

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001329-ME

DEBBIE FRANCIS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK FLETCHER, JUDGE
ACTION NO. 05-CI-00401

JEFFERY FRANCIS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; GRAVES,¹ SENIOR JUDGE.

CLAYTON, JUDGE: Debbie Francis (hereinafter Debbie) appeals from a July 29, 2007, order of the Breathitt Circuit Court that awarded temporary custody of the parties' minor children, Dustin and Trevor, to their father, Jeffery Francis

(hereinafter Jeffery). Jeffery argues that the original custody decree, which

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

incorporated by reference the recommendation of the domestic relations commissioner (DRC), reserved the right of the circuit court to change the custody order and was merely a temporary custody order. Thus, under this line of reasoning, the court had the authority to change it. However, Debbie argues that the circuit court was without jurisdiction to change the custody decree since the statutory requirements of KRS 403.340 and 403.350 had not been followed. Because we agree with Debbie, we reverse and remand.

The parties were divorced by decree of dissolution, signed by the presiding judge in October 2006, and subsequently entered on January 2, 2007. The decree was silent as to the custody of the parties' children.

The history of the custody orders for the children shows that the court, on December 17, 2005, granted temporary custody of the children to Debbie, named her as the temporary primary residential custodian, and established a regular visitation schedule for Jeffery. On April 4, 2006, the parties appeared before the DRC for a hearing on the unresolved issues for their pending dissolution action including child custody. In the June 7, 2006, recommendation, the DRC suggested that custody be designated as follows:

It is the Recommendation of the Commissioner . . . that the parties share Joint Custody; that the mother be granted primary care, with the father having visitation every other weekend from Friday at 6:00 p.m. to Sunday at 6:00 p.m. . . . The mother should have her own residence with the children alone within six months or failure to do so **may** be statutory grounds for a change in primary care. (Emphasis added).

Then, on June 8, 2006, Jeffery filed exceptions to the Commissioner's Report regarding the recommendation about child custody. The aforementioned decree of dissolution was signed on October 9, 2006, and entered on January 2, 2007. While the decree noted the recommendation of the DRC, it did not adopt it.

On April 17, 2007, the court, after entertaining several motions regarding child custody, adopted the DRC's recommendation. (The order incorrectly referred to the date of the DRC's recommendation as June 2, 2007.) Besides adopting the recommendation, the court also adopted the January 2, 2007, findings of facts, conclusions of law, and final decree of dissolution verbatim.

Then, Debbie filed a May 7, 2007, motion for entry of a decree of dissolution, notwithstanding the January 2, 2007, decree, and the April 17, 2007, order adopting the decree. Thereupon, the court on May 29, 2007, entered another decree of dissolution. In this decree, the court used the following language regarding custody:

That the Respondent, Debbie Francis be granted primary care custodian of the parties' minor children with the Petitioner, Jeffrey [sic] Wayne Francis having visitation every other weekend from Friday 6:00 p.m. to Sunday 6:00 p.m.

This language is somewhat confusing in that it does not delineate whether the order is one of joint or sole custody; however, it mirrors the DRC's recommendation for shared joint custody with Debbie having primary care of the boys.

Finally, in a June 6, 2007, order, the court corrected the April 17, 2007, order's incorrect date for the DRC's report and added the correct date of

June 7, 2006. It reiterated its adoption of the recommendation and the January 2, 2007, decree. Additionally, the court ordered *sua sponte* another hearing on custody and set a hearing date of June 25, 2007. The court stated therein:

In reviewing the Recommendations of DRC Fain dated 06-07-06, . . . **the DRC Fain recommended that if the Respondent mother did not have her own residence within six months, the statutory grounds for a change in primary care existed.**

Importantly, the court did not interpret the words of the DRC's recommendation as they were actually written. We will further elucidate this below.

Following the entry of the order, Debbie filed a motion that the court did not have subject-matter jurisdiction in its *sua sponte* order for a hearing to modify the custody. She asserted that a hearing on modifying custody cannot be set because the requisite statutory requirements of KRS 403.340 and 403.350 have not been met.

After the June 25, 2007, hearing, the court granted temporary custody to Jeffery with Debbie receiving visitation pursuant to the visitation schedule of the 39th Judicial District.

We begin our analysis by determining the applicable standard of review to be applied in this appeal. First, on review of child custody matters, this Court must ascertain whether or not the circuit court's findings of fact are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719

S.W.2d 442 (Ky. 1986). However, issues that are strictly legal in nature and questions of law will be reviewed *de novo*. *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky.App. 2002).

In this appeal, Debbie claims that the trial court's order adopting the DRC's recommendation is a permanent custody order and, as such, any motion for a modification of custody must meet the statutory requirements in KRS 403.340 and 403.350.

