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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000896-ME

VICTORIA JONES — APPELLANT

v.

APPEAL FROM CLARK FAMILY COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 02-CI-00647

HAROLD JONES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: Victoria Jones appeals from an order of the Clark Family Court granting the motion of her ex-husband, Harold Jones, to modify custody of the minor child born of the parties' marriage. We affirm.

Victoria and Harold were married in early 2000 and have one child, Lauren Nicole Jones, who was born on October 23, 2000. Victoria filed a petition to dissolve the

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as special judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

marriage in November 2002, and the parties entered into a separation agreement in February 2004. The agreement provided in part that the parties would have joint custody of Lauren and that Victoria would be the primary physical custodian of the child. The divorce decree, which incorporated the separation agreement, was entered by the court on March 3, 2004.

On November 22, 2005, Harold filed an ex parte motion for emergency custody. The court granted the motion; but, after a hearing, it determined that an emergency did not exist and ordered the child returned to Victoria's custody.

On January 9, 2007, Harold filed a motion to modify custody pursuant to KRS 403.340(3). The court conducted a hearing on March 21, 2007. On April 3, 2007, the court entered an order modifying custody and designating Harold as the primary residential custodian of the child in the joint custody arrangement.[2] This appeal by Victoria followed.

KRS 403.340(3), the statute applicable to this case, provides in part that a court shall not modify custody unless it finds that "a change has occurred in the circumstances of the child or his custodian, and that modification is necessary to serve the best interest of the child." The statute lists several factors that the court must consider. *Id*. Our standard in reviewing the trial court's findings are whether such findings were clearly erroneous or whether the trial court abused its discretion. *See Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).

[2] Joint custody is a custody award, and any modification must be made pursuant to KRS 403.340. *Fenwick v. Fenwick*, 114 S.W.3d 767, 783 (Ky. 2003).

In its order modifying custody, the court highlighted testimony concerning the environment in which the child lived at Victoria's residence. The court noted that Harold testified that Lauren consistently smells of smoke when she is delivered to his residence for visitation with him, that Lauren has been diagnosed with asthma and has made numerous trips to the doctor's office and emergency room for problems relating to her upper respiratory system, and that Lauren was not to be around smoke. Further, the court noted in this regard that Victoria stated that she quit smoking in December 2006, the month before Harold filed his motion, and that her boyfriend, Alfredo, smokes but she no longer allows him to do so in the residence. The court also cited the testimony of Wanda White, Harold's mother, who testified that the child often smells of smoke when she comes from Victoria's residence, even in spite of Victoria's claim that the residence is now smoke-free.[3]

Next, the court related testimony and photographs it had received in evidence showing several red bumps on Lauren that had recently appeared on at least two occasions. After three visits to the doctor's office, it was determined that the bumps were flea bites. Victoria acknowledged the flea problem in her residence, but she stated that she had since burned the couch, chair, and Lauren's bed, all of which were believed to have been infested with fleas. Also, it was believed that the cat had been the source of the fleas, and the cat had since died.

[3] Victoria also admitted that Lauren was exposed to smoke during the times she went to Victoria's mother's residence.

The chief cause of concern was apparently the fact that in December 2006, Lauren, age 6, was left alone with an infant in the residence for a period of time while Victoria went to get lunch for the child. Victoria admitted that this was a mistake, but she stated that she was only gone from the residence for approximately ten minutes.

Additionally, the court specifically stated the factors that KRS 403.340(3) required it to consider, and it set forth the considerations set forth in KRS 403.270(2) that were relevant to this case. In deciding the case, the court stated as follows:

> Because of the factors set forth above, the Court concludes that a change in circumstances has occurred since entry of the parties' custody decree sufficient enough to give the Court jurisdiction to modify the decree pursuant to KRS 403.340. While the Court makes no finding that the child is seriously endangered when in the care of Victoria, given the child's unique medical condition, the poor parenting decisions Victoria has recently made, and atmosphere in both homes, it is in the child's best interests that her father be the primary residential custodian.

This appeal by Victoria followed.

Victoria argues that the court entered findings that were clearly erroneous and also abused its discretion in granting Harold's motion to modify custody. Additionally, she asserts that Harold did not meet his burden of proof in seeking modification and that the court made no findings that satisfied the requirements of the statute.

Victoria urges this court to follow the language in *Wilcher v. Wilcher*, 566 S.W.2d 173 (Ky.App. 1978), that the "moving party has the burden of proving a change of circumstances so substantial and continuing as to make the terms of the decree

unconscionable." *Id*. at 175. She maintains that the incidents relied upon by the court in its order modifying custody were neither substantial nor continuing. In that regard, she asserts that when the parties entered into the separation agreement she smoked but her residence is now smoke-free at any rate, that the flea problem was not a continuing one, and that the incident where she left Lauren alone with an infant was an isolated occurrence and not a continuing problem.

In *Fowler v. Sowers*, 151 S.W.3d 357 (Ky.App. 2004), this court stated:

> The strict standards for modification in the pre-2001 version of the statute were intended to inhibit further litigation. *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990). In enacting the amendments, 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 statute now directs the trial court to consider and to permit a change of custody based on the factors enumerated in KRS 403.270(2), the statute used in making initial custody decisions. KRS 403.340(3)(c). The former standards for modification . . . are now mere elements or factors to be considered by the court. KRS 403.340(3)(d) and (e).

Id. at 359.

The court here based its decision on the child's medical condition, poor parenting decisions by Victoria, and the atmosphere in the home. The court obviously found that circumstances had changed in that Lauren was facing a series of poor parenting decisions that could and did affect her physical condition and safety and that, under these circumstances, it was in Lauren's best interest that Harold be her primary physical custodian.

We conclude that the findings of fact by the trial court were sufficient to comply with the statute and were not clearly erroneous. Also, such facts were sufficient to satisfy Harold's burden of proof. Further, we conclude that the trial court did not abuse its discretion in granting Harold's motion to modify custody.

The order of the Clark Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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