RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002074-ME

ANGELA JEFFRIES SNYDER — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 98-CI-00699

SEAN EDWARD SNYDER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM,[1] DYCHE, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Angela Jeffries Snyder has appealed from the order of the McCracken Circuit modifying child custody and naming her former husband, Sean Edward Snyder, the child's primary residential custodian. She argues that the circuit court utilized an incorrect standard in determining that modification was warranted. We affirm.

Sean and Angela were married in 1995, and their son Chase was born on February 28, 1996. Sean filed a Petition for

[1] Judge David C. Buckingham concurred in this opinion prior to his retirement effective May 1, 2006.

Dissolution of Marriage in 1998, shortly after they separated. The circuit court entered a decree in early 1999, and awarded the parties joint custody of Chase, with Angela designated as the primary residential custodian. Sean was granted visitation rights and ordered to pay child support by way of a wage assignment. In October 2003, Sean moved the circuit court to modify custody based upon a change in circumstances. He indicated that Angela had remarried, and that her new husband had a history of domestic violence against her and Chase. Following a hearing, the circuit court entered an order on February 19, 2004, denying the motion, although indicating some concern about Angela's husband's past history of abuse to her. However, because he was receiving treatment for anger management, there were no current grounds to support modifying custody. Sean filed a motion to alter, amend or vacate that order, which was denied the next month.

On July 6, 2005, less than two years later, Sean filed another motion to modify custody, this time citing the extensive criminal background of Angela's current live-in boyfriend, Ryan Hufford. In the motion, Sean stated that he feared for the safety and well-being of Chase. Attached to the motion were two affidavits, one from Sean and one from Sean's mother, Jan Haynes. Sean's affidavit reads as follows:

AFFIDAVIT

The Affiant, being first duty sworn, states as follows:

1. The Affiant is the Petitioner in the above-referenced action and the father of the minor child, Chase Snyder.

2. My ex-wife, the Respondent in this action, was granted the primary residential custody of Chase in a hearing held before this Court in January 2004. At that time, the Respondent was married to David Frensley, who has a history of criminal activity, and it was my opinion then that such an environment would be detrimental to Chase's well being.

3. The Court allowed Chase to stay with the Respondent on the condition that she remove herself from her husband. The Respondent finally did remove herself from her husband, but it took nine months and David Frensley had to be put in jail before it occurred.

4. It has now come to my attention that the Respondent is living with another lifelong criminal, Wanna Ryan Hufford. As is evident from the attachments to the Motion, Mr. Hufford has an even more extensive criminal background, including several domestic violence orders and charges for sexual assault and other serious crimes.

5. Chase has told me on several occasions without being asked that Mr. Hufford is prone to fits of rage, that are sometimes directed at him.

6. Chase has also told me that he would rather stay with me than go back into a situation where both he and his mother are fearful of doing anything wrong because Mr. Hufford often "goes ballistic."

7. I strongly believe that Chase is in a situation that will seriously endanger his physical and emotional well-being if he were required to remain with the Respondent and her new boyfriend.

8. Even worse, it is evident that the Respondent only chooses individuals of the lowest moral character to reside with her and be [a part] of Chase's life. Therefore, I believe returning Chase to my care is in his best interests and is the only way to be assured that Chase will remain safe throughout his teenaged years.

FURTHER THE AFFIANT SAYETH NAUGHT

XXXXXXXXXXXXXX
SEAN SNYDER

Haynes' affidavit reads as follows:

AFFIDAVIT

The Affiant, being first duly sworn, states as follows:

1. The Affiant is the paternal grandmother of Chase Snyder.

2. I have had significant contact with the minor child over the past several years, specifically since Angela Frensley has obtained primary residential custody of the minor child.

3. Angela has a habit of cohabiting with individuals of poor character and long criminal backgrounds. In January 2004, the Court allowed her to have primary residential custody of the minor child on the condition that she remove herself from her then husband, David Frensley, a man with a history of violent behavior.

4. Since that time I have become aware that she has begun cohabitating with an

individual named Ryan Hufford. The reason that I am aware that they live together is because I was at Lourdes Hospital one day awaiting results for my husband when Mr. Hufford came in to the hospital to request some test results. He gave Ms. Frensley's address as his contact information.

5. Subsequently, Mr. Hufford received a traffic citation while driving Ms. Frensley's car.

6. I have become aware of Mr. Hufford's extensive criminal background, and it is much more extensive than that of Angela's previous husband. Not only does he have a lengthy record of criminal convictions, he also has had domestic violence orders placed against him on at least two occasions.

7. In my conversations with the minor child, he has informed me that Mr. Hufford often screams and yells at both Angela and himself, as well as Mr. Hufford's own child.