KRS 403.340(2) provides as follows:

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. . . .

KRS 403.350 provides as follows:

A party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or of modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. . . . The court shall 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.

Thus, looking at these two statutes together, a motion to modify a prior custody decree must be accompanied by at least one affidavit; and if the

motion is made earlier than two years after the custody decree's date of entry, it must be accompanied by at least two affidavits. As stated in *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999), the "circuit court does not acquire subject-matter jurisdiction over a motion to modify a prior custody decree unless the motion is accompanied by the requisite affidavit or affidavits." Therefore, without a motion for modification of the original custody order, supported by two (2) affidavits because it has been less than two years since the entry of the pertinent custody decree, the trial court lacked jurisdiction to modify custody. Furthermore, the necessary affidavits must set forth facts stating that the children's present environment may endanger their physical, mental, moral and emotional health.

Here, Jeffery did not file any motions with the trial court requesting modification of the decree of custody. While Jeffery filed several motions citing exceptions to the DRC's recommendation, these motions were overruled by the trial court's April 17, 2007, order that adopted the DRC's recommendation for custody. Essentially, the trial court, *sua sponte*, in its June 6, 2007, order, after review of the DRC's recommendation, set the date for the hearing on modification of custody. It based its *sua sponte* order on its interpretation of the DRC's recommendation. The words of the order were:

DRC Fain recommended that if the Respondent mother did not have her own residence within six months, the statutory grounds for a change in primary care existed.

Hence, in ordering a hearing without a motion from either party and without the requisite affidavits, the court clearly failed to follow the procedure necessary to modify a permanent custody decree. Consequently, the trial court did not have subject-matter jurisdiction to modify the custody decree. *Id. See Robinson v. Robinson*, 211 S.W.3d 63 (Ky.App. 2006).

In summary, without a motion and accompanying affidavits, the court held a hearing anyway and entered an order modifying custody. Its modification of the custody decree was to give Jeffery temporary custody of the boys and Debbie visitation.

An analysis of underlying procedure used for the order demonstrates the legal insufficiency. First, as has been previously stated, in order to modify custody one must follow the strict requirements of KRS 403.340 and 403.350. Second, the DRC said, as has previously been cited, that if the mother did not have her own residence within 60 days of the recommendation that “failure to do so **may** be statutory grounds for a change in primary care.” (Emphasis added). Nothing in the DRC’s recommendation suggests that custody must be changed if Debbie does not have her own residence. The recommendation merely notes that this factor might be used to ascertain whether Debbie should continue as the primary residential custodian. In truth, the potency of the factor has become somewhat less important since Debbie testified at the hearing that she is now married to her former boyfriend and lives in their residence. Finally, the recommendation never refers to its custody determination as temporary.

In conclusion, the court did not have the requisite subject-matter jurisdiction to modify the joint custody order because modification of custody was not properly raised. Accordingly, we reverse the June 29, 2007, temporary custody order of the Breathitt Circuit Court and remand for a reinstatement of the original joint custody decree.

GRAVES, SENIOR JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS AND FILES SEPARATE
OPINION.

NICKELL, JUDGE, CONCURRING. Although I agree with the majority's conclusion, I write separately to discuss an issue the majority did not address. I believe, as does the majority, the critical issue is that Jeffery failed to file a motion to change custody. Even if we were to construe one of his other motions as satisfying this requirement, his failure to include the required affidavits is fatal. KRS 403.340-.350; *Petrey, supra*.

The majority fails to note that, prior to even holding a hearing on the proposed modification, the trial court must find probable cause exists based solely on the allegations set forth in the affidavits, and such allegations of fact must "compel the court's attention." *West v. West*, 664 S.W.2d 948 (Ky.App. 1984). *See also Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990), *Betzer v. Betzer*, 749 S.W.2d 694 (Ky.App. 1988). In the absence of sufficient affidavits, there was no authority for the trial court to hold a hearing. *See Robbins v. King*, 519 S.W.2d 839 (Ky. 1975); *Gladish v. Gladish*, 741 S.W.2d 658 (Ky.App. 1987).

Thus, as Jeffery failed to move for modification of custody and failed to submit the statutorily required affidavits setting forth facts to justify modification, the trial court clearly erred in *sua sponte* holding the hearing. A trial court simply does not have authority to modify custody outside the confines of the statutory mandates. *Robinson v. Robinson*, 211 S.W.3d 63 (Ky.App. 2006). I believe the trial court's failure to comply with the statutory requirements obviates the need for any discussion of Debbie's failure to obtain a residence of her own.

BRIEF FOR APPELLANT:

Richard Kenniston
Jackson, Kentucky

BRIEF FOR APPELLEE:

Hershel Branson, Jr.
Jackson, Kentucky

