

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002307-ME

HELEN LIBANAN GUFFEY

APPELLANT

v. APPEAL FROM BARREN CIRCUIT COURT
HONORABLE W. MITCHELL NANCE, JUDGE
ACTION NO. 00-CI-00448

JERRY DALE GUFFEY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

SCHRODER, JUDGE: This is an appeal from an order changing primary residential custodian of the minor child from appellant to appellee, and terminating appellee's maintenance obligation. Upon review of the record and hearing in this case, we reverse both as to the modification of custody and as to the termination

¹ Senior Judge Joseph R. Huddleston 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 maintenance. The matter is remanded for any necessary proceedings consistent with this opinion.

The parties, Helen Guffey and Jerry Guffey, were married in 1996 in Hong Kong and divorced by decree of dissolution entered on February 27, 2001. One child was born of the marriage, James Guffey, born October 14, 1996. Another child, Nicole Guffey, who was born before the parties' marriage and who was not James' biological child, lived with the parties during the marriage. The separation agreement, which was incorporated by reference into the decree, provided that the parties would have joint custody of James and that Helen would be the primary residential custodian of the child. Helen was to continue to be the sole custodian of Nicole. Jerry was given reasonable visitation with James and Nicole.

At the time of the divorce, Jerry was 35 years of age and Helen was 28. Jerry is employed as an airline pilot, earning approximately \$48,000 a year in 2003. Helen, who is from the Philippines and not an American citizen, apparently did not work outside the home during the marriage. Per the separation agreement, Jerry was to pay Helen \$1,000 a month, of which \$580 was designated as child support for James, and \$420 was designated as maintenance.

After the divorce, Jerry moved to Clarksburg, West Virginia to be near his base, Pittsburgh. He would normally

exercise his visitation with the children at his parents' home in Glasgow, Kentucky every other week. During that time, Helen and the children were living in the marital residence in Glasgow. In October 2002, Helen moved with the two children to Lebanon, Tennessee without telling Jerry. The evidence established that Lebanon was about an hour's drive from Glasgow. At the hearing in this case, Jerry testified that he had to find out where they had moved on his own and did not learn that they had moved to Lebanon, Tennessee until two weeks later. After the move, Helen did, however, continue to bring the children to Glasgow for visitation every other week per the informal visitation schedule the parties had established.

On March 3, 2003, Jerry filed a motion requesting that his maintenance obligation be suspended. Jerry thereafter amended the motion, requesting modification of custody as to James and Nicole. Specifically, Jerry sought to be named the primary residential custodian of both children. The court held a full evidentiary hearing on the maintenance and custody issues on September 18, 2003. On September 23, 2003, the court entered its findings of fact, conclusions of law and order in which it terminated maintenance to Helen and named Jerry primary residential custodian of James and Nicole. The basis for the custody award as to Nicole was a finding that Jerry was a *de facto* custodian of Nicole pursuant to KRS 402.270(1). Upon

Helen's motion to amend, alter or vacate, the court entered an amended order on October 24, 2003, retaining Helen as the sole custodian of Nicole. The court found that Jerry did not sustain his burden of proof that he was the primary caregiver of Nicole under KRS 403.270(1)(a). The court's rulings as to termination of maintenance and primary residential custody of James were unchanged. Helen now appeals those rulings.

Modification of Custody Hearing

Helen first argues that the trial court erred in setting a modification of custody hearing pursuant to KRS 403.350. Helen maintains that Jerry did not present sufficient facts to warrant a custody modification hearing in this case. KRS 403.350 provides that "a party seeking a . . . modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification." Under KRS 403.340(3), a prior custody decree cannot be modified unless the court 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." In determining if a change has occurred necessitating modification for the best interests of the child, the court is to consider the following:

- (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;
- (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.

KRS 403.340(3).

