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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002563-ME

JUDITH ANN POWELL — APPELLANT

v.

APPEAL FROM CARROLL CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 94-CI-00153

JOSE L. LIRA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: Judith Ann Powell (Judy) appeals from a judgment entered by the Carroll Circuit Court awarding sole custody of the parties' child to appellee Jose L. Lira (Luis). We affirm.

The parties, who never were married to one another, are the parents of a daughter who was born in July 1994. In December 1994, Luis filed a petition seeking joint custody and visitation. In April 1995 the court entered an order granting Judy temporary custody of the child, subject to Luis's

reasonable visitation rights. However, no order was entered regarding permanent custody. In July 1996 the action was dismissed without prejudice for lack of prosecution.

Luis then filed motions in 1997 and 1998 seeking permanent child custody, but again no orders were entered. In March 2001 he filed a motion seeking joint custody, which was denied by the trial court on the ground that Luis had not filed two supporting affidavits. Luis filed another motion seeking joint custody in September 2003. In February 2004 the court remanded the case to the Domestic Relations Commissioner (DRC) after finding that the matter had been erroneously dismissed without prejudice in September 1996, rather than merely being remanded from the court's active docket, and that the court's consideration of contested issues in May 2001 "included an implied reinstatement of this case." The court therefore overruled Judy's motion to dismiss the action for lack of jurisdiction, and it directed the DRC to conduct a hearing regarding permanent custody. Ultimately, the court entered an order confirming and adopting the DRC's report, which recommended that Luis should be awarded sole custody of the child. This appeal followed.

Judy first contends that the trial court erred by failing to find that it lacked jurisdiction to enter an order altering child custody. We disagree.

Circuit courts retain jurisdiction to modify previous child custody orders even if those orders otherwise are final. *See* KRS 403.340. *See also Wright v. Wright,* 305 Ky. 680, 205 S.W.2d 491 (1947); *Burke v. Hammonds,* 586 S.W.2d 307, 308 (Ky.App. 1979). Here, although the trial court purported to dismiss the underlying custody proceeding in September 1996, that dismissal was without prejudice and it did not disturb the existing temporary award of child custody to Judy.

Although Luis filed additional motions some fifteen months later, another six years passed before Judy finally challenged the pending proceedings on the ground that the underlying case had been dismissed. Given Judy's active participation in the various proceedings until that time, we must conclude that she waived any objection to what was, in effect, a reinstatement of the original proceedings. In any event, given the trial court's ongoing ability to alter its prior temporary custody order regardless of whether it had otherwise dismissed the original proceedings, we cannot say that the court erred by exercising jurisdiction below.

Next, Judy alleges that the trial court erroneously considered a custodial evaluation report in violation of KRS 403.300(3). We disagree.

KRS 403.300 addresses the "investigation and report concerning custodial arrangements for the child" which a court

may order in a contested custody proceeding. KRS 403.300(3) provides in part that when such an investigation and report are completed,

> [t]he clerk shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data, and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2), and the names and addresses of all persons whom the investigator has consulted.

If these provisions are satisfied, "the investigator's report may be received in evidence at the hearing." KRS 403.300(2).

Here, the record shows that in April 2004, Luis filed a motion which in part requested the court to order a custodial evaluation pursuant to KRS 403.300. The court granted the motion and an evaluation was conducted by Dr. Claudia Crawford, who timely filed a report in the record on January 24, 2005. On that same date, in accordance with KRS 403.300(3), the circuit court clerk mailed copies to Luis's counsel and to Judy, who at that point was proceeding pro se. On May 9, after Judy retained new counsel, her attorney sent a letter to Crawford requesting her to

> forward a copy of your report, and a copy of your file in this matter, and curriculum vitae. Please make sure to include any underlying data, reports, complete texts of

> diagnostic reports, names and addresses of all persons whom you consulted. I will also need to know the financial arrangements made between yourself and the father.

On June 6 Judy's attorney filed a motion requesting the court to strike Crawford's evaluation report from the record and to suppress her testimony at the hearing, stating that Crawford had ignored the May 9 request for information in violation of the KRS 403.300 requirement "that an evaluator open their file" to counsel.

In the first place we note that counsel's May 9 request to Crawford for copies of all items in Crawford's file, including "any underlying data, reports, complete texts of diagnostic reports, names and addresses of all persons whom you consulted[,]" far exceeded the KRS 403.300(3) requirement that Crawford make her file "available" to counsel. Second, this issue was waived when it was neither ruled upon prior to the DRC's hearing, nor renewed during the hearing even though Crawford testified. KRE 103(d). *See Hayes v. Commonwealth,* 175 S.W.3d 574, 596 (Ky. 2005). The trial court therefore did not err by failing to exclude the report from evidence.

Finally, Judy contends that the trial court abused its discretion by awarding sole custody of the child to Luis rather than to her. We disagree.

Judy suggests that this matter could be reviewed either as an original custody action or as a modification of custody. However, as previously there was only a temporary award of custody to Judy, the matter was properly considered by the trial court as an original custody action made pursuant to KRS 403.270, which required the court to equally consider both parents and to determine custody in accordance with the child's best interests after considering all relevant factors including those enumerated in KRS 403.270(2).

The trial court found below

> that both parents can provide adequate and proper homes and that both parents love their child and legitimately want to care for her. If the decision of custody was to be based on these factors alone, it would be very difficult.

However, after considering other relevant factors, the court noted that

> [p]roviding a home and a loving environment . . . is not enough. The law requires that a child be sent to school, and a loving and caring parent, regardless of this legal requirement, should realize the importance of education. In this case, the mother has been solely responsible for getting the child to school, making certain homework was completed and that the child understands the course material. On this issue, the record of the mother is abysmal. No child can miss over ten percent of the school year and be expected to succeed. This court must infer from the excessive absenteeism that either the mother places no priority on school attendance or that she acquiesces in the

> child's desire not to attend. Neither of these inferences is acceptable for a parent.

The court awarded sole custody to Luis after concluding that the parties' past inability to cooperate precluded an award of joint custody.

The record includes substantial evidence which supports the court's findings, including those findings pertaining to school attendance and performance. As noted below, school attendance reports indicated that the child averaged more than 23 absences and 10 tardies per year, nearly half of which were unexcused without satisfactory explanations. Although the child was not believed to have any learning disabilities, she performed poorly in school and reportedly tested significantly below grade level. Further, although Judy asserts that the child made significant progress after enrolling at the Sylvan Learning Center, that enrollment occurred only at the behest of Luis and its costs were paid by him. Having reviewed the evidence, we cannot say that the trial court's findings are erroneous, or that the court abused its discretion by awarding sole custody to Luis. CR 52.01. *See B.C. v. B.T.,* 182 S.W.3d 213, 219-20 (Ky.App. 2005) (citing *Sherfey v. Sherfey,* 74 S.W.3d 777, 782 (Ky.App. 2002)).

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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