

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001332-ME

DENA SUE GREER MASTERS

APPELLANT

APPEAL FROM MADISON FAMILY COURT
v. HONORABLE DOUGLAS BRUCE PETRIE, SPECIAL JUDGE
ACTION NO. 04-CI-00960

SHANE THOMAS MASTERS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Dena Masters, appeals from an order of the Madison Family Court modifying the parties' joint custody agreement and awarding sole custody of their minor child to Appellee, Shane Masters. Because we conclude that the family court lacked jurisdiction to entertain the motion for a modification of custody, we remand the matter for further proceedings.

¹ Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

Dena and Shane Masters were married on December 17, 1994. One child was born during the marriage, a son named Alek who was born on June 21, 2003. The parties separated in August 2004, and a decree of dissolution of marriage was entered on August 12, 2005. Pursuant to an agreement incorporated into the decree, the parties were awarded joint custody with Dena designated as the primary residential parent.

Between 2005 and 2007, Shane filed numerous motions seeking additional timesharing and/or alleging contempt for Dena's failure to abide by the court's orders. Eventually, in May 2007, Shane filed a motion seeking sole custody of Alek. In his accompanying affidavit, Shane claimed that Alek was at risk for serious mental and emotional endangerment as a result of Dena's "obsessive and controlling behavior and failure to abide by court orders." The family court granted a hearing on the modification motion and ordered a custody evaluation.

However, on May 5, 2009, Shane filed a verified ex parte emergency motion for temporary custody alleging alleged parental alienation, coercion, and false reporting of abuse to CHFS. Following a hearing on May 11, 2009, the family court granted Shane temporary sole custody, concluding:

The Court finds that the testimony has established by a preponderance of the evidence that the child's mother . . . has embarked upon a course to totally destroy the relationship that this child might enjoy with his father.

The well-documented behaviors reviewed by the Cabinet and Dr. Ebben, a Qualified Mental Health Care Professional, have led each to

conclude that the emotional manipulation of the child by the mother is abusive and should cease immediately. The Court also finds no basis in fact to determine that the father has abused this child in any way.

In making this modification in temporary custody, the Court is painfully aware of the damage to the child in uprooting him from his current environment. However, the Court finds that the benefit of placing him in an environment where he will not be continually subjected to the emotional abuse and manipulation perpetrated upon him by the mother far outweighs this harm. Unfortunately, the Court can think of no other way to begin to undo the damage that has already been done to the child by the continuous brainwashing occurring in the mother's home.

Due to Dena's "bizarre" behavior, the family court further ordered that all contact between her and Alek be supervised, that Alek begin counseling, and that Dena undergo a psychological evaluation. Additionally, Alek was appointed a guardian ad litem.

A final custody hearing was held on December 11, 2009, during which the family court heard extensive evidence including live testimony from numerous witnesses as well as deposition testimony of over 21 witnesses. The trial court issued a final ruling on May 14, 2010, awarding sole custody to Shane.

Following the denial of her motion to alter, amend or vacate, Dena appealed to this Court as a matter of right.

Because we conclude that Shane's 2007 motion to modify custody was deficient, we cannot address the merits of the issues presented herein. Specifically, KRS 403.350 provides:

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.

Further, 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) [t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]

In *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999), the Kentucky Supreme Court held that when “[r]ead together, these two statutes² require that a motion to modify a prior custody decree must be accompanied by at least one affidavit; and if the motion is made earlier than two years after its date, it must be accompanied by at least two affidavits. If the applicable requirement is not met, the circuit court is without authority to entertain the motion.” (Internal citations omitted). *See also Copas v. Copas*, 699 S.W.2d 758 (Ky. App. 1985). Thus, if the provisions of KRS 403.340(2) are not satisfied, the family court lacks subject matter jurisdiction to consider a motion for the modification of custody. *Petrey*, 987 S.W.2d at 788. Such is true even if the error is not preserved for review, as in this case. Defects in

² At the time the *Petrey* decision was rendered, KRS 403.340(2) was numbered as KRS 403.340(1). The statute was amended in 2001 and renumbered accordingly.

subject matter jurisdiction cannot be waived and may be raised by the parties or courts at any time. *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001).

Shane's May 2007 motion for a modification of custody was filed within two years of the August 2005 decree and agreement establishing joint custody with Dena. Thus, KRS 403.320(2) required Shane's motion to be accompanied by two or more affidavits showing that "[t]he child's present environment may seriously endanger his physical, mental, moral, or emotional health[.]" Shane, however, only submitted his own affidavit in support of his motion. Absent compliance with the statutory mandates, we are compelled to conclude that the family court lacked jurisdiction to entertain the motion for modification.

However, our decision herein in no manner affects the family court's ruling on temporary custody as it clearly had jurisdiction over the emergency motion. Nevertheless, as the court's final custody determination was based upon the ongoing custody evaluation that was initiated by Shane's 2007 motion, its findings of fact, conclusions of law, and order must be vacated, leaving in place the temporary order awarding Shane sole custody of Alek. We would note that our decision to vacate the family court's order in no manner is a reflection on the merits of this case as a review of the record and evidence herein certainly appears to support the family court's findings of fact and conclusions of law. Nevertheless, because Shane's motion was deficient, the family court was without jurisdiction to entertain such and all rulings issued in conjunction therewith are necessarily void.

The Madison Family Court's final custody order entered on May 14, 2010, is vacated and this matter is remanded for further proceedings consistent with this opinion.

CAPERTON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, CONCURRING: In 1999, the Supreme Court of Kentucky unanimously held, in dictum, that the statutory requirement of two affidavits where custody change is sought within two years of the decree is jurisdictional. "Thus, the circuit court does not acquire subject matter jurisdiction over a motion to modify a prior custody decree unless the motion is accompanied by the requisite affidavit or affidavits." *Petry v. Cain*, 987 S.W.2d 786 (Ky. 1999). In my view, that determination was erroneous. Nevertheless, as the foregoing appears to be controlling authority, I am compelled to concur with the Court's opinion herein.

This case illustrates the mischief of labeling statutory requirements as jurisdictional. Once that label is attached to a statute or rule of court, defects in the proceedings which would be otherwise subject to waiver become non-waivable and often result in a serious waste of judicial resources and inconvenience to the parties. In this case, the motion for custody change was brought within two years of the original decree. Without objection or a motion to dismiss, the case proceeded to trial. Many witnesses were heard, and the deposition testimony of

more than twenty witnesses was considered. The trial court rendered extensive findings of fact, conclusions of law and decree. Now, for want of one additional affidavit at the commencement of the proceeding, all is for naught and the parties must start over. But for the “jurisdictional” label affixed to actions brought under KRS 403.340(1) arising from the dictum in *Petry v. Cain*, the defect in the pleadings herein would be subject to normal rules of preservation and waiver. The Supreme Court of Kentucky should take this case as an opportunity to correct this error that has crept into Kentucky law. As in any case, parties should be required to move for dismissal and assert their defenses in a timely manner without permitting a case to reach a final judgment and then cry foul. A parent responding to a custody change motion should not be allowed to sit back, do nothing, let the case be decided on the merits, and at the last minute allege that the filing papers were insufficient.

BRIEFS FOR APPELLANT:

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