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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001589-MR

BRENDA HUDSON MAGGARD — APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT,
FAMILY COURT DIVISION
HONORABLE GENE CLARK, JUDGE
ACTION NO. 93-CI-00087

JAMES MAGGARD, JR. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Brenda Hudson Maggard appeals from an order of the Leslie Circuit Court, Family Division, which granted her ex-husband's motion to modify custody of their oldest child, Brittany. Because we believe that the evidence was insufficient to warrant modification of custody, we reverse and remand.

Brenda and her ex-husband, James Maggard, Jr., were married in 1990 and were divorced by a decree of the Leslie Circuit Court on April 14, 1994. Brenda was awarded sole

custody of the two minor children, Brittany, who was born on May 24, 1989, and Brianna, who was born on September 24, 1990.

The children resided with Brenda and James in Leslie County until Brenda and James separated in April 1992. For the eight years following the divorce in 1994 until this litigation commenced, Brenda and the children lived outside of Leslie County. During the three years immediately preceding this litigation in 2002, Brenda and the children resided in Jefferson County.

In the spring of 2002, during one of James's visitation periods with Brittany, James's father, James Maggard, Sr., obtained an emergency custody order for Brittany from the Leslie District Court. James Jr. then filed a motion for change of custody in the Leslie Circuit Court on May 15, 2002. He also filed an affidavit in support of his motion, wherein he alleged "[t]hat the respondent [Brenda] is presently living with a male which has physically abused the child." The motion and affidavit were served on Brenda by mail, and the hearing was noticed to be heard on June 20, 2002.

When Brenda and James appeared before the court for the hearing, James was accompanied by an attorney to represent him. However, while Brenda stated that she was represented by an attorney, she also stated that her attorney was unable to come from Louisville to the hearing. No attorney had entered an

appearance of record on Brenda's behalf, and Brenda stated to the court that she did not want the hearing postponed but wanted James's motion to be heard that day.

During the hearing on the motion, the court heard testimony from Brenda, James Jr., James Sr., and Arthur Rogers. Rogers stated that he lived with Brenda and her daughters and had helped raise them during the eight years since Brenda's divorce. Before hearing testimony, the court found that the affidavit in support of the motion was sufficient to warrant a custody modification hearing. After hearing testimony from the witnesses, the court orally granted James's motion for modification of custody and granted him custody of Brittany with visitation for Brenda. A brief written order, which did not contain any findings or conclusions setting forth the reasons for custody modification, was entered a few days later. This appeal by Brenda followed.

Brenda raises several arguments, and we will address them in a different order from which Brenda has presented them in her brief. First, Brenda argues that the trial court erred in refusing to dismiss the motion or transfer it to Jefferson County, the county where Brittany had lived in the three years prior to the entry of the emergency custody order by the Leslie District Court. Although Brenda's argument of improper venue

may have had merit, she is deemed to have waived it by not properly raising the issue as required in CR[1] 12.08(1).

Second, Brenda argues that the trial court erred in entertaining a hearing on the issue of custody modification even though the affidavit to support the motion was not sufficient to warrant a hearing. KRS[2] 403.350 requires a party seeking custody modification to submit a supporting affidavit together with the motion. The statute further states that "[t]he court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits." See also West v. West, Ky. App., 664 S.W.2d 948, 949 (1984).

As we have noted, the affidavit supporting James's motion stated that Brenda was living with a male who had physically abused Brittany. The court in the West case stated that "the movant must present facts in his affidavit that compel the court's attention." Id. We conclude that the affidavit supporting James's motion compelled the court's attention and was adequate cause for the court to grant a hearing.

The remainder of Brenda's arguments addresses matters that cause us to reverse the court's order. Citing KRS 403.340 and Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485 (1990), Brenda argues that the trial court made insufficient and

[1] Kentucky Rules of Civil Procedure.

[2] Kentucky Revised Statutes.

erroneous findings to support its ruling. KRS 403.340(3) states in pertinent part that "the court shall not modify a prior custody decree unless after hearing it finds . . . that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child." The statute then sets forth factors for the court to consider in making these determinations. The most relevant factor in this case is "[w]hether the child's present environment endangers seriously his physical, mental, moral, or emotional health." KRS 403.340(3)(d).[3] Furthermore, in determining whether the child's present environment endangers his or her physical, mental, moral, or emotional health, KRS 403.340(4) states that the court shall consider "all relevant factors." These factors include the interaction of the child with his or her parents or any other person who may significantly affect the child's best interests and the repeated or substantial failure of either parent to pay child support. KRS 403.340(4)(a) and (c).