Pursuant to KRS 403.340(4), "In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:"

- (a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;
- (b) The mental and physical health of all individuals involved;
- (c) Repeated 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, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis of which parent is more likely to allow visitation or pay child support;
- (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child

and the child's relationship to both parents.

The affidavit submitted by Jerry in support of his motion to modify provided in pertinent part:

2. In October, 2002, Respondent (hereafter Helen) moved to Tennessee and failed to notify him of her intention to move. At that time, the children were uprooted from their 3 bedroom, 2-bath house in Barren County and from the school they were attending and had attended and were moved to a town where they had no friends or family.

3. Since that time, he has noted a marked change in Nicole; she is quiet and withdrawn and no longer the vivacious out-going child she once was.

4. Helen has been allowing her boy-friend to stay all night while the children are present and Jerry believes that this sudden change and insertion of a new adult male in their lives has been damaging to the children and it is not in their best interest that they remain with Helen.

An affidavit of Jerry's sister, Sue Jester, was also submitted. This affidavit stated in pertinent part:

2. She is familiar with Helen Guffey and has observed her in the company of her boy-friend whose name affiant does not know; affiant has also seen the vehicle which Mrs. Guffey's boyfriend drives.

3. During the night on February 20, 2003, she saw the vehicle at the residence of Mrs. Guffey in Lebanon, Tennessee; the children were there that night.

Whether a party has alleged sufficient facts to warrant a hearing on modification of custody is a matter within the discretion of the trial court. See West v. West, 664 S.W.2d 948 (Ky.App. 1984). A court's decision to hold a modification hearing will be upheld so long as the affidavits submitted contain facts which establish adequate cause for such a hearing. Gladish v. Gladish, 741 S.W.2d 658 (Ky.App. 1987). "Given the trial court's reluctance to change custody, the movant must present facts in his affidavit that compel the court's attention." West, 664 S.W.2d at 949. From our review of the above affidavits, we believe they contained facts which brought James' well-being into question as a result of two changes in his life - the sudden move to Tennessee and Helen's new boyfriend. Accordingly, the court acted within its discretion in holding the hearing to further inquire into whether a modification of custody was necessary to serve the best interests of the child.

Modification of Custody

Helen's next argument is that the trial court erred in modifying custody and designating Jerry as the primary residential custodian. A court's findings of fact made pursuant to a custody decision will not be overturned unless they are clearly erroneous. CR 52.01; Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). Findings of fact are clearly erroneous if they are

manifestly against the weight of the evidence. Wells v. Wells, 412 S.W.2d 568 (Ky. 1967). The trial court's ultimate decision as to custody will not be disturbed absent an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423 (Ky. 1982). A court will be deemed to have abused its discretion if its decision is unreasonable or unfair. Kuprion v. Fitzgerald, 888 S.W.2d 679 (Ky. 1994). The party seeking modification of custody under KRS 403.340 must bear the burden of proof. Wilcher v. Wilcher, 566 S.W.2d 173 (Ky.App. 1978).

Helen, who was 31 years old at the time of the hearing, represented herself at the modification hearing. In her testimony, she admitted that she did not tell Jerry that she and the children had moved to Tennessee. Helen maintained that she never told him because he and his family were harassing her and she wanted to get away from them. Helen testified that she chose to move to Lebanon, Tennessee because she had many Philippine friends there. Helen stated that before moving there, she and the children had visited friends in Lebanon on multiple occasions.

When Helen and the children first moved to Tennessee Helen did not have a job. Shortly thereafter, she got a job as a waitress at a Mexican restaurant. Helen admitted that on a couple of occasions when her children were not in school, she would take them to the Mexican restaurant when she worked

because she did not have childcare. She testified, however, that she now has an older woman friend who watches the children when she must be gone. After the Mexican restaurant closed, she worked other jobs - selling Mary Kay cosmetics, as a receptionist, and occasionally cleaning houses. Helen testified that at the time of the hearing, she was not working because she was a full-time student at Cumberland College in Tennessee. She stated that with going to school and taking care of the children, she had no time to work outside the home.

