RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000502-ME

REBECCA NANTZ CHANEY (NOW SAYLOR) — APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE JOHN DAVID MYLES, JUDGE
ACTION NO. 01-CI-00121

ARTHUR GREEN CHANEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD, JUDGE; GUIDUGLI AND KNOPF, SENIOR JUDGES.[1]

HOWARD, JUDGE: Rebecca Chaney (hereinafter Rebecca) appeals from a February 9, 2007, order of the Anderson Circuit Court, holding that a previous order, entered March 22, 2006, is the controlling custody order in this matter. That March 22, 2006, order established joint custody between Rebecca and Arthur Chaney (hereinafter Arthur), as to

[1] Senior Judges Daniel T. Guidugli and William Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

the parties' minor son, Dolton Chaney. Finding no error in the Circuit Court's ruling, we affirm.

The parties were divorced by a decree entered on September 20, 2001. As agreed by the parties and incorporated by the court in the decree, Rebecca was awarded sole custody of the parties' only child, Dolton, with visitation granted to Arthur. This arrangement continued until 2006, when Arthur filed a motion pursuant to KRS 403.340 and a supporting affidavit pursuant to KRS 403.350, seeking to modify the custody arrangement to joint custody. In support of his motion, Arthur stated that Dolton, then seven years of age, had been placed in his care by Rebecca, due to problems she was having controlling and disciplining him. Rebecca agreed that Dolton was living with Arthur, but maintained that the reason for the residential change was her work schedule. At a hearing held on February 28, 2006, the parties indicated that they were in agreement and the circuit court issued its order, entered March 22, 2006. That order, in its substantive terms, stated as follows:

> Upon Motion by the Respondent, asking the Court for entry of an Order modifying the current custody arrangement, this matter having come before the Court for a hearing on February 28, 2006, the Court having been advised that the Petitioner had no objection, the Court having reviewed the Court record, and having been otherwise sufficiently advised:
>
> IT IS HEREBY OFDERED AND ADJUDGED that the Respondent's Motion is GRANTED. The parties shall share joint custody of their son, Dolton,
>
> IT IS FURTHER ORDERED AND ADJUDGED that the parties shall work out the specific timesharing arrangement

> by agreement. In the event they are unable to reach an agreement, the matter will be revisited by the Court.

Approximately six weeks later, on May 9, 2006, Rebecca filed a "Motion to Enforce Decree," seeking to reinstate the custody provisions of the original divorce decree. She did not file her motion as one for modification pursuant to KRS 403.340, but instead argued that the March 22, 2006, order was only temporary and therefore that the original custody decree had never been modified, but was still in effect. Arthur responded, the matter was submitted, and the circuit court issued its order on February 9, 2007, declaring that the March 22, 2006, order was in fact a modification of the original custody decree and was thereby the prevailing custody order. Rebecca then filed this appeal.

It is well-established that a custody award will not be disturbed on appeal unless it constitutes an abuse of discretion. In *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005), we stated,

> "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." . . . The exercise of discretion must be legally sound.

(quoting *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky.App. 2002), which in turn quoted *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

On this appeal, Rebecca again argues that the March 22, 2006, order granting the parties joint custody was only temporary in nature, and that the original decree is still the applicable order regarding "permanent" custody. We disagree.

Custody orders are, of course, in one sense, temporary by their very nature. That is, either parent may move the court, at any time, to modify a custody order. Whether a party is successful in modifying custody will depend upon their ability to satisfy the statutory requirements for such modification. However, there are meaningful, statutory distinctions between "custody," under KRS 403.270 and "temporary custody," under KRS 403.280. Among others, the substantive and procedural requirements of KRS 403.340 and 403.350 apply, in full, only to a motion to modify custody, and not to temporary custody.[2]

A review of the record in this case shows that Arthur filed a motion and affidavit, pursuant to KRS 403.340 and 403.350, requesting not temporary custody, but a modification of the original custody decree. A hearing was held on February 28, 2006, and an order was subsequently entered. That order specifically stated that the motion to modify custody was granted.

In support of her argument, Rebecca cites *Crouch v. Crouch*, 201 S.W.3d 463 (Ky. 2006), in which an order, similar in some respects to the March 22, 2006, order in this case, was held to be only temporary in effect. We believe the facts in *Crouch* are distinguishable from those in this case, and the distinction is instructive in demonstrating why the opposite result is required here. *Crouch* involved a mother who was ordered to report to active duty in the National Guard and therefore transferred custody of her child to the father by means of an agreed order between the parties. Upon dismissal from

[2] However, KRS 403.280(1) does require a party seeking an award of temporary custody to file an affidavit, "as provided in KRS 403.350." KRS 403.350 similarly refers to "[a] party seeking a temporary custody order," as well as to a party seeking a modification of custody.

active duty, the mother attempted to regain custody of the child, but the father refused to comply. Although the agreed order did not use the language, "temporary custody," the mother argued that the order was temporary in nature, as evidenced by the intent of the parties and by language in the order which read "until further orders of the court." *Id.* at 464. The Circuit Court agreed that this was the intent, but refused to return the child to the mother, based on the "best interests of the child." We reversed, and the Supreme Court affirmed our opinion, returning the child to the mother.

There are several distinctions between the *Crouch* case and the case at hand. First, no motion was filed in *Crouch* to modify custody, pursuant to KRS 405.340. Rather, the parties simply signed an agreed order, which was approved by the court. This was found to be significant by the Supreme Court. *Id.* at 466. Second, the Supreme Court in *Crouch* focused on the phrase "until further orders of the court" and found that language to be ambiguous. *Id.* at 466. As such, it then looked outside of the document and to the intent of the circuit court. There is no such ambiguous language in the March 22, 2006, order in this case and the circuit court has made its intent clear by its February 9, 2007, order which states in part:

> This Court speaks through its orders. *Respondent sought to modify custody and his motion was granted* pursuant to an agreed order signed by both counsel. The March 22, 2006 order is the prevailing order and established the custody of the minor child as between these parties. Any further changes sought by either of the parties relating to custody would hence need to be brought by a motion to modify custody or by agreement of the parties. (emphasis added).

Rebecca argues that the intent of the parties in this case was also that the modification of custody be temporary, and there are statements in the record which appear to support this contention. But the Supreme Court in *Crouch* made it clear that it is the intent of the trial court that is controlling, not the intent of the parties: "Interpreting court orders differs from that of statutes and contracts only to the extent that instead of construing the intent of the legislature or the intent of the parties, we must determine the intent of the ordering court." *Id.* at 465.

Although not relied on by the court in *Crouch,* because it had only been recently adopted and was therefore not controlling, the Supreme Court also noted KRS 403.340(5), which states that any custody modification based on a parent's active military duty shall be deemed to be temporary in nature. *Id.* at 466.

Unlike the father in *Crouch*, Arthur followed precisely the requirements set out in KRS 403.340 and 403.350 for a motion to modify custody. In his motion, he specifically stated that he was seeking an order "modifying" the existing custody arrangement. The circuit court order, which the attorneys for both parties signed, expressly stated that Arthur's motion to modify custody was granted. The circuit court has made clear that this was its intent.

Therefore, we find no abuse of discretion in the circuit court's ruling that the March 22 order constituted a modification of the original custody decree, pursuant to KRS 403.340. As such it is the current and controlling custody order in this case, subject to any future modification.

For the foregoing reasons, the February 9, 2007, order of the Anderson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David P. Nutgrass
Lawrenceburg, Kentucky

BRIEF FOR APPELLEE:

Kevin P. Fox
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