RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

97-CA-0180-MR

KARLA SUE CHAFFINS — APPELLANT

V.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
ACTION NO. 95-CI-0368

MICHAEL JOHN CHAFFINS — APPELLEE

OPINION
REVERSING AND REMANDING

* * * * * *

BEFORE: ABRAMSON, GARDNER and COMBS, Judges.

COMBS, JUDGE: Karla Sue Chaffins (Karla) appeals from an order of Grayson Circuit Court awarding physical custody of her three minor children to the children's father, Michael John Chaffins (Michael). She alleges two errors: 1) that the trial court failed to conduct a *de novo* hearing on the issue of physical custody and 2) that the trial court improperly considered affidavits that had not been formally introduced into the record. Upon reviewing the record and the arguments of the parties, we reverse and remand.

The parties were married on June 1, 1985. Three children were born of the marriage: Brandon, on July 7, 1985; Aaron, on January 16, 1989; and Amanda, on February 20, 1991. On

December 14, 1995, Karla filed a Petition for Dissolution of Marriage in Grayson Circuit Court. On January 3, 1996, the trial court entered an agreed order granting Karla and Michael joint temporary custody of the children with Karla as the primary custodian. Following a hearing, the Domestic Relations Commissioner issued his report of March 22, 1996, recommending that the parties be granted joint custody, that appellant be primary custodian, and that the children not be removed from Kentucky without a re-examination of the primary custody issue. On June 21, 1996, the trial court issued a Decree of Dissolution, awarding the parties joint custody and designating Karla as the primary custodian.

On July 25, 1996, Karla filed a motion to modify custody to permit her to remove the children from Kentucky in order to move to Memphis, Tennessee. In his response, Michael moved for care, custody, and control of the children. A hearing was held on September 24, 1996, and on October 9, 1996, the Domestic Relations Commissioner issued a report finding that it was in the best interest of the children to remain in Grayson County and that, therefore, primary custody should be changed to Michael. Karla filed exceptions, but on December 20, 1996, the trial court issued its order awarding custody of the children to Michael. Karla filed a motion to vacate or amend, which the trial court overruled on January 21, 1997. This appeal followed.

Appellant first alleges that the trial court erred in ruling the hearing conducted by the Domestic Relations

Commissioner Hearing on September 24, 1996, to be a *de novo* hearing. In support of her contention, Karla cites that portion of the Commissioner's report which states: "the commissioner notes for the record that he has fully considered the prior hearing held in this action concerning custody in arriving at his decision and recommendation in this case." (Emphasis added). The September 24, 1996, proceeding was a hearing to modify joint custody. Karla is correct in arguing that an attempt to modify joint custody must be examined *de novo* pursuant to KRS 403.270(1). Newton v. Riley, Ky. App., 899 S.W.2d 509, 510 (1995). A modification of a joint custody award should be made anew as if there had been no prior custody determination. Erdman v. Clements, Ky. App., 780 S.W.2d 635, 638 (1989). "A hearing de novo means trying the dispute anew as if no decision had been previously rendered." Louisville and Jefferson County Planning and Zoning Commission v. Grady, Ky., 273 S.W.2d 563, 565 (1954), overruled on other grounds, American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964).

We agree with appellant. The very language of the Commissioner's report belies the notion that the hearing was *de novo*. If, as the Commissioner states, he "fully considered the prior hearing held in this action concerning custody," he failed to determine custody "anew as if there had been no prior custody determination." Erdman, supra. The prior hearing should not have been considered in the modification proceeding.

Appellant's second allegation of error is that the trial court improperly considered affidavits that were filed in the record but not introduced into evidence. In support of her position, appellant argues that the affidavits constituted inadmissible hearsay. KRE 801-803. Again, we agree. The hearsay rule forbids the use of an out-of-court assertion as evidence of the truth of the fact asserted. Davis v. Bennett's Adm'r, Ky., 132 S.W.2d 334, 338 (1939).

> [I]t is of little significance that the hearsay evidence was in the form of an affidavit. We are unaware of any rule of law whereby inadmissible hearsay is rendered admissible by virtue of the fact that it is sworn. At most a statement made under oath might be regarded as possessing a greater degree of trustworthiness, but such is not sufficient to overcome the general rule[.]" Barnes v. Commonwealth, Ky., 794 S.W.2d 165, 167 (1990).

We agree that admission of these affidavits constituted error under the hearsay rule where the affiants were available to testify and to undergo cross-examination in open court.

Although it is apparent from the record that both the DRC and the trial judge had sincere concern and some reservations about relocating the children outside of Leitchfield, the glaring irregularities correctly cited by the appellant as error require us to reverse the findings of the trial court and to remand this case for a *de novo* hearing. The statutory mandate is clear and unambiguous in requiring a hearing anew, without any taint, influence, or association of previous hearings. These children deserve no less than a full and fair consideration of their best interest that complies fully with the dictates of due process.

We therefore reverse and remand for findings and a determination consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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