

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000214-MR

GARY WASHABAUGH

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JUDA MARIA HELLMANN, JUDGE
ACTION NO. 94-FD-001965

ROBIN CURTSINGER

APPELLEE

OPINION
AFFIRMING
** ** * * * **

BEFORE: KNOPF, TACKETT, AND VANMETER, JUDGES.

KNOPF, JUDGE: Gary Washabaugh appeals from an order of the Jefferson Family Court, entered December 21, 2001, denying his motion to enforce a child-custody order. Washabaugh contends that the trial court exceeded its jurisdiction. We disagree.

Following a marriage of about five years that produced two sons, Washabaugh and Robin Curtsinger separated in 1994 and were divorced in 1996. Curtsinger was designated sole custodian of the children. Apparently the boys began to have behavioral problems that led Curtsinger to seek Washabaugh's assistance.

By order entered February 12, 2001, the trial court re-designated the parties' joint custodians and provided that the boys' primary residence would be with Washabaugh.

Curtsinger had by that time moved to North Carolina. In June 2001, the boys visited her there and she refused to return them. Thereupon, Washabaugh alleged that Curtsinger had violated the custody order and moved for an order to enforce it. Curtsinger, in papers filed the next day, alleged that Washabaugh had abused the boys by disciplining them inappropriately and by failing to acknowledge that they had emotional conditions in need of treatment. She moved for an emergency order permitting the boys to remain with her and for another modification of the custody order. By order entered July 25, 2001, the court appointed a guardian ad litem for the children and ordered that they were to continue residing with Curtsinger pending resolution of the matter.

The motions eventually came before a court-appointed arbitrator. The guardian ad litem recommended that custody be returned to Curtsinger, because the guardian ad litem believed that the children were in need of the sort of counseling and medical therapies Curtsinger had sought for them but that Washabaugh opposed. Nevertheless, by order entered November 26, 2001, the arbitrator ruled that Curtsinger's motion to modify custody must be dismissed because it had not been accompanied by

the two affidavits statutorily required.¹ Apparently on the basis of this ruling, the arbitrator did not make findings with respect to the allegations of abuse, but ordered Curtsinger, pursuant to the custody order entered February 12, 2001, to return the children to Washabaugh by December 22, 2001, or face sanctions for contempt.

Immediately, Curtsinger filed a new motion to modify custody, this one accompanied by several affidavits substantiating her claim that the children were in need of treatment for emotional and behavioral problems. She also moved for reconsideration of the order requiring her to return the children to Washabaugh. The matter was again referred to the arbitrator, who by order entered December 21, 2001, ruled that Curtsinger's new motion for modification met the statutory prerequisites and therefore should be considered on the merits. Pending that consideration, the arbitrator reversed his prior order that the children be returned to Washabaugh and ordered instead that they continue to reside with Curtsinger. The children's interest in stability trumped, for the time being, the arbitrator believed, Washabaugh's interest as a custodian.

It is from this December 21, 2001, order that Washabaugh appealed. He contends that the trial court is without jurisdiction to modify the February 12, 2001, custody

¹ Petrey v. Cain, Ky., 987 S.W.2d 786 (1999).

order and that pursuant to that order he is entitled to the return of his sons. Upon Curtsinger's motion, this Court abated the appeal to permit resolution of the trial-court custody proceedings. Although neither party has seen fit to inform this Court how those proceedings were resolved, the abatement period has now ended and by the Court's motion Washabaugh's appeal has been returned to the active docket.

Washabaugh characterizes Curtsinger's November 2001 motion to modify custody as an attempt to rectify her June 2001 motion that the arbitrator had found defective. The rectification is untimely, he insists, and so does not cure the jurisdictional defect. We reject this characterization. KRS Chapter 403 does not prohibit successive motions for custody modification. The trial court is entrusted with discretion to summarily deny motions that do not satisfy the statutory standard of seriousness² and to deal appropriately with motions serving merely to harass the other party.

Curtsinger's November motion, therefore, was entitled to consideration apart from the June motion, and the trial court did not err by deeming the November motion sufficient on its face to invoke the court's jurisdiction. The motion was accompanied by at least two affidavits, the allegations of which provided reason to believe that the existing custody regime

² KRS 403.340.

seriously endangered the children's emotional health. The trial court did not act outside its jurisdiction when it undertook to hear the merits of Curtsinger's November motion to modify custody. Accordingly, we affirm the December 21, 2001, order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellee.

J. Russell LLOYD
Mobley & LLOYD
Louisville, Kentucky