Helen testified that she has a friend and mentor in Lebanon named Dr. Larry Menifee, who is a professor at Cumberland College. According to Helen, Dr. Menifee is married and has several children and grandchildren. She testified that three or four times a week, he would come to her apartment after the children were in bed. She stated that he was tutoring her to help her pass her GED so she could get into college. She said that the tutoring was necessary because of her difficulties with the language. Helen testified that her children call Dr. Menifee "grandfather" and that he once went to Grandparents Day at the children's school when Jerry's parents could not come. Helen admitted that Dr. Menifee often brought groceries for her when he came to her apartment and that she had on occasion borrowed money from him. She insisted, however, that she had paid him back.

Peter Cash, a private detective hired by Jerry, testified at the hearing that he observed Dr. Menifee on March 3, 2003, leave Cumberland College, go to Kroger, and then proceed to Helen's apartment at around 8:30 p.m. Cash stated that Helen was not there when Dr. Menifee arrived and that Dr. Menifee apparently let himself in with his own key. Cash testified that at around 9:56 p.m., Helen and both children arrived at the apartment. According to Cash, he observed the lights go out in the apartment at 11:20 p.m., and the lights were still out at 12:15 a.m. when Cash left and ended his surveillance for the evening. Cash testified that he conducted surveillance of Helen's apartment two other evenings that same week and observed Dr. Menifee arrive after 9:00 p.m. and the lights go out at 11:30 p.m. When Cash ended his surveillance on those evenings between 12:15 a.m. and 1:30 a.m., Dr. Menifee was still at the apartment.

Jerry's sister, Sue Jester, testified that she had gone to Tennessee twice to see what cars were at Helen's apartment. She stated that she had observed Helen's boyfriend's car during the day on one date and in the evening on another date.

Jerry also called as a witness Donnie Owen, the principal at Eastern Elementary School, the school the children attended in Kentucky before moving to Tennessee. Owen testified

that both children were well-behaved and model students. Owen noted that there were a couple of instances of transportation problems with the children getting home from school. Owen stated that the interaction he observed between the children and Jerry was positive. He also testified that Helen's involvement with the children at school was supportive, concerned, and positive.

As to how the children were doing in school since moving to Tennessee, Helen offered to submit some of the children's schoolwork and awards from their new school. On that point, Jerry's counsel agreed to stipulate that the children were likewise doing well in school in Tennessee.

Jerry testified that he is a pilot for U.S. Airway Express. There was no evidence regarding his work schedule. However, Jerry did testify that if he got primary residential custody of the children, he intended to take advantage of the Family Medical Leave Act for some time off to be home with the children. Relative to care for the children once he went back to work, Jerry stated that he intended to contact the nanny the parties had in Hong Kong or he might hire an au pair. Jerry testified that he owns a large eight-bedroom five-bathroom home in West Virginia and that Helen could stay there for visitation of the children if he had primary residential custody. Jerry

also testified that he has access to free flights for the children and Helen that could be used for visitation.

Jerry testified that since the children moved to Tennessee, he has noticed changes in the children. However, Jerry did not specify any changes in the behavior of James. The only specific change he noted regarding Nicole was that she was different to him when Helen was around. Helen's explanation for any change in Nicole's behavior toward Jerry was the fact that Jerry had decided to tell Nicole that she was not his biological child for the sole purpose of punishing Helen. Jerry denied telling Nicole he was not her father to punish Helen. He stated that he merely tried to comfort Nicole when she learned he was not her biological father.

