

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000470-ME

RICHARD CROSS

APPELLANT

v. APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 03-CI-00107

STACY KAY MCWHORTER CROSS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

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

BARBER, JUDGE: This is an appeal from a post-decree custody modification decision rendered in Clinton County, Kentucky. Appellee, Stacy Kay McWhorter Cross, was awarded sole custody of the parties' two minor children. Appellant, Richard Cross, appeals the modification.

The questions for our court are (1) whether the affidavits filed with the motion to modify custody satisfied the

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

statutory elements requiring a hearing be held on the matter and 2) if a hearing was appropriate, whether the findings supported the custody modification. Following a review of the record, we vacate and remand.

BACKGROUND

Stacy filed for a divorce from Richard following more than ten years of marriage. An agreed findings of fact, conclusions of law, and decree of dissolution of marriage was entered in July 2004. The parties agreed to joint custody with Richard having a total of five days of visitation each two week period.²

In July 2005, less than two years after the entry of the decree, Stacy filed a motion to modify custody. In support of her motion, she filed her own affidavit along with the affidavit of her mother, Sue McWhorter. In response, Richard filed a pro se³ motion to modify custody.⁴

A hearing was held all day October 5, 2005, by the Domestic Relations Commissioner (DRC). Stacy was represented by counsel and Richard appeared pro se. At the hearing, it was evident there was a great deal of animosity between the parties.

² This total excludes any holidays, events, etc. that may change the amount of visitation during a two week period. Also, the parties agreed that no child support would be paid by either party.

³ Richard had been represented by counsel through entry of the parties agreed decree.

⁴ Richard filed no affidavits in support of his motion.

The DRC issued his report and recommendations (report) two months later. In the report, the DRC recommended that Stacy be awarded sole custody of the children with Richard having standard visitation.⁵ Richard hired counsel and filed exceptions. After hearing arguments, the circuit court overruled Richard's exceptions and adopted the DRC's report. Richard appealed to our court.

Richard makes two arguments in his appeal: (1) a hearing on Stacy's motion should not have been held because the affidavits filed with her motion to modify custody failed to satisfy statutory requirements and (2) the DRC's findings do not support the custody modification.

PRELIMINARY ISSUE

We must first address the issue of whether a hearing should have been held on the custody modification. Richard argues that the affidavits Stacy filed with her motion to modify custody did not satisfy statutory requirements. The threshold requirements to warrant a custody modification hearing are contained in KRS 403.350 and 403.340. Kentucky Revised Statute 403.350 states:

A party seeking a . . . modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested . . . modification. . . . The court shall deny the motion unless it finds that

⁵ Richard was also ordered to pay child support to Stacy.

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 . . . modification should not be granted.

Kentucky Revised Statute 403.340 states, in pertinent part:

(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.

. . . .

(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 . . . 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 . . . 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.

Read together, these two statutes require that a motion to modify a prior custody order made earlier than two years after its date must be accompanied by at least two affidavits. Petry v. Cain, 987 S.W.2d 786, 788 (Ky. 1999). The trial court should deny the motion for modification unless it finds that adequate cause for hearing is established by the affidavits. Crossfield v. Crossfield, 155 S.W.3d 743, 744-745 (Ky. 2005).

If the threshold requirements are not met, the circuit court is without authority to entertain the motion. Id. Thus, the circuit court does not acquire subject matter jurisdiction over a motion to modify a prior custody decree unless the motion is accompanied by sufficient affidavits. Id. Subject matter jurisdiction is a question of law and is reviewed by this Court *de novo*.

The purpose of KRS 403.340(2) is to provide stability and finality to a custody decree. See S v. S., 608 S.W.2d 64, 66 (Ky.App. 1980). The key word in KRS 403.340(2)(a) is the word "may." Id. This word does not mean that injury to the

physical, mental, moral, or emotional health of the child must have already occurred or be occurring at the present time. Id. A judge is not required to wait until the children have already been harmed before he can give consideration to the conduct causing the harm. Sturgill v. Krug, 647 S.W.2d 790, 793 (Ky. 1983). We now examine the affidavits attached to Stacy's motion.

Stacy's affidavit was fourteen pages in length excluding attachments. The majority of her affidavit⁶ consisted of summaries of various conversations she had recorded between her and Richard, as well as, messages he left on her answering machine. All conversations and messages occurred between August 1, 2004 and June 26, 2005.⁷ The summaries reflected that the parties had had a difficult time trying to work together through the past year.

In essence, Stacy's affidavit is about her relationship with Richard and not his relationship with the children. However, she did state in her affidavit that Richard had created an atmosphere which precluded cooperation and if continued, the children's mental welfare would be endangered. We believe Stacy's affidavit satisfied the statutory requirements. We now examine Stacy's second affidavit.

⁶ The summaries were twelve pages in length.

⁷ Richard made frequent alarming statements, e.g. threatening Stacy. Many of these conversations and messages were played at trial.

