

RENDERED: October 5, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002435-MR

RICHARD HARDY

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 97-CI-00208

RICHELLE HARDY LAYNE;
AND GEORGE HOWELL

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Richard Hardy has appealed from two orders of the Boyd Circuit Court entered on September 13, 2000, and October 9, 2000. Having concluded that the trial court did not abuse its discretion in refusing to modify custody and in awarding an attorney's fee against Hardy, we affirm.

Richard Hardy and Richelle Hardy Layne were married on May 5, 1988, and their marriage was dissolved by a decree of dissolution of marriage entered on September 12, 1997. One

child, Ian Kye Hardy, was born of this marriage. He was eight years of age on the date of dissolution. In an order and judgment entered on January 27, 1998, the trial court awarded the parties joint custody of their son with the mother having "primary physical custody." In an order entered on February 23, 1998, the trial court provided the father with additional findings of fact regarding custody, to wit:

With respect to the issue of custody and visitation, the Court found pursuant to KRS 403.270(4) that the best interest of the child called for an arrangement of joint custody. The Court feels that the Respondent must be involved in significant decisions regarding the child's upbringing. The circumstances surrounding the Petitioner's departure of her previous employer together with her financial irresponsibility dictate that she not be the sole decision maker on issues of significance concerning the child's upbringing. The regular hours of the Petitioner compared to the call out situation of the Respondent dictate that physical custody should be with the Petitioner.

On February 8, 2000, the father filed a motion to modify custody, whereby primary custody of the child would have been changed to the father. The father's motion stated that "for the third time, possibly the fourth, within a twenty-four month period the [mother] has again uprooted the minor child of this union from his residency." The father claimed the mother "has also remarried for the second time since the dissolution of the parties." The father stated that he "fears due to the mobile and transient lifestyle of the [mother] the minor child will suffer irreparable psychological harm." The father's motion continued

by generally stating, "[t]he history of this case is one of long-standing nature, wherein several significant events have occurred, all at the hands of the [mother] which has [sic] created a terribly disturbing, disruptive lifestyle for the minor child of this marriage." The father claimed that after his son was relocated for a second time that the child's teacher "approached" him and asked "if there was some problem with Kye, and upon further discussion, the teacher advised that every day that week Kye had complained with a headache, stomach ache, and said he needed to call his mother." The father alleged that the teacher "feared that this type of situation would interfere with Kye's scholastic abilities." The father also claimed the mother "has created difficulties in taking the child to and picking him up from sport activities, creating again a very unstable environment for this child." The father also attached to his motion a letter from the school principal, which showed that Kye had been absent for four days and tardy for 11 days.

A hearing on the motion to change custody was held before the Domestic Relations Commissioner on August 10, 2000. In addition to himself, the father called as witnesses the child's school principal, the child's fourth grade teacher,¹ two neighbors, and Bobby Jean Hardy, the child's stepmother at the time of the hearing. The Commissioner filed a report on September 1, 2000, which recommended a finding that the father

¹Kye was in the sixth grade at the time of the hearing.

"had failed to carry his burden of proof to justify a change of custody under KRS² 403.340", and that the "child is well off in the physical custody of the [mother]."³ The Commissioner also recommended that the father's motion be found to be "meritless in fact and law" and that he "be responsible for the [mother's] attorney's fees." The father filed objections to the Commissioner's report, which were denied by the trial court on September 13, 2000. Subsequently, counsel for the mother filed a motion and affidavit seeking an attorney's fee of \$2,350.00. The trial court entered an order on October 9, 2000, awarding an attorney's fee of \$2,350.00 to attorney George C. Howell. This appeal followed.

In his brief, the father set forth three arguments: (1) whether the trial court abused its discretion in denying a change of custody; (2) whether the trial court abused its discretion in

²Kentucky Revised Statutes.

³Nowhere in the pleadings, orders or briefs do the parties or the trial court make reference to Scheer v. Zeigler, Ky.App., 21 S.W.3d 807 (2000). Scheer was a significant en banc decision of this Court concerning modification of joint custody, which overruled Benassi v. Havens, Ky.App., 710 S.W.2d 867 (1986), and Mennemeyer v. Mennemeyer, Ky.App., 887 S.W.2d 555 (1994). Scheer was rendered by this Court on June 23, 2000, which was during the time the motion for change of custody in the case sub judice was being litigated. However, there is no reference to Scheer anywhere in the record. Regardless, since the father's motion was filed within less than two years from the date of the original custody decree, under KRS 403.340(1) he was required to show that "[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health." This requirement was the same both pre-Scheer and post-Scheer. See Briggs v. Clemons, Ky.App., 3 S.W.3d 760 (1999), and Scheer, supra at 809-814.

awarding an attorney's fee against the father; and (3) whether the trial court erred by adopting findings which had been prepared by the mother's attorney. For the father to prevail in this appeal, he must demonstrate that the trial court's findings of fact were clearly erroneous or that the trial court abused its discretion. Under CR⁴ 52.01, the trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The findings can be held to be clearly erroneous only if they were not supported by substantial evidence.⁵ Substantial evidence has been defined as evidence sufficient to induce conviction in the mind of a reasonable person.⁶ An abuse of discretion has been defined as "arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision."⁷

The findings adopted by the trial court were that the father failed to meet his burden of demonstrating how "the child's present environment may endanger seriously his physical, mental, moral or emotional health[,] and that "[t]his child is well off in the physical custody of the [mother]." While the father may be very concerned that the mother moved three to four

⁴Kentucky Rules of Civil Procedure.

⁵Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982).

⁶Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972).

⁷Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

times in two years and that she had married twice during this time, there is substantial evidence in the record to support the trial court's findings. Accordingly, we must affirm.

While the father also takes great exception to the trial court finding his motion for change of custody "meritless in fact and law[,] " there is substantial evidence to support such a finding; and we cannot conclude that the trial court abused its discretion in awarding an attorney's fee of \$2,350.00. Trial courts are given wide discretion in awarding attorney's fees in domestic relations cases, and we find no abuse of discretion.⁸

Finally, the father objects to the Commissioner, and ultimately, the trial court adopting the findings prepared by the mother's attorney. While this approach has been criticized by the courts,⁹ we do not believe that it rises to an abuse of discretion in this case.

For the foregoing reasons, the orders of the Boyd Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Hughes
Ashland, KY

BRIEF FOR APPELLEES:

George C. Howell
Ashland, KY

⁸Underwood v. Underwood, Ky.App., 836 S.W.2d 439, 444 (1992).

⁹Bingham v. Bingham, Ky., 628 S.W.2d 628 (1982).