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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001614-ME

LAURA RIGGS — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-00068

MICHAEL MCCAFFREY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

ACREE, JUDGE: Laura Riggs appeals from an order of the Hardin Family Court denying her motion to modify custody of her minor child without an evidentiary hearing. Riggs argues the family court committed error when it determined that her affidavit, filed pursuant to Kentucky Revised Statute (KRS) 403.350, was

insufficient to entitle her to a hearing. After careful consideration of the issues and the record, we affirm the decision of the court below.

Riggs and Michael McCaffrey are the parents of a daughter, born October 13, 2002. They were never married to one another. After the couple ceased to be in a romantic relationship, McCaffrey filed a petition seeking joint custody in January 2004. By agreed order, the family court awarded them joint custody with McCaffrey being designated as the primary physical custodian. Riggs was to have liberal visitation rights. In September 2005, the parties filed a document with the family court purporting to change the visitation to a shared parenting schedule, with each parent having the child fifty percent of the time. The family court never entered any orders related to this change in visitation.

Since that time, McCaffrey has moved from Hardin County to adjacent Meade County and begun cohabiting with his fiancée and her four children. Riggs has remarried and now has three children, one older and one younger than her daughter with McCaffrey. She filed a motion with the family court on June 20, 2007, requesting that custody be changed to joint custody with herself as the primary physical custodian. Riggs attached an affidavit in support of her motion, as required by statute. The family court, however, denied the motion without a hearing after finding that Riggs' affidavit did not furnish adequate grounds for a hearing. This appeal followed.

On appeal Riggs argues that her affidavit established that her daughter's best interests would be served by a change in custody due to

circumstances which have arisen since the entry of the original order. KRS 403.340(3) outlines the following five factors which a court must consider in reaching a determination that a change in circumstances results in the child's best interests being served by custody modification:

> (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;
> (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.

Riggs contends that her affidavit showed the presence of three of the five factors, KRS 403.340(3)(a), (b), and (c). We disagree. First of all, we note that McCaffrey does not agree to the requested modification. Both he and his fiancée filed affidavits explaining their opposition to Riggs' motion to be named primary physical custodian. Further, he continues to advocate for the family court's decision by participating in the appellate process. The second factor, integration into Riggs' family, is debatable given that, under the visitation schedule which has been in effect since September 2005, the child has spent an equal amount of time in the homes of both her mother and father. Finally, we need not address in detail whether the proposed modification would serve the child's best interests, as determined by the factors found in KRS 403.270(2), because the family court

correctly found that Riggs' affidavit did not establish adequate cause to conduct a hearing on her custody motion.

KRS 403.350 requires a party seeking custody modification to submit "an affidavit setting forth facts supporting the requested order or modification[.