

RENDERED: MARCH 16, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000353-MR
AND
NO. 2005-CA-001179-MR

LISA NEWTON (NOW THOMAS)

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM GRAYSON CIRCUIT COURT
v. HONORABLE ROBERT A. MILLER, JUDGE
CIVIL ACTION NO. 99-CI-00197

ROBERT NEWTON

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Lisa Newton (now Thomas) appeals from a judgment of the Grayson Circuit Court modifying the child custody and support

¹ Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

agreement with her ex-husband, Robert Newton. Robert cross-appeals from the judgment of the court, arguing that he should have been granted sole custody. We affirm.

Robert and Lisa were divorced on September 22, 1999. The divorce decree incorporated an agreement of the parties to share joint custody of their child, Trevor, who was born on June 4, 1993. The decree named Lisa as the primary residential custodian and granted Robert visitation in accordance with standard guidelines used by the court. Robert was ordered to pay child support in the amount of \$400 per month.

Following the divorce, Trevor was diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD), and he exhibited other behavioral problems. On March 10, 2004, Robert moved the court to modify custody and name him Trevor's primary residential custodian. Robert also sought to establish visitation with his stepson, Travis², who was 16 years old at that time. Days after Robert filed his motion to modify custody, Lisa filed a motion for increased child support.

The case was referred to a domestic relations commissioner (DRC) for hearings. Both parties testified, as well as Trevor, Travis, and several other family members. Trevor's teachers also testified. Each party indicated the other was to blame for Trevor's behavioral problems, including an alleged suicide threat. Final hearings were conducted in April 2004.

On December 15, 2004, the DRC recommended in his report that it was in Trevor's best interest for Robert to be his primary custodial parent. In a separate report,

² Travis apparently views Robert as his father, referring to him as "Dad", and is presented as Robert's natural son.

the DRC also recommended that Robert's child support obligation be increased and that it continue until the court approved Trevor's custody transfer to Robert.

Lisa filed timely exceptions to the DRC report, requesting the court to deny custody modification and arguing that the DRC's and the court's application of Kentucky Revised Statutes (KRS) 403.340 was erroneous. Robert filed a motion to confirm the DRC report, but at the same time requested the court to grant him sole custody of Trevor. On January 20, 2005, the court entered a judgment affirming the DRC's recommendation and awarding Robert primary residential custody of Trevor. However, the court rejected Robert's request for sole custody. Further, the court overruled the DRC and denied the increase in support sought by Lisa. This appeal and cross-appeal followed.

The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. Kentucky Rules of Civil Procedure (CR) 52.01. Thus, when the trial court adopts the recommendations of the DRC, those recommendations fall under the same standard of review that is applied to a trial court's findings. *See Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427, 429 (Ky. 1980), and *Wells v. Sanor*, 151 S.W.3d 819, 822 (Ky.App. 2004).

The standard of review for appellate courts in a custody case is that findings of fact may be set aside only if those findings are clearly erroneous, i.e. whether or not those findings are supported by substantial evidence. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005). Substantial evidence has been defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Secretary, Labor Cabinet v.*

Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134 (Ky. 2000). Mere doubt as to the correctness of a finding will not justify its reversal. *Allen*, 178 S.W.3d at 524.

“After a trial court makes the required findings, it must then apply the law to the facts.” *Id.* “The determination of the proper law to be applied to the facts is reviewed *de novo.*” *Id.* “The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion.” *Id.* “Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Id.*

Modification of custody is governed by KRS 403.340. KRS 403.340(3) does not allow a court to modify child custody:

[U]nless 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)³ 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.

Lisa argues that the court relied upon the wrong statute in its decision. She asserts that the court considered only the best interests standard set forth in KRS 403.270(2) and did not determine whether there was a change in circumstances as is required under KRS 403.340 before modification may be granted. To support her argument, Lisa points to the court's reference to KRS 403.270 and to the lack of any finding by the court relative to changed circumstances. In connection with this argument, Lisa contends that the DRC and court considered custody de novo and did not properly assign Robert the burden of proof as to custody modification.

At the bottom of page 3 and the top of page 4 of the DRC's report, he cites KRS 403.340, the custody modification statute, but he then sets forth the provisions of

³ The pertinent factors include:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

KRS 403.270(2) relating to a child's best interests. Thereafter, near the end of the report on page 5, the DRC states that he "has considered the criteria contained in KRS 403.340(2) (c) and (e)" and concludes that "the best interest of the child dictates that he be placed in the home which offers the more strict discipline and where the child always knows where he stands with the custodial parent, and that would be the home of the Petitioner [Robert]." The DRC also found that "custody with his father would give him a more rational and stable environment than with his mother."

