

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001447-ME

SHAUNA SATURLEY (NOW TURNER)

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JUDY A. HALL, JUDGE
ACTION NO. 02-CI-01596

DAVID GLEN SATURLEY

APPELLEE

OPINION
VACATING

** ** * ** * ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.
VANMETER, JUDGE: Shauna Saturley (now Turner) appeals from an order entered by the Christian Circuit Court modifying joint child custody by naming appellee David Glen Saturley as the child's primary residential custodian. As the record demonstrates that David's motion for modification was not supported by at least two affidavits although it

¹Senior Judge Lewis G. Paisley, 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.

was filed within two years of the previous award of joint custody, KRS 403.340(2), we are compelled to conclude that the trial court lacked authority to consider the motion. Hence, the court's order granting the requested modification must be vacated.

The parties divorced in February 2003, when their only child was two years old. The dissolution decree incorporated their original agreement that Shauna would have sole custody of the child. One month later, on March 12, the court entered an agreed order which provided for the parties to share joint custody, with Shauna serving as the primary residential custodian.

One year later, in March 2004, the child went to live with David after Shauna exhibited symptoms of mental illness and was hospitalized for two weeks. On March 26 the court granted David's motion seeking an ex parte order temporarily naming him as the child's primary residential custodian, and it directed that Shauna would be entitled to a hearing on David's motion "on proper notice by either party." The record reflects that no further action was taken until December 1, 2004, when David filed a motion which in part sought an award of sole custody as well as "the tax exemption for 2004" and subsequent years. The matter was continued for "evaluations."

Initially, Shauna's only response was a *pro se* motion seeking the 2004 tax exemption. However, Shauna subsequently obtained counsel and in March 2005, she filed a notice setting a date for a "case management conference regarding visitation and temporary custody." A hearing eventually was conducted and the court directed that temporary custody should continue as ordered in March 2004. Finally, an evidentiary

hearing was conducted in May 2006. On June 19 the court entered an order awarding the parties joint custody and naming David as the child's primary residential custodian. This appeal followed.

We must agree with Shauna's assertion on appeal that the trial court erred by failing to follow the dictates of KRS 403.340 regarding the modification of custody decrees. KRS 403.340(2) provides in pertinent part:

No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]

The Kentucky Supreme Court has interpreted this section and KRS 403.350 as requiring a party to file at least two affidavits to support any motion for modification which is made within two years of the prior custody order. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). Further, these requirements apply not only to the modification of sole custody, but also to the modification of joint custody through a change in the primary residential custodian. *Fenwick v. Fenwick*, 114 S.W.3d 767, 783-84 (Ky. 2003); *Crossfield v. Crossfield*, 155 S.W.3d 743, 746 (Ky.App. 2005). If the requirements of KRS 403.340(2) are not satisfied, the circuit court lacks subject matter jurisdiction to consider a motion for the modification of custody. *Petrey*, 987 S.W.2d at 788; *Crossfield*, 155 S.W.3d at 746; *Gladish v. Gladish*, 741 S.W.2d 658, 661 (Ky.App. 1987); *Copas v. Copas*, 699 S.W.2d 758, 759 (Ky.App. 1985). This is true regardless of

whether the issue was properly preserved for review, as defects in subject matter jurisdiction cannot be waived but instead may be raised by the parties or by the courts at any time, including for the first time on appeal. *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001).

Here, the record clearly shows that David's December 2004 motion, seeking a modification and award of sole custody, was filed within two years of the February 2003 dissolution decree and the March 2003 agreed order regarding joint custody. Thus, KRS 403.320(2) required David's motion for modification to be accompanied by two or more affidavits showing that “[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]” However, the only ground listed in David's motion was that it was “in the best interest of the minor child for [David] to have sole custody. There is a temporary order granting this relief, and [David] requests it be made permanent.” Further, the single affidavit accompanying David's motion was that provided by his mother, who in pertinent part stated only that:

3. I have read the Motion for Sole Custody and Child Support filed by my son.

4. I am aware of the same facts as my son, and I state that all the facts alleged in his motion are true and correct to my knowledge and belief.

Thus, not only did David fail to file the two affidavits required by KRS 403.340(2), but also neither his motion nor the single affidavit showed or even alleged that “[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional

health[.]” Absent compliance with the statutory mandates, the trial court lacked jurisdiction to entertain David's motion for modification.

It follows, therefore, that the court's order of June 19, 2006, must be vacated and set aside, leaving in place the prior order temporarily naming David as the child's primary residential custodian. Further, given our conclusion that the court lacked subject matter jurisdiction, Shauna's remaining contentions on appeal are rendered moot and will not be addressed.

The circuit court's order is vacated.

ALL CONCUR.

BRIEF FOR APPELLANT:

No Brief for Appellee

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