The second affidavit was prepared by Stacy's mother, Sue McWhorter. Ms. McWhorter's affidavit focuses primarily on the relationship between Stacy and Richard rather than their relationships with the children. She stated that the parties were unable to cooperate for the benefit of the children due to Richard's behavior. Ms. McWhorter does not specifically state how Richard's behavior seriously endangered the children. See KRS 403.340(2)(a). We believe it is more prudent to err on the side of caution and hold a hearing when two affidavits support the modification motion and a child's well-being is at stake. Moreover, we note Richard had filed his own motion to modify custody. Under the circumstances, we do not believe the trial court erred or abused its discretion when it decided to hold a hearing on the custody modification issue. We now turn to the decision to modify custody of the parties' children.

STANDARD OF REVIEW

The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. CR 52.01. Thus, when the trial court adopts the recommendations of the DRC, those recommendations fall under the same standard of review as applied to a trial court's findings. See Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429, (Ky. 1980) and Wells v. Sanor, 151 S.W.3d 819, 822 (Ky. App. 2004).

The standard of review for appellate courts in a custody case is that findings of fact may be set aside only if those findings are clearly erroneous, i.e. whether or not those findings are supported by substantial evidence. Allen v. Devine, 178 S.W.3d 517, 524 (Ky.App. 2005). Substantial evidence has been defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000). Mere doubt as to the correctness of a finding will not justify its reversal. Allen, supra 178 S.W.3d at 524.

After a trial court makes the required findings, it must then apply the law to the facts. Allen, supra 178 S.W.3d at 524. The determination of the proper law to be applied to the facts is reviewed *de novo*. Id. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion. Id. Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision. Id.

LEGAL AUTHORITIES AND ANALYSIS

Richard argues that the DRC's findings do not support a modification of custody. After a hearing is granted, custody

modification is governed by KRS 403.340, which states, in relevant part:

(3) If a court of this state has jurisdiction . . . 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)⁸ to determine the best interests of the child;

⁸ Kentucky Revised Statute KRS 403.270(2) states, in part:

The court shall consider all relevant factors including:

(a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(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 best interest;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence . . . ;

(g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and

(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian. . . .

(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.

(Emphasis added.)

We note that KRS 403.340 was significantly amended by the General Assembly in 2001. 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. Fowler v. Sowers, 151 S.W.3d 357, 359 (Ky.App. 2004). The former standards for modification, i.e. the current versions of KRS 403.340(3)(d) and (e), are now mere elements or factors to be considered by the court. Id.

As stated earlier, after a hearing is granted, custody modification is governed by KRS 403.340. The DRC applied only KRS 403.270(2) in his report.⁹ The sole consideration of elements contained in KRS 403.270(2) is appropriate in making initial custody decisions. However, in custody modifications, KRS 403.270(2) is a factor to consider. See KRS 403.340(3)(c).

⁹ We acknowledge that Richard did not make this argument in his appellate brief. However, applicable legal authority is not evidence and can be resorted to at any stage of the proceedings whether cited by the litigants or simply applied, *sua sponte*, by the adjudicator(s). Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 930 (Ky. 2002).

The elements of KRS 403.270(2) are not determinative in custody modifications. The DRC failed to consider all required statutory factors contained in KRS 403.340(3) in his report. This was error. We lastly discuss custody modification based upon the parties' lack of cooperation with each other.

A court may modify joint custody where the parties are unable to cooperate. See Scheer v. Zeigler, 21 S.W.3d 807, 814 (Ky.App. 2000). However, lack of cooperation by one or both parties is not a ground for modification of joint custody unless it rises to the statutory level required for modification of custody under KRS 403.340. Fenwick v. Fenwick, 114 S.W.3d 767, 784 (Ky. 2003).

When the misconduct of a proposed custodian is advanced as a factor in the determination of custody, evidence of such misconduct may be heard and received, but before giving any consideration to such misconduct, the court must conclude, in its reasonable discretion, that such misconduct has affected, or is likely to affect, the child adversely. Krug v. Krug, 647 S.W.2d 790, 793 (Ky.App. 1983). 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. Id.

The lengthy hearing consisted almost exclusively of testimony regarding the parties' relationship with one another.

There was very limited testimony regarding the effect or possible effect of the parties' behaviors on the children themselves. Additional proceedings must be held to determine what effect, if any, the parties' actions have had or may have upon the children.

CONCLUSION

The trial court did not err when it permitted a hearing on the custody modification motion. However, error occurred when the DRC failed to consider all statutory factors required in custody modification proceedings. Also, further proceedings are required to determine what affect, if any, the parties' actions have had or may have upon the children. Therefore, we vacate and remand for additional proceedings consistent with this opinion.

HUDDLESTON, SENIOR JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE DISSENTING: I respectfully dissent. Although I agree with most of the majority's analysis, I believe the findings of the trial court are supported by substantial evidence. The court did not abuse its discretion by granting Appellee's motion to change custody. I would affirm the judgment of the Clinton Circuit Court.

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BRIEF FOR APPELLEE:

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