After the DRC rendered his report, Lisa filed exceptions contesting the custody modification. In a five-page order, the court adopted the report and awarded Robert the status of Trevor's primary residential custodian. The court noted that the DRC "correctly considered and weighed the relevant factors required to be considered under KRS 403.270(2) (a) to (e)." Further, the court noted that the best interests of Trevor indicated that the custody award should be modified and that Robert should be designated as the primary residential custodian. No specific mention was made of whether changed circumstances existed.

Lisa acknowledges that she did not file an exception from the DRC's report regarding this issue and thus did not properly preserve the alleged error for our review. See *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997); *Brewick v. Brewick*, 121 S.W.3d 524, 527 (Ky.App. 2003). However, she maintains that this court may consider the alleged error even though it was insufficiently preserved for review. She cites CR 61.02, the palpable error rule, to support her position. CR 61.02 states in part that:

A palpable error which affects the substantial rights of the parties may be considered by . . . an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

It is difficult to determine the extent that the DRC and the court properly considered the custody modification statute, KRS 403.340. Nevertheless, from the findings of the DRC and the court, it is apparent that there were changed circumstances warranting custody modification. As such, we fail to see any manifest injustice that would cause us to allow relief pursuant to CR 61.02.

Lisa's next argument is that the DRC and the court failed to make sufficient findings of fact and conclusions of law concerning the relevant factors necessary for custody modification. Additionally, she contends that those findings of fact that were made were not supported by the evidence. She cites *McFarland v. McFarland*, 804 S.W.2d 17, 18 (Ky. 1991), and CR 52.01 to support her arguments.

Lisa argues that the court relied upon one factor, the best interests of the child, in its decision to modify custody and that it erred in not making specific findings for all relevant factors set forth in KRS 403.340(3). She cites the *McFarland* case to support this argument. The court in *McFarland* did not hold that the court must make findings concerning all the relevant statutory factors. Rather, the court held that the trial court must consider all relevant factors. Here, there is no indication that the court did not consider those factors. Further, Lisa is precluded from reviewing any error in this regard because she did not move the court for more specific findings pursuant to CR 52.02. *See* CR 52.04 and *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Lisa argues that the findings the court did make were not supported by the evidence in that the court incorrectly found: that she had an obsessive compulsive disorder; that her mental condition was compounded by Trevor's problems; that the court ignored Robert's problems, including his depression, domestic violence, and whippings of Trevor; that she threatened to move away; and that she wrongly restricted Robert's visitation. Having reviewed the record and the court's findings, we conclude that the record contained ample evidence to support the court's findings and that none of the findings was clearly erroneous. Furthermore, it was for the trial court to judge the credibility of the witnesses.

Lisa's last argument is that the court erred in overruling the DRC's ruling concerning child support. In his report, the DRC found that Lisa was underemployed, and he imputed minimum wage income to her. After doing so and applying the statutory child support guidelines, the DRC determined that Robert's child support obligation should be raised from \$400 per month to \$601.35 per month. Thus, as the increase was over 15%, Lisa was entitled to have her motion granted. *See* KRS 403.213(2).

After determining the amount of support, the DRC directed that the modification be retroactive to the date Lisa filed her modification motion. Further, Robert was directed to pay until the circuit court approved the transfer of custody to him. Robert filed exceptions, and the circuit court agreed with his position. The court held that "Because child custody should have been modified in March 2004 when originally motioned by Petitioner, the recommendation of the Commissioner that Respondent's child support be made retroactive to March 30, 2004, should be overruled." Further, the

court noted that Lisa had agreed in the divorce decree to receive less support than that called for in the guidelines “for various reasons (including the fact that Petitioner provides for the child separately).”

Child support payments may be modified retroactively but only as to installments accruing after the date of the filing of the motion to modify. KRS 403.213(2). Clearly, the DRC had the right to recommend modification retroactive to the date of Lisa’s motion. However, the effective date of modification is within the sound discretion of the trial court. *See Ullman v. Ullman*, 302 S.W.2d 849, 850-51 (Ky. 1982); *Giacalone v. Giacalone*, 876 S.W.2d 616, 620 (Ky. 1994).

Concerning commissioner’s reports, CR 53.06(2) states that trial courts “may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.” Under the circumstances of this case, we find no abuse of discretion by the court in rejecting the DRC’s recommendation and in denying Lisa’s request to order payments modified retroactively to the filing of her motion.

On cross-appeal, Robert argues that the trial court erred by not granting him sole custody. We disagree.

In Robert’s motion to modify child custody, he sought only to be named as the primary residential custodian. Moreover, Robert did not file exceptions to the DRC’s report. In fact, in his “Motion/Notice” filed on December 21, 2004, Robert moved “the Court to confirm the Commissioner’s Report entered December 15, 2004, and grant him sole custody of his child, Trevor Newton.”

In short, Robert's argument is without merit because he did not timely request the court to grant him sole custody. He waited until after the hearings and after the court had entered its judgment to raise the issue. Until that time, he had requested only that he be designated as the primary residential custodian.

The judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

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