8. It is my understanding from Angela that Mr. Hufford does not have any custodial rights to his own [] child, but rather Mr. Hufford's parents are the custodians of his child.

9. I do not believe that this environment is the proper environment for a child of Chase's age, and I am fearful that serious physical or emotional harm may occur if he were to [be] allow[ed] to remain in the same residence as Angela and her new boyfriend.

10. Sean Snyder has always provided a good home for Chase, and it would be in the best interests of Chase if Sean Snyder were given primary residential custody of the minor child.

FURTHER THE AFFIANT SAYETH NAUGHT.

Angela responded to Sean's motion, asserting that the proper standard to modify custody is the serious endangerment standard, and that the affidavits were inadequate to justify a hearing as they contained baseless allegations only. After hearing arguments from counsel, the circuit court opted to hold a hearing on the motion to modify custody.

At the August 15, 2005, hearing, the circuit court heard testimony from Angela, Haynes, and Hufford's mother, LaVonda Cantrell. At the parties' request, the circuit court also interviewed Chase in chambers. Angela testified that she and Hufford were not married, but that they had lived together for the last four to five months. Hufford told her about his criminal history the second day they met, and she believed him to be a fairly good father. She denied that Hufford had ever abused Chase. Haynes expressed concern about Chase in that he was more withdrawn and quiet. She testified that Chase had a close relationship with Sean and a great relationship with his stepmother, Wendy. Cantrell testified that she had had physical possession of Hufford's almost 10-year-old son since he was seven months old. At the conclusion of the hearing, Angela's counsel stated that the applicable standard in cases where the motion for modification is made less than two years later is the

serious endangerment standard. The circuit court indication that this was the correct standard, and Sean's attorney agreed.

On August 18, 2005, the circuit court entered an order granting modification of custody, naming Sean as the primary residential custodian. The circuit court first clarified the appropriate standard to be applied in this case, holding that for motions made within two years of a prior decree, the court must first follow KRS 402.340(2) and determine whether the child is in serious danger based upon the affidavits attached to the motion before deciding whether to hold a hearing. If the movant reaches that hurdle and the circuit court decides to hold a hearing, the best interest of the child standard then applies pursuant to KRS 402.340(3). The circuit court then entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

> 1. Respondent (mother) was granted primary residential custodian of the minor child, Chase, in January 2004.
>
> 2. A condition of the Order granting Respondent custody was that she have no overnight, unrelated, guests of the opposite sex. She has, and continues to, violate that Order.
>
> 3. Respondent has a history of romantic relationships with men who have abused her while residing together.
>
> 4. Respondent's current paramour, Wanna Ryan Hufford, is on probation for felony wanton endangerment. He has a long

history of drug and alcohol abuse and violent behavior.

5. Petitioner (father) is a “good father” to Chase. He is Chase’s Cub Scout troop leader. He has remarried to a woman who is employed in the church he and his family attend.

6. Chase is equally happy with the idea of residing with his father or his mother. He has a good relationship with his stepmother and her children who also reside with Petitioner.

7. Because of Mr. Hufford’s history of violence, drug and alcohol abuse, and assaultive behavior, there is a danger that Chase’s mental and/or physical health will be damaged if he remains in the primary custody of Respondent.

CONCLUSIONS OF LAW

1. The Court has jurisdiction to modify custody.

2. The Court has found reason to believe from Petitioner’s affidavit supporting his motion to modify custody that the child’s present environment may endanger seriously his physical, mental, moral, or emotional health.

3. Following a hearing, and considering all matters in light of the requirements of the applicable statutes, the Court finds it is in the best interests of the child that Petitioner be primary residential custodian.

4. Petitioner’s motion to modify custody is hereby granted.

5. Petitioner is to be primary residential custodian of Chase, effective upon entry of this order.

> 6. Absent any agreement otherwise, Respondent is awarded standard visitation.
>
> 7. Any other relevant issues are to be agreed upon by the parties or will be resolved upon appropriate motion.

Angela moved the circuit court to alter, amend, or vacate the order, arguing that it was not logical for a lower standard to apply to modification of custody once a hearing is granted. The circuit court denied Angela's motion, and this expedited appeal followed.

On appeal, Angela presents three arguments: 1) whether the circuit court erred in granting a hearing on child custody; 2) whether the circuit court applied the proper standard for modification of custody; and 3) whether the circuit court erred in modifying custody. Sean responds to each argument in his brief.

The standard of review applicable in this matter is set forth in CR 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . . . Findings 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.

In Moore v. Asente,[2] the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact,

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

With this standard in mind, we shall review the circuit court's decision in this matter.

The applicable statute in this case is KRS 403.340, which details the modification of custody. The statute, as amended by the General Assembly in 2001, provides:

[2] 110 S.W.3d 336, 354 (Ky. 2003).

(2) No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:

(a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

(b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall 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;[3]

(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.

(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

[3] The factors listed in KRS 403.270(2) include the wishes of the parent or parents as to the child's custody; the child's wishes; the interaction of the child with parents and siblings; the child's adjustment to his home, school and community; and the mental and physical health of everyone involved.

> orders shall not be made solely 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 Kentucky Court of Appeals has stated that in amending the statute, "the General Assembly not only relaxed the standards for modification of custody, but it also expanded upon the factors to be considered when modification is requested. . . . The former standards for modification . . . are now mere elements or factors to be considered by the court."[4] KRS 403.350 requires a party seeking modification of a custody decree to submit an affidavit supporting the motion. The court is required to deny the motion "unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted."[5]

Angela first argues that the circuit court erred in granting a hearing on modification of custody. She asserts that

[4] Fowler v. Sowers, 151 S.W.3d 357, 359 (Ky.App. 2004).

[5] Id.

in a case where the motion is filed within two years of a prior decree, the two affidavits accompanying such a motion must show that serious endangerment to a child's mental, physical, moral or emotional well-being exists. In this case, Angela argues that the affidavits "only contained baseless allegations about a *possible* danger to the child based on the criminal record of Mr. Hufford." On the other hand, Sean reminds the Court that the affidavits only have to demonstrate that the child's present environment may endanger his physical, mental, moral or emotional health.

In reviewing the affidavits that accompanied Sean's motion to modify custody, we agree with circuit court that those sworn documents establish that being subjected to Angela's live-in boyfriend may indeed cause Chase to be seriously endangered. The affidavits establish that Hufford has a rather extensive criminal background, including domestic violence and assault charges. They also establish that Hufford has a problem with anger. Based upon these affidavits, we must hold that substantial evidence supports the circuit court's decision to hold a hearing in this case, and that there was no error in this holding.

Next, we shall address the proper standard to be applied in this case to the circuit court's decision whether to modify custody. Angela asserts that a serious endangerment

standard applies, while Sean asserts that the best interests of the child standard applies. We agree with Sean that regardless of when the motion is made, a best interests standard applies to the decision to modify custody under the amended version of the statute.

While we somewhat agree with Angela that it appears incongruous that the General Assembly fixed a higher standard on the decision as to whether a hearing is warranted than on the decision to modify itself, the plain language of KRS 403.340 compels that result. In situations where a motion to modify is made earlier than two years after a prior decree, KRS 403.340(2) permits the court to review such a motion only in two situations, including when "[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]"[6] Once a court has decided that a hearing is justified, the statute then instructs the court to consider several factors, including whether there is serious endangerment to the child, before determining whether a change in circumstances has occurred and whether a modification would be in the child's best interests.[7] Based upon our review of the statute, we must conclude that the circuit court did not commit any error in interpreting the statute in question and properly

[6] The other situation applies when the custodian places the child with a de facto custodian, which is not alleged in this case.

[7] KRS 403.340(3).

applied a best interest of the child standard in ruling on the motion to modify custody.

Finally, Angela argues that the evidence submitted was not sufficient, and was too speculative, to justify modifying custody. She asserts that Sean presented no evidence since the 2004 ruling that anyone had ever been violent toward herself or Chase, or that Hufford had lost his temper with Chase. Sean, on the other hand, argues that the circuit court's findings are supported by substantial evidence and, as such, should not be disturbed.

In determining whether a modification is in a child's best interest, KRS 403.340(3) now requires a court to consider an expanded list of factors, including whether his present environment presents a serious endangerment to him, whether the harm a change in environment would likely cause is outweighed by its advantages, as well as the nine relevant factors listed in KRS 403.270(2). The testimony presented in this case clearly supports the circuit court's findings of fact, on which the decision to modify custody was based. While Angela testified that Hufford had never abused Chase, she admitted that she had known about his criminal history since the second time they met and only described Hufford as a "fairly good father." She also admitted that they had lived together for the past four to five months prior to the hearing without being married. Haynes

testified about the changes she noticed in her grandson, that he had become more withdrawn and quiet. She testified that Chase had a close relationship with Sean, who was also his Cub Scout pack leader, and a great relationship with his stepmother. Based upon the testimony and evidence presented, the circuit court was not clearly erroneous in determining that Chase's mental and/or physical health was in danger of being damaged if he remained in the primary custody of Angela or that it would be in his best interests to transfer primary custody to Sean. Therefore, the circuit court did not commit any error in granting Sean's motion to modify custody.

For the foregoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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