There was evidence presented of an instance of domestic violence between the parties when Helen came to Jerry's parents' home one evening to kiss the children goodnight when Jerry was exercising his visitation there. Helen alleged that when she tried to enter the home, Jerry picked her up and threw her down, bruising her side. Jerry claimed that he had heard from someone that she was doing drugs that night and did not want her near the children, so he merely blocked her entry into the house. Relative to this incident, there is an agreed order in the record from the Barren County District Court regarding a fourth-degree assault charge against Jerry. In this order,

Jerry and Helen agree that the charge against Jerry will be dismissed if: Jerry does not have any contact or communication with Helen except as specifically directed by Circuit Court orders; Jerry does not engage in any other conduct to threaten, harass, or harm Helen; and Jerry has no more violations of the penal code. Helen testified at the hearing that she does not drink alcohol or do drugs.

In the trial court's final written order, the court summarizes the testimony of the various witnesses and then makes the following general finding, "After considering the factors enumerated in KRS 403.270(2), pursuant to KRS 403.340(3), the Court finds that based upon events that have occurred since the Decree, a change has occurred in the circumstances of the children and modification is necessary to serve the best interests of the children." In this order, the court did not specify what change in the circumstances of the children warranted modification. However, on the record at the conclusion of the hearing on the matter, the court made the verbal finding that Helen's relationship with Dr. Meniffee was an endangerment to the children. The court also made much of the fact that Helen had taken the children with her to work at the Mexican restaurant.

Pursuant to KRS 403.340(3)(d), "[w]hether the child's present environment endangers seriously his physical, mental,

moral, or emotional health" is indeed a proper factor the court is to consider in determining whether a change has occurred in the child's life and whether a modification in custody is necessary. The question before us is whether the trial court's finding that Helen's relationship with Dr. Menifee was an endangerment to the children was clearly erroneous. As there was no evidence that Dr. Menifee was abusive to or neglectful of the children or exhibited any negative conduct around the children, we must assume that the court determined that Helen's relationship with Dr. Menifee was per se an endangerment to the children.

KRS 403.270(3) provides that "[t]he court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." In Powell v. Powell, 665 S.W.2d 312 (Ky. 1984), the Court stated as follows regarding the lower court's consideration of the custodial parent's misconduct:

As stated in *Krug v. Krug*, Ky., 647 S.W.2d 790 (1983), the standard to be used in consideration of misconduct on the part of the custodian is not whether it has affected the child but whether it is likely to adversely affect the child. "If such a determination is made, the trial court may then consider the potential adverse effect of such misconduct as it relates to the best interests of the child." *Krug, Id.*, at 793.

Powell, 665 S.W.2d at 313. In Powell, wherein the Court adjudged that the lower court properly found that the mother

engaged in sexual misconduct likely to adversely affect the child, the mother had sexual relations twice with the child in the house with men other than the man she was married to at the time. The lower court in Powell, however, considered other evidence than the sexual misconduct in modifying custody. There was also evidence that the child was dirty, poorly clothed, and hungry, and that the house in which he lived did not have heat at certain times.

In Krug v. Krug, 647 S.W.2d 790 (Ky. 1983), it was adjudged that the lower court properly awarded custody to the father based, in part, on the mother's sexual misconduct. In that case, the mother had admitted to three affairs, one with a man who was an alcoholic and was ultimately imprisoned for forgery. In addition, there was evidence that she had used drugs with this man.

In the present case, the evidence established that Dr. Menifee usually came to Helen's apartment later in the evening when the children were in bed. There was no evidence regarding when Dr. Menifee left the apartment, only that he was still there at around 1:00 a.m. and the lights were out. Other than the fact that Dr. Menifee came to the apartment in the evening and the lights subsequently went out, there was no evidence relative to a sexual relationship between Helen and Dr. Menifee. The trial court never made a finding of fact regarding the

existence of any sexual relationship. The only evidence regarding Dr. Menifee's relationship with the children was that they called him "grandfather" and that he came to their school on Grandparent's Day. In our view, the above did not constitute substantial evidence that Helen's relationship with Dr. Menifee adversely affected or was likely to adversely affect the children. Hence, the court's finding that the relationship was an endangerment to the children was clearly erroneous.

