

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001696-ME

KELLI RAE MARKINS

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 02-CI-00246

LAWRENCE WOODROW MARKINS;
LAURA JUDY MARKINS; AND
JAY MARKINS

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

VANMETER, JUDGE: Kelli Rae Markins appeals from an order entered by the

Greenup Circuit Court, Family Division, denying her motion for a modification of

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

custody, and failing to address her motion for a rule. For the reasons stated hereafter, we affirm.

Kelli and Lawrence Woodrow Markins (Buck) married in 1993. Their two children were born in 1996 and 1998. When Kelli and Buck divorced in 2002, the children were placed in Buck's sole custody by agreed order, with reasonable visitation rights awarded to Kelli.

In 2003, Kelli filed a motion seeking to modify custody. She asserted that the children currently lived with their paternal grandparents, appellees Judy Markins and Jay Markins (the Markins). Buck specifically denied that he had abandoned the children, but he admitted that the children lived with his parents while he resided at another location due to his employer's move from Ashland to West Virginia. He asserted that he remained substantially involved in the children's lives, and that Kelli's motion should be denied. Alternatively, Buck urged the court to find that if the Markins had become the children's de facto custodians, it would be in the children's best interests to remain in their care and custody. The Markins in turn moved to intervene, requesting the court either to deny the motion to modify custody or, alternatively, to name them as de facto custodians and grant child custody to them. A hearing was conducted before a domestic relations commissioner (DRC), who recommended that Kelli's motion to modify custody should be denied, that the Markins should be named as the children's de facto custodians, and that the Markins and Buck should be awarded joint custody. The trial court adopted the DRC's findings and conclusions.

Various motions followed regarding custody, visitation, and child support issues. In May 2007, Kelli filed another motion seeking to modify custody, as well as a motion requesting the court to issue a rule against the Markins for their alleged failure to facilitate court-ordered visitation.

The court conducted a hearing and, at Kelli's request, interviewed the children. In its order the court summarized the evidence presented at the hearing and concluded:

Based upon the evidence presented the Court can find no reason to change custody of the children to the mother. The Court is required, pursuant to KRS 403.270, to utilize the best interest standard in determining whether or not custody should be changed. The Court is directed by KRS 403.270 and is to only change custody if there has been a change in circumstances that would require a modification for the best interest of the children. The Court is not convinced that any abuse occurred with the children. The children are well established and very stable in their current environment. The Court has obviously considered the wishes of the children, but does not feel that alone is sufficient enough to transfer custody. There has been no change in circumstances that the Court can see that warrant a change in custody. The Court finds it would be in the best interest of the children to allow the present custody arrangement to continue.

The court denied Kelli's motion to modify custody without addressing the pending motion for a rule. This appeal followed.

First, Kelli contends that the trial court abused its discretion by denying her motion to modify child custody. We disagree.

KRS 403.340(3) permits a court with jurisdiction to modify child custody only 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (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.

The relevant factors set out in KRS 403.270(2) for purposes of determining a child's best interests, as required by KRS 403.340(3), include: the wishes of the parent(s), child and any de facto custodians; the child's relationships with others; the child's adjustment to home, school and community; the health of the involved individuals; and the circumstances and extent of any de facto custodian's involvement. For purposes of determining whether a child is seriously endangered by his or her present environment, KRS 403.304(4) sets out relevant factors which

include but are not limited to: the child's relationship with parents, siblings, and de facto custodians; health issues; and any repeated or substantial visitation issues.

Here, Kelli's motion to modify was based on allegations that her eleven-year-old son and eight-year old daughter wished to live with her, that her son had told her that Jay Markins had pulled him "up by his neck/throat" and had "hit him with a fly swatter," and that Jay Markins had health problems which compromised his ability to care for the children. Kelli asserted that she was "ready, willing and able to care for" the children, that she had become financially and emotionally stable, and that she visited with the children whenever possible and provided excellent care for them. During the hearing Kelli asserted that she should be awarded custody because she loved her children but had "never had the chance to actually raise" them, and she alleged that the children would cry and "get agitated" as their visits with her came to an end. She stated that by living with her the children would benefit from having their own rooms, being around neighborhood children, attending her church, and being in schools which were smaller and "a little better." Finally, Kelli described visitation scheduling conflicts and the difficulties she sometimes experienced in reaching the children by telephone.

Appellees testified regarding the children's adjustment to their home, community and school, as well as regarding their activities and relationships with others. They denied Kelli's claim that Jay Markins was not in good health, stating that his doctor had advised him to continue with his regular activities, and

describing his gardening and other activities. Although they admitted that on one occasion Jay Markins grabbed his grandson by the shirt collar, warned him to behave, and then spanked him with a fly swatter when the boy continued misbehaving, they denied any abuse of the children.

Our review of the evidence shows that the trial court did not err by finding that no abuse occurred, that the children were well established in a stable environment with the Markins, and that no change in circumstances warranted a change in custody. Further, even if we should assume that the children expressed a desire to live with Kelli, that fact alone was insufficient to compel a change of custody. We conclude, therefore, that the trial court did not abuse its discretion by finding that it was in the children's best interests to continue the existing custody arrangement.

Kelli also complains that the trial court failed to address her motion for a rule, wherein she asserted that the Markins had failed to "accommodate and facilitate" her court-ordered visitation rights during the Easter holiday, fall or spring breaks, and summer vacation. At the beginning of the hearing the court acknowledged that the motion for a rule was before it, and during the hearing the parties addressed various issues relating to the scheduling of visitation. However, the court's final order denying the motion to modify custody contained no reference to the pending motion for a rule, and the record contains nothing to indicate that Kelli requested a ruling on that motion before filing this appeal. As it therefore appears that the motion is still pending before the trial court, the matter is

not properly before this court on appeal, although Kelli presumably may choose to renew the motion below.

The order of the Greenup Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marie Moraleja Hoover
Portsmouth, Ohio

BRIEF FOR APPELLEE:

William R. Palmer
Grayson, Kentucky