RENDERED: December 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001047-MR

STACY LEE RATLIFF
F/K/A VANHOOSE — APPELLANT

v.

APPEAL FROM JOHNSON FAMILY COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 00-CI-00422

CHRISTOPHER SCOTT VANHOOSE — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

KNOPF, JUDGE: Stacy Ratliff (formerly Vanhoose) and Chris Vanhoose were divorced by decree of the Johnson Circuit Court entered August 20, 2001. The decree provides for joint custody

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of the couple's two children and designates Ratliff as the residential caretaker. In early February 2004, Ratliff was arrested on DUI; theft-by-deception; and trafficking-in-a-controlled-substance charges.[2] On February 9, 2004, in the Johnson Family Court, Vanhoose moved for temporary custody of the children and obtained an *ex parte* order giving him immediate custody pending a hearing on his motion. The family court conducted the evidentiary hearing on March 19, 2004. Although his motion sought temporary custody, Vanhoose testified at the hearing that he wanted sole permanent custody. He presented evidence tending to show that he would be a fit custodian. By summary order entered March 30, 2004, the family court modified the custody decree by awarding sole custody to Vanhoose and limited visitation to Ratliff. It is from that order that Ratliff has appealed. She contends that the family court lacked jurisdiction to modify the permanent custody decree because Ratliff's motion put only temporary custody at issue. Although we do not characterize the family court's error as jurisdictional, we agree with Ratliff that the judgment is palpably flawed and must be reversed.

As Ratliff notes, KRS 403.280, 403.340, and 403.350 require that motions for temporary custody or to modify a custody decree more than two years old be accompanied by at

[2] Soon after the arrest, the trafficking charge was dismissed.

least one affidavit "setting forth facts supporting the requested order or modification."[3] Our Supreme Court has held that a motion unaccompanied by the requisite affidavit does not invoke the trial court's subject matter jurisdiction.[4] Even if the motion is properly before the court, if the affidavit(s) fails to allege facts which, if true, would justify relief, the court should deny the motion summarily. Only a properly and adequately supported motion requires a hearing.[5]

KRS 403.280 provides that the trial court may award temporary custody if it determines that the award is in the best interest of the child. KRS 403.340, however, provides that an existing permanent custody decree shall not be modified unless the movant establishes that either the child's or the custodian's circumstances have changed, and that the modification would be in the child's best interest. In determining the child's best interest, the court is required to consider

> (a) Whether the custodian agrees to the modification;
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

[3] KRS 403.350.

[4] Petrey v. Cain, Ky., 987 S.W.2d 786 (1999).

[5] KRS 403.350; Petrey v. Cain, *supra.*

> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.

Vanhoose's motion for temporary custody was accompanied by the affidavit required to invoke the family court's subject matter jurisdiction. The affidavit alleged facts, Ratliff's arrest, suggesting that an award of temporary custody may be in the best interest of the children. Thus the court properly ordered a hearing on the temporary custody motion. The mere charges against Ratliff, however, by themselves, did not permit an inference that Ratliff's circumstances had significantly changed. Had Vanhoose's motion sought a modification of the custody decree, therefore, it should have been summarily denied.

The evidentiary hearing did not change that result. While it is true that our rules allow for the liberal amendment of pleadings to conform to the issues actually litigated, an amendment should not be allowed if it unfairly prejudices the opposing party.[6] Vanhoose was permitted, in effect, to amend his pleading at the hearing to seek permanent rather than temporary

[6] CR 15.02; Kroger Company v. Jones, Ky., 125 S.W.3d 241 (2004).

custody. Ratliff did not consent to the change. Although she argued against the amended motion on its merits, she did so only after objecting to the introduction of issues that had not been pled. The lack of notice, furthermore, denied Ratliff a fair opportunity to martial her case. The amendment was unfairly prejudicial and should not have been allowed.

Even on its merits, moreover, Vanhoose's motion to modify the custody decree should have been denied. As noted above, the affidavit accompanying the motion did not allege grounds justifying such a modification. Vanhoose's evidence at the hearing likewise tended to show only that he was capable of caring for the children. He made no showing of a permanent change of circumstance. Nor did he introduce any evidence tending to show that the current custody arrangement seriously endangered the children. Although such evidence is no longer necessary to justify a change of custody, it remains an important consideration the family court is required to consider. Because Vanhoose failed to meet the heightened standard KRS 403.340 imposes for the modification of a custody decree, he was not entitled to that relief.

Finally, KRS 403.340 requires the court modifying a custody decree to enter findings supportive of the change. The family court's summary order included no findings. This error,

at least in conjunction with the court's apparent misapplication of the controlling standards, also merits reversal.[7]

In sum, although Vanhoose may have been entitled to an award of temporary custody while the charges against Ratliff were resolved, he did not properly raise the issue of custody modification, and did not make the heightened showing required to justify a permanent modification of the former couple's custody decree. Accordingly, we reverse the March 30, 2004, order of the Johnson Family Court and remand for reinstatement of the original joint custody decree.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Lance A. Daniels Paintsville, Kentucky	Wesley W. Duke Paintsville, Kentucky

[7] McFarland v. McFarland, Ky. App., 804 S.W.2d 17 (1991).