RENDERED: MARCH 9, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000768-MR

GINA MARIE LEE APPELLANT

v.

APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 92-CI-00705

BENSON LOCKHART LEE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON, JUDGE; KNOPF AND ROSENBLUM, SENIOR JUDGES.[1]

ABRAMSON, JUDGE: Gina Marie Lee appeals from an order of the Franklin Family Court granting Benson Lockhart Lee's motion to modify his child support obligation and further designating Benson as the primary custodian for the parties' two children born during their marriage. Gina argues that the trial court did not have jurisdiction because Benson did not support his motion with an affidavit as required by Kentucky Revised

[1] Senior Judges William L. Knopf and Paul W. Rosenblum sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

Statute (KRS) 403.340 and KRS 403.350. Because we find that Benson was not required to file an affidavit, we affirm.

On October 14, 2004, Gina filed a Motion to Show Cause seeking to have Benson held in contempt for failure to make required child support payments. Shortly thereafter, she also filed a motion for the purpose of establishing Benson's paternity of a son born approximately three and one-half years following the couple's 1994 divorce.[2] Gina also sought custody of the child. On November 4, 2004, Benson responded to Gina's show cause motion and further asserted his own motion for a modification of his child support obligation. In his child support modification motion, Benson argued that he was the *de facto* custodian of the parties' two older children, but he did *not* ask for a modification of the parties' custody arrangements.

On November 23, 2004, the trial court entered an order establishing Benson as the father of the child born after the parties' divorce. All other issues were held in abeyance pending a hearing to be held on a later date. Prior to the hearing, Gina objected to the issue of custody being addressed by the court because of Benson's failure to file an affidavit pursuant to KRS 403.340 and KRS 403.350. Nonetheless, a hearing was held on February 8, 2005, and, on March 10, 2005, the trial entered an order designating Benson as the primary residential custodian of the parties' children born during the marriage and Gina as the primary custodian of the child born subsequent to their divorce. The court also granted Benson's child support modification motion. Approximately one

[2] The parties have two other children who were born during their marriage. Those children are the subjects of the custody dispute at issue in this appeal. As a part of their divorce, the court granted residential custody of those two children to Gina.

week later, on March 16, 2005, the court entered a second order suspending contempt sanctions against Benson imposed for his prior failure to pay child support and again noting that his motion for modification of his child support obligation was granted. Gina appealed.[3]

Gina relies on KRS 403.340 and KRS 403.350 in support of her argument that a party seeking a modification of custody must accompany his or her motion with an affidavit. In fact, KRS 403.350 does require a party seeking modification of a custody order to support the request with an affidavit. In pertinent part, this statute states:

> A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. . . . The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

In this matter, Gina argues that Benson's failure to file the required affidavit deprives the court of jurisdiction over the question of custody modification. *See, e.g., Petrey v. Cain,* 987 S.W.2d 786 (Ky. 1999); *Robbins v. King,* 519 S.W.2d 839 (Ky. 1975); *Crossfield v. Crossfield,* 155 S.W.3d 743 (Ky. App. 2005).

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[3] In her Notice of Appeal, Gina challenges the trial court's decision to modify custody of their two older children. However, she designated only the March 16, 2005 order which did not address custody, and not the March 10, 2005 order that did. However, our Supreme Court held in *Ready v. Jamison,* 705 S.W.2d 479 (Ky. 1986), that an appeal may be maintained despite the appellant's failure to properly specify the judgment appealed from when it can be ascertained within a reasonable certainty from a review of the record and no substantial prejudice has resulted to the appellee.

We agree with Gina that a family court generally has no authority to consider a party's motion seeking a change in custody that is not supported by affidavit. However, the family court's attention to the custody issue in this matter was *not* initiated by a party seeking to modify custody arrangements. Rather, it was Gina's efforts to hold Benson in contempt for failure to pay child support that brought the issue before the family court. Though Benson did seek to modify his child support obligation, he never requested an alteration of the parties' custody arrangements. Rather, the question of custody was addressed by the family court on its own initiative after reviewing all of the evidence offered in connection with Benson's motion to modify child support. Thus, because Benson did not move to modify custody and, therefore, was not "[a] party seeking a . . . modification of a custody decree," KRS 403.350 has no application herein.

Additionally, the family court indicated in its March 10, 2005 order, that both Gina and Benson, as well as their two older children, testified during the hearing on February 8, 2005. Because of this, even though no affidavits were presented in support of any proposed alteration to the parties' custody arrangements, the family court was certainly presented with sufficient sworn testimony to support its decision to modify custody. Moreover, we cannot find in the record any objection by Gina that the ultimate decision of the family court was somehow unfair or not otherwise proper with respect to the evidence. This is not surprising given that the record demonstrates that since 2002, the two older children have resided with Benson *with Gina's permission.* The trial court's decision, therefore, merely represented a judicial recognition of the parties' own

agreed-upon arrangements.[4] We, therefore, affirm the March 10, 2005 judgment of the Franklin Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Willie E. Peale, Jr.
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Kevin P. Fox
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[4] Further support for the trial court's decision is also found in the fact that Gina's boyfriend at the time of the hearing had previously been charged with a number of offenses including child abuse, fourth degree assault of a minor, custodial interference, harassment and menacing. Gina testified that she was not aware of his criminal record prior to learning of it at the hearing.