Given our ruling above, we must now look at the other evidence in the case in light of the factors in KRS 403.340(3) and KRS 403.270(2) to determine whether the court abused its discretion in modifying custody and naming Jerry primary residential custodian of James.

KRS 403.270(2)(c) - The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's interest

It is undisputed that Helen had been the primary caregiver for both children during the marriage and after the divorce, and that both children are very attached to her. There was also evidence that Nicole and James enjoyed a close sibling relationship and that, up until the court's modification of custody, the two children had always lived together. As to the children's relationship with the parents, the lower court found,

"The children have a good relationship with Jerry and both parties are loving parents." The evidence also established that the children had close family ties and friends in Glasgow and that the children had made new friends since moving to Tennessee. In particular, Jerry's parents, who sometimes babysat the children and to whom the children are very close, live in Glasgow, which is much closer to Lebanon, Tennessee (65 miles away) than to Clarksburg, West Virginia (433 miles away). There was evidence that the children maintained their relationships with family and school friends in Glasgow even after moving to Tennessee. Other than his father, there was no evidence that James had any family or friends in West Virginia.

KRS 403.270(d) - The child's adjustment to his home, school, and community

There was evidence that the children were doing well in their school in Tennessee and had made friends there. Additionally, there was evidence that there was a sizeable Philippine population in Lebanon and that Helen and the children had made friends within this community.

KRS 403.270(f) - Information, records, and evidence of domestic violence as defined in KRS 403.720

As noted earlier, there was an agreed order in the record regarding an incident of domestic violence perpetrated on Helen by Jerry.

KRS 403.340(3)(d) - Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health

Besides Helen's relationship with Dr. Menifee, the court also looked at the fact that Helen had taken the children with her to work at the Mexican restaurant in determining that their present environment was an endangerment to the children. However, the evidence established that: Helen no longer works at the restaurant; those were isolated occasions when the children were not in school; she brought videos for the children to watch in an apartment above the restaurant; and she now has adequate childcare for the children when she cannot be home.

KRS 403.340(3)(e) - Whether the harm likely to be caused by a change in environment is outweighed by its advantages to him

As a result of the court's custody order in this case, James has been forced to move nearly 500 miles away to West Virginia, where he has no friends or family besides his father. Significant to this Court is also the fact that according to Jerry's testimony, after he has utilized his time under the

Family Medical Leave Act, James will be looked after by a nanny or an au pair when Jerry is away from home working as a pilot. It was further acknowledged by the lower court in this case that this ruling will likely result in the child traveling frequently by air for visitation, whereas, when Helen was primary residential custodian, Jerry was the one who flew for visitation in Glasgow.

The lower court also apparently considered the parties' contrasting housing circumstances in its order, finding that, "[u]pon her move to Tennessee, Helen left a three-bedroom brick house in a nice area for a three-bedroom apartment." The court then noted that Jerry's house in West Virginia has eight bedrooms and five baths and in the past, had been used as a bed and breakfast. Helen testified that the apartment complex in Tennessee was nice, in a fine area and that a state trooper lived in the same complex. Helen offered as proof numerous photographs of the apartment which show it to be roomy, clean, and attractive.

Whether the court abused its discretion in modifying custody given all of the relevant factors

In reviewing the record, we believe the trial court abused its discretion in changing primary residential custody from Helen to Jerry. The court changed primary residential

custody from the parent who had been the child's primary caregiver since birth (and away from his only sibling) to the parent who travels for a living and lives 500 miles away, where the child has no other family or friends and will frequently be cared for by a nanny. In our view, such a drastic change in custody was not justified and was thus unreasonable under the facts. The court based its decision on a relationship which, as we have already discussed, was not shown to be an endangerment to the child, and on some isolated instances of bad judgment regarding childcare. Accordingly, the order modifying custody is reversed and the matter is remanded for any necessary further proceedings.

