RENDERED: JUNE 4, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000907-ME

WILLIAM BOGGS — APPELLANT

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CI-00512

RHONDA JOLICOEUR (NOW ALFORD) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CLAYTON, JUDGE: The Appellant, William Boggs, appeals the April 13, 2009, order of the Logan Circuit Court granting the Motion for Custody filed by Appellee Rhonda Jolicoeur (now Alford). On appeal, Boggs argues that the trial court lacked jurisdiction to hear this matter because Alford never filed the requisite affidavit with her motion for change of custody. Alternatively, Boggs argues that

[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 Kentucky Revised Statutes (KRS) 21.580.

even if the court below had jurisdiction to hear this matter, the court mentioned no change in circumstances which had arisen since the prior custody decree, and failed to consider the relevant factors pertaining to the best interest of the child, as required by KRS 403.270 and KRS 403.340. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

On January 23, 2009, Alford filed a Motion for Custody with the Logan Circuit Court, requesting that the court grant custody of the parties' minor child, Dyllan, to Alford. In that motion, Alford noted that Boggs currently had criminal charges pending indictment. Further, Alford's motion stated that, "[t]he Respondent has attached detailed affidavits which completely state out all concerns for custody at this time." Nevertheless, the parties do not dispute that no affidavits were actually attached to the motion nor filed other than as noted hereinafter.

In his response to the motion filed by Alford, Boggs requested the court to dismiss the action, arguing that the court lacked jurisdiction to hear the matter given that Alford failed to file the requisite affidavit with the court. A hearing was held by the circuit court on March 20, 2009. At the time of the hearing, the parties had a joint custody arrangement which had previously been established pursuant to a judgment entered on December 8, 2005. Under that judgment, Boggs was designated the primary residential custodian and Alford exercised visitation.

At the time of the hearing, Dyllan was seven years old and in the first grade. Generally, he would stay approximately three nights per week with his

paternal grandmother and would spend the remainder of the week with either Boggs or Alford. During the course of the hearing, the bulk of the testimony centered on difficulties that Dyllan was having in school, particularly with reading. Educational professionals called to testify opined that Dyllan should remain in the first grade for another year, rather than advancing with the other students. Further, the educational professionals testified that Dyllan had a learning disability, although they were uncertain as to whether or not he was developmentally delayed.

In addition to testimony concerning Dyllan's performance in school, it was also established that Boggs and Alford had a volatile relationship and that Boggs had a criminal record. During the course of the hearing, the parties did not discuss issues concerning the purported affidavits, the sufficiency of the pleadings, or jurisdictional matters generally.

Following the hearing, the circuit court granted Alford's motion and designated her as Dyllan's primary residential custodian, effective as of his last day of school in May of 2009. In so doing, the court noted that its main concern was Dyllan's lack of progress in school. It also noted that Alford had been exercising regular visitation with Dyllan, and that Dyllan appeared to get along well with her other children. It is from that order that Boggs now appeals to this Court.

At the outset, we note that the issues raised in this appeal involve statutory interpretation. Accordingly, we review de novo. In so doing, we note that our courts have repeatedly held, with regard to the interpretation and construction of statutes, that the primary rule is to ascertain and give effect to the

intention of the legislature, which must be determined, if possible, from the language of the statute itself. *Moore v. Alsmiller*, 289 Ky. 682, 160 S.W.2d 10, 12 (Ky. App. 1942). Further, when the statute itself does not provide a specific definition of a word, the words of the statute shall be construed according to their common and approved usage. *See Kentucky Unemployment Ins. Comm. v. Jones*, 809 S.W.2d 715, 716 (Ky. App. 1991).

As his first basis for appeal, Boggs argues that the circuit court lacked subject matter jurisdiction to modify custody in this matter. Specifically, Boggs notes that KRS 403.350 requires that a party shall submit an affidavit with a motion for custody, setting forth facts supporting the requested modification. Further, Boggs notes that KRS 403.350 provides that the court shall deny the motion for modification of custody, unless it finds that adequate cause for hearing on the motion is established by the affidavits. Accordingly, Boggs argues that because Alford failed to file the affidavit required by the statute, the court was without authority to make a determination concerning custody.

In response, Alford argues that she was not required to file affidavits with the trial court. She asserts that because the underlying custody arrangement between the parties provided for joint custody, with William designated as the primary residential custodian, this was a "shared custody" arrangement as described in *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). Accordingly, Alford argues that the modification made by the trial court herein

was a modification of time-sharing, and not a modification of custody. Accordingly, she argues that affidavits were not required.

Alternatively, Alford argues that if this Court finds that affidavits are required, this case should be held in abeyance or remanded to the trial court for a ruling concerning supplementation of the record. To this end, we note that in accordance with Kentucky Rules of Civil Procedure (CR) 75.08, simultaneously with the filing of her brief to our Court, Alford filed a motion with the trial court to allow the record to be modified to include the affidavits of Robert Alford (dated January 23, 2009), and Rhonda Alford (dated January 23, 2009, and February 2, 2009).

While Alford requested that the appeal be held in abeyance pending ruling by the trial court on the affidavits, these were not part of the record considered by the trial court in rendering its judgment which is now on appeal. Thus, the affidavits will not now be considered by our Court in rendering an opinion based on the judgment from which the appeal was taken.

Beyond the issue concerning the affidavits, Boggs argues that if this Court determines that the trial court did have subject matter jurisdiction, this matter should nevertheless be reversed. Specifically, Boggs argues that the trial court, in making its determination, failed to consider the factors mandated by KRS 403.340 and KRS 403.270(2). In response, Alford asserts that the record clearly indicates that the court did consider the factors set forth in the statute, and that it made

findings of fact and conclusions of law that it was "in the best interest of the child" that Alford become primary residential custodian.

In reviewing the matter at issue, we observe that visitation or time-sharing may be modified pursuant to KRS 403.320, and custody may be modified pursuant to KRS 403.340. There is no requirement that there be a supporting affidavit before visitation/time-sharing may be modified. There is, however, such an affidavit requirement before custody may be modified. *See* KRS 403.350. The distinction between a visitation/time-sharing motion and a custody motion has been explained by our Supreme Court in the *Pennington* case.

In *Pennington*, the Court stated as follows:

> The obvious problem is that parties often ask for one thing when they are actually seeking the other, due to the unique nature of their shared (joint) custody or split (sole) custody. Courts have struggled ever since the concept of joint custody emerged with what part physical or residential possession of the child plays in each type of custody.

266 S.W.3d 759, 767.

The *Pennington* court also stated that "the first question on a custody modification . . . is, '[i]s the motion actually seeking modification of custody or visitation/timesharing?'" *Id*. at 768. Answering this question, we believe that the situation herein involved a modification of visitation rather than custody. Notably, the court treated the motion as one to change time-sharing rather than a motion to change custody. The court considered it a motion to change custody since it merely changed the time-sharing component and did not comment on the lack of

an affidavit. Boggs, himself, treated it as a motion to modify visitation/time-sharing, as he never brought to the court's attention the lack of a supporting affidavit. And Alford argues that, notwithstanding the title of her original motion, she was merely seeking a modification of the visitation/time-sharing.

Additionally, Alford maintains, in accordance with *Pennington*, that KRS 403.350 does not apply. It is significant that the trial court in this case changed the "primary residential custodian" from Boggs to Alford. Thus, our analysis focuses on the meaning of the designation of the "primary residential custodian." In *Pennington* the Kentucky Supreme Court discusses that, since Kentucky became a no-fault divorce state, joint custody arrangements have attained equal status with sole custody arrangements and that "custodial arrangements have become increasingly amorphous." *Id*. at 764. The Court further stated:

> Though it is often stated that there are two categories of custody, sole custody and joint custody, there is in practice a subset of joint custody that combines the concept of joint custody with some of the patterns of sole custody - often called "shared custody." In shared custody, both parents have full legal custody that is subject to some limitations delineated by agreement or court order. Unlike full joint custody, time sharing is not necessarily flexible and frequently mirrors a typical sole custody pattern where the child may live with one parent during the week and reside with the other on alternate weekends. The weekend parent does not have "visitation," a sole custody term which is frequently misused in this context, but rather has "time-sharing," as he or she is also a legal custodian. However, in practice, the terms visitation and timesharing are used interchangeably. Additionally, one parent may be

> designated the "primary residential parent," a term that is commonly used to denote that the child primarily lives in one parent's home and identifies it as his home versus "Dad's/Mom's house." **This concept is frequently misnamed "primary residential custody."** (Emphasis added).

Id. at 764-65. The reality of the trial court's decision in this case was to deny Alford's motion to modify custody, but to modify time-sharing within the joint custody arrangement (which relief Alford did not, in a legalistic sense, specifically request). Furthermore, the trial court used the phrase "primary residential custodian" when it meant "primary residential parent."

As previously mentioned, modification of visitation/time-sharing is governed by KRS 403.320, which states:

> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

Therefore, according to the plain meaning of the appropriate statute, since Alford was actually seeking to modify the time-sharing arrangement, there is no need for an affidavit. Boggs' actions at the hearing bolster this interpretation of Alford's actions. At the hearing, he did not follow with a motion or any other argument to the court requesting dismissal of Alford's motion on that ground. And, when the court heard the case, it made no decision on the question of subject matter jurisdiction and made no reference to the absence of affidavits. Regarding Boggs' contention that subject matter jurisdiction is never waived, we observe that, here,

the issue was not modification of custody, which requires an affidavit, but modification of visitation/time-sharing, which does not require an affidavit. Thus, the trial court had subject matter jurisdiction to decide whether to modify the time-sharing agreement.

Finally, we would be remiss if we did not address Boggs' contention that, even if we determine that the trial court had jurisdiction, the court erred in making its determination because it failed to consider the factors mandated by KRS 403.340 and KRS 403.270(2). In the case sub judice, however, we have already held that the case hinges on modification of visitation/time-sharing, not custody and, therefore, falls under the purview of KRS 403.320. This statute states that visitation/time-sharing may only be modified upon proper showing that, under it, "modification would serve the best interests of the child." KRS 403.320(3). Here, we believe that the court made findings of fact and conclusions of law that demonstrated it was "in the best interest of the child" that Alford become primary residential [sic] custodian.

Having so found, we affirm the April 13, 2009, order of the Logan Circuit Court.

BUCKINGHAM, SENIOR JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS BUT DOES NOT FILE SEPARATE OPINION.

BRIEF FOR APPELLANT:

Kenneth R. Williams, Jr.
Russellville, Kentucky

BRIEF FOR APPELLEE:

Pamela C. Bratcher
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