation from middle school and his enrollment in a special-needs high school caused the court to doubt whether Antoinette would be able to put Nicholas's needs ahead of her own during a face-to-face meeting, which, without her cooperation, would almost certainly become unduly emotional and stressful. It is from this order that Antoinette has appealed.

Before addressing the merits of Antoinette's appeal we must first consider Darrell's motion to dismiss. He contends that Antoinette's claim was rendered moot in August 2005 when Nicholas turned eighteen. Eighteen is the legal age of emancipation in Kentucky, and Darrell is correct that in the usual case the circuit court loses jurisdiction over custody and support issues upon the child's emancipation.³ KRS 405.020(2), however, provides that parents retain the custody, care, and support of "their children who have reached the age of eighteen (18) and who are wholly dependent because of permanent physical or mental disability." Where custody and support of

³ KRS 2.015; KRS 403.213(3); KRS 405.020; Wilhoit v. Wilhoit, 521 S.W.2d 512 (Ky. 1975); Abbott v. Abbott, 673 S.W.2d 723 (Ky.App. 1983).

their adult children remain in the parents, the circuit court retains jurisdiction to address custody and support issues.⁴ There is no dispute that Nicholas remains dependent and in Darrell's custody. The circuit court retains jurisdiction, therefore, over Antoinette's visitation claim, which thus has not been rendered moot.

Even if her claim is viable, however, Antoinette is not entitled to relief. After moving to Kentucky, Darrell married Katrina Scott. In 1998, apparently, they separated and Katrina petitioned for divorce. Apparently they reconciled, however, for they were married still in 2005, and Katrina testified at Antoinette's visitation hearing. Antoinette contends, first, that because Judge Wise's former law partner represented Katrina in the divorce action, Judge Wise was disqualified to hear the dispute between Darrell and Antoinette. We disagree.

KRS 26A.015 provides that a judge shall disqualify herself in any proceeding

[w]here [s]he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings . . . [or] in private practice or government service [s]he served as a lawyer or rendered a legal opinion in the matter in controversy, or a lawyer with whom [s]he previously practiced

⁴ Williams v. West, 258 S.W.2d 468 (Ky. 1953); Abbott v. Abbott, *supra*.

law served during such association as a lawyer concerning the matter in controversy.⁵

Here there is no allegation that Judge Wise's former partner had anything to do with the case between Darrell and Antoinette (the "matter in controversy") or that Judge Wise had any personal knowledge of disputed evidentiary facts. Absent some such indication that the former association infected the current proceeding, Judge Wise did not err by refusing to disqualify herself.

Otherwise Antoinette's claim appears to be that the trial court erred by finding that visitation would not be in Nicholas's best interest. The child's best interest is the appropriate standard when the trial court is asked to modify a prior order denying visitation.⁶ This Court reviews best-interest determinations under an abuse of discretion standard. Under that standard, we must affirm the trial court's decision if it is supported by substantial evidence, is not contrary to law, and is not otherwise arbitrary or capricious.⁷ Antoinette has submitted materials tending to support her therapist's testimony to the effect that Antoinette is no longer as ill as

⁵ See also SCR 4.300 canon 3E(1)(a) and (b).

⁶ McNeeley v. McNeeley, 45 S.W.3d 876 (Ky.App. 2001); Hornback v. Hornback, 636 S.W.2d 24 (Ky.App. 1982).

⁷ Allen v. Devine, 178 S.W.3d 517 (Ky.App. 2005); Sherfey v. Sherfey, 74 S.W.3d 777 (Ky. 2002).

she may have been in 1997 when the New York court ordered that she have no contact with Nicholas. While that testimony might well have supported a ruling in her favor, it does not compel one. As noted above, there was also evidence that, despite her therapy and whatever improvements she may have made, Antoinette continued to seek inappropriate contact with Nicholas, his caregivers, and with Darrell's employer. This apparent impulsiveness together with the evidence of Nicholas's psychological frailty constitutes substantial evidence that visitation with Antoinette would likely interfere with Nicholas's treatment and was not in his best interest. The trial court did not abuse its discretion by so finding.

In sum, although Antoinette's appeal is not moot, Judge Wise was not obliged to disqualify herself because of her former partner's association with Katrina Scott, and her ruling that visitation was not in Nicholas's best interest did not constitute an abuse of discretion. Accordingly, Darrell's motion to dismiss is hereby denied, and we affirm the March 15, 2005, order of the Fayette Circuit Court.

ALL CONCUR.

ENTERED: July 14, 2006

/s/ Wm. L. Knopf
JUDGE, COURT OF APPEALS

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