Termination of Maintenance

We next turn to the court's termination of Jerry's maintenance obligation. Per the terms of the parties' separation agreement, which was incorporated into the decree, Jerry agreed to pay Helen \$420 a month in maintenance. There was no end date for the maintenance provided in the agreement. Also, per the separation agreement, when Helen moved out of the marital residence, the residence was sold and the equity was divided between the parties. There was no evidence in the record as to how much money Helen received from the sale of the residence.

The evidence established that when Helen came to the United States with Jerry, she did not have the equivalent of a U.S. high school education. After the divorce, Helen worked for short periods as a waitress, a receptionist, cleaning houses and selling cosmetics. Helen stated she had difficulty obtaining and retaining employment because of her lack of education. Sometime in 2002 or 2003, Helen obtained her GED and began attending Cumberland College as a full-time student. She testified that she had no time to work outside the home while she was going to school full-time and taking care of the children.

Helen testified that while she is in school, she is able to pay for her school and the family's living expenses through her maintenance, support, student loans, work study programs, and scholarships. Helen admitted that Dr. Menifee often bought her groceries. She also stated that she had on occasion borrowed money from Dr. Menifee but had paid him back. There was no evidence that Dr. Menifee provided any further monetary support for Helen.

Jerry's income at the time of the hearing was \$48,000 a year. There was no evidence that Jerry had experienced any change in circumstances regarding his finances since the divorce.

In deciding to terminate maintenance, the trial court found:

Helen has had adequate time in which to prepare herself for work and additional rehabilitative maintenance would not be appropriate. Furthermore, there has been a substantial and continuing change of circumstances that make the continuation of maintenance unconscionable.

Relative to modification of a maintenance award, KRS 403.250(1) provides:

Except as otherwise provided in subsection (6) of KRS 403.180, the provisions of any decree respecting maintenance may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable.

The party seeking modification of the maintenance award has the burden of establishing that a change of circumstances has occurred. McKenzie v. McKenzie, 502 S.W.2d 657 (Ky. 1973). Awarding maintenance is a matter within the discretion of the trial court. Browning v. Browning, 551 S.W.2d 823 (Ky.App. 1977). A trial court's findings of fact pursuant to a maintenance award are subject to the clearly erroneous standard. Adams v. Adams, 565 S.W.2d 169 (Ky.App. 1978).

The lower court does not state in its order what it considered to be the change of circumstances which necessitated termination of Helen's maintenance. We can only presume that the court was of the belief that Dr. Menifee was now supporting

Helen, although the evidence merely established that he bought her groceries and sometimes loaned her money which she paid back. There was no evidence that he contributed to her financial support beyond that.

As to Jerry's claim that the short duration of the marriage and Helen's young age render the maintenance award now unconscionable, we would point out that Jerry agreed to the open-ended award of maintenance in the separation agreement and thus must prove a "change of circumstances" to modify the award. At the time of the hearing, Helen was not working so she could attend college full-time, presumably to obtain a good job and ultimately be self-supporting. From our review of the record, the court's finding of a substantial and continuing change of circumstances which rendered the maintenance award unconscionable was clearly erroneous. Hence, the decision to terminate maintenance was an abuse of discretion, and the order terminating maintenance is hereby reversed.

Applicability of UCCJA

As to Helen's argument that the court improperly exercised jurisdiction of the case under the Uniform Child Custody Jurisdiction Act ("UCCJA"), we would note that, as of the time of Jerry's custody motion in this case (March, 2003), the children had not been in Tennessee for six months. KRS

403.420(1)(a); KRS 403.410(5). Therefore, Kentucky was still James' home state at the time of that motion.

For the reasons stated above, the judgment of the Barren Circuit Court is reversed relative to its decisions to modify custody and terminate maintenance, and the case is remanded for any necessary further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Corey Morgan
Glasgow, Kentucky

BRIEF FOR APPELLEE:

Cheryl Berry
Glasgow, Kentucky