As we have noted, the written order of the court made no findings and conclusions concerning any of these matters. Therefore, our review is limited to the findings and conclusions

[3] James states in his brief that this factor is the factor that is applicable in this case. We will accept that for purposes of addressing his argument. However, James addresses this factor in the context of KRS 403.340 before it was amended in 2001.

stated orally by the court at the conclusion of the hearing. It is not clear to us exactly why the trial court changed the custody of Brittany from Brenda to James. After noting that Brittany had stated that she desired to live with her father, the court went on to note that her grades had improved and that she appeared to be happy and well-adjusted in her new environment. The court further noted that the Leslie District Court granted a temporary change of custody based on concerns about the interaction between Brittany and Arthur Rogers. In that regard, the court stated as follows:

> He doesn't seem like a dangerous fellow to me. He seems quite well intentioned. I do have a problem, however with the idea that mother's boyfriend, even one of such a long standing and apparent stable nature, administers any type of discipline or attention getting to the children. I asked a question of Mr. Rogers by what right do you administer any discipline and he candidly answered, none. He doesn't have a right.

Finally, after expressing its concern with splitting up Brittany and Brianna, the court found that it would be in the best interest of Brittany for the modification motion to be granted.

Concerning whether Brittany's environment with Brenda seriously endangered her physical, mental, moral, or emotional health, there was little testimony. James stated that he instituted these proceedings to get custody of Brittany because she wanted to live with him and "her [Brenda's] boyfriend was

smacking her [Brittany] around a little bit."[4] Arthur Rogers testified that he had a good and loving relationship with Brittany but that he occasionally tapped Brittany and Brianna on the back of the head to get their attention when they were misbehaving. He testified that he had never administered corporal punishment to Brittany at any time and had never physically disciplined either of the children other than to tap them on the back of the head to get their attention. He also testified that he put the children in "timeout" when they misbehaved. Rogers stated unequivocally that he had never spanked Brittany in the eight years that he had lived with Brenda and the children.

Brenda, a registered nurse, testified that she had witnessed the girls being tapped on the back of the head by Rogers but that "it was in no shape, form or fashion, abuse. I would not allow it. She's my daughter." Brittany was interviewed in chambers by the court, but the court did not cause a record of the interview to be made a part of the record as required by the statute. Therefore, it is not known if Brittany testified to any form of abuse.

There are problems with the order granting custody modification. First, the written order made no findings or

[4] This testimony was inadmissible hearsay testimony on the issue of abuse, but Brenda did not object to it.

conclusions. Second, regarding the oral ruling by the trial court, it did not make any finding that there was such a change in Brittany's circumstances as to warrant modification. KRS 403.340(3) requires such a finding before a modification may be made. Further, the court made no reference to whether Brittany's environment seriously endangered her physical, mental, moral, or emotional health. Additionally, the court made no finding concerning whether Brittany had been abused or otherwise mistreated by Rogers.[5]

There was also a problem with the court's in chambers interview with Brittany that alone would merit reversal. KRS 403.290(1) allows the court to "interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." The statute further provides that "[t]he court shall cause a record of the interview to be made and to be part of the record in the case." Id. That was not done in this case. Such has been held to be reversible error where the court relies, at least in part, on the interview. See Schwartz v. Schwartz, Ky., 382 S.W.2d 851, 853 (1964). Also, see Holt v. Chenault, Ky., 722 S.W.2d 897, 899 (1987). The court in the

[5] Rogers testified that James Jr. and James Sr. had said that they would see to it that Rogers, Brenda, and the children did not move to Florida. In other words, Rogers implied that the custody modification proceedings were an attempt by James to prevent Brenda and the children from moving away and that the allegations of abuse were fabricated.

case *sub judice* obviously relied, at least in part, on the interview.

Were the problems with the written and oral orders of the court and the problem with the in chambers interview with Brittany the only problems, we would simply vacate the order and remand the matter for additional review, findings, and conclusions by the trial court. However, separate and apart from the inadequate findings of the court, there was insufficient evidence to warrant custody modification. There was no evidence that the child's environment with Brenda seriously endangered her physical, mental, moral or emotional health.

The only evidence of anything remotely close to abuse was the testimony of Rogers that he tapped the girls on the back of the head when they misbehaved. Brenda testified that Rogers' actions did not constitute abuse, and no other witness provided any testimony that any abuse had ever occurred. Brittany was interviewed by the court in chambers, but no record was made of that portion of the proceeding, and the record is thus void of evidence from her. At any rate, the trial court apparently did not find any abuse because it did not mention abuse in its ruling. Furthermore, Brittany's sister, Brianna, a witness who might have been able to either substantiate or refute James's allegations, was not allowed to testify. In short, we believe

the evidence was insufficient to prove that a change had occurred in the circumstances of the child or the custodian. Had there been evidence of abuse, we likely would have been constrained to conclude otherwise.

"KRS 403.340 reflects a strong legislative policy to maximize the finality of custody decrees without jeopardizing the health and welfare of the child. The statute creates a presumption that the child's present custodian is entitled to continue as the child's custodian." Wilcher v. Wilcher, Ky. App., 566 S.W.2d 173, 175 (1978). Further, "[i]t is obvious the provision of [KRS 403.340(3)] intend to inhibit further litigation initiated simply because the noncustodial parent, or the child, or both, believe that a change in custody would be in the child's best interest." Quisenberry, 785 S.W.2d at 487.[6]

In this case it appears that the trial court changed custody based on the fact that the child was well adjusted in her new environment, had improved her grades in schools, and desired to be with her father. Although an argument can be made that it would have been in the child's best interest to move to the home of her father, the statutory requirement of a change in circumstances was not shown. "A prior custody decree may not be

[6] Wilcher and Quisenberry addressed KRS 403.340 prior to the amendment of the statute in 2001. The standards for custody modification are not as strict in the statute as amended.

modified absent a finding of changed circumstances that necessitate the modification." Holt, 722 S.W.2d at 899.

Finally, we can not leave this case without mentioning the apparent unfairness of the proceedings. Brenda made the decision to proceed with the custody hearing without the services of an attorney. Her decision was an unwise one, and the trial court cannot be faulted for telling Brenda at the beginning of the hearing that it would hold her to the same standards of proof and evidence as it would if she had an attorney. Nevertheless, we are disturbed that Brenda, a litigant from Jefferson County facing her Leslie County ex-husband, a Leslie County attorney, and a Leslie County judge in the Leslie Circuit Court, was required to follow the rules of procedure to the extent it appeared the court was more interested in Brenda following the rules than in the court getting to the truth of the matter before it. We will cite a few examples in the hope that other litigants will have a level playing field and will not face the hostility that Brenda endured.

First, at the outset of the hearing, when Brenda advised the court that she wanted to proceed without an attorney because she had spent a considerable amount of money by hiring a Jefferson County attorney to represent her, the court stated, "You should be spending your money locally. You might get a

better return." While this comment by itself might only raise an eyebrow, it set the stage for what was to follow.

Brenda attempted to call her eleven-year-old daughter, Brianna, as a witness. Undoubtedly, as a sibling of Brittany living in Brenda's home, Brianna would have relevant testimony concerning Brittany's relationship with Arthur Rogers and whether Brittany was being abused or otherwise mistreated. Nevertheless, because Brenda did not properly qualify Brianna as a witness, the court did not allow her to testify. We understand that Brenda was held to the standards of an attorney in her attempts to present evidence to the court. However, this case did not involve something of the nature of a traffic ticket, but it involved an attempt to take a child from the custody of her mother. We believe the court, in the interest of fairness and in the interest of getting to the truth, would have assisted Brenda by asking one or two questions to determine the child's competency and maturity to testify as a witness. After all, the issue of Brianna's competence and maturity were matters for the court to determine (see KRE[7] 601(b)). Further, the court had the authority to ask questions (see KRS 614(b)), as it did when it chose to cross-examine Rogers.[8]

[7] Kentucky Rules of Evidence.

[8] We will discuss this matter later in the opinion.

Brenda also attempted to introduce evidence that James had been convicted of nonsupport. As we have noted previously herein, KRS 403.340(4)(c) states that the "[r]epeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child" are relevant factors in a court's determination of whether a child's present environment may endanger his or her health. We understand that Brenda should have had a proper document to introduce concerning any conviction that James may have had for the offense of nonsupport, but it was apparent that the court was not going to consider the issue of child support as it related to the custody modification motion. See page 34, lines 5 and 6 of the transcript of the hearing.

We also note that the court interjected a question of its own during the testimony of Arthur Rogers. The court asked Rogers, "Do you think it's appropriate to cohabitate with a woman with whom you are not married in the presence of the two infant children?" It seems strange that the court would be interested in the living arrangement of Rogers but not the living arrangement of James. Furthermore, the basis of James's motion was abuse, not the fact that Brenda and Rogers lived together.

We are also concerned with numerous instances of apparent hostility by the court toward Brenda. For example, in response to a question by James's attorney concerning whether she was willing to put Brittany "through anything to fight with the Maggards," Brenda responded that she was not trying to put her child through anything but was like a lioness fighting for her lion cub. The court responded that "I don't need the Discovery Channel." At another point in the hearing, Brenda attempted to ask James a question and stated that she thought "the court needs to know how long a time that that child has been out of my care." The court then interrupted and stated, "Don't worry about what the Court needs to know. Just ask your questions." At another point in the hearing, Brenda handed James's attorney a document and attempted to tell him what it was. The court interjected that "you don't have to tell him; he can read real well." We question whether the court would have said this to an attorney who was identifying a document for a witness.

Several additional comments by the court deserve being mentioned. At one point the court inquired of Brenda concerning why "my questions only have a few words and your answers have so many?" At yet another point in the proceedings, Brenda explained to the court that she was attempting to introduce an affidavit into evidence because her attorney had advised her

that it would likely be accepted by the court. After denying Brenda's attempt to introduce the affidavit into evidence, the court commented on the advice Brenda had received from her attorney and stated "[y]ou tell him to come down here and explain that to the Judge." Later in the hearing when Brenda attempted to explain an answer, the court stated "I don't need editorializing." In short, the evidence to support custody modification was insufficient, and the hearing appeared to be unfair.

The order of the Leslie Circuit, Family Division, is reversed, and this case is remanded for the entry of an order denying James's motion for modification.

ALL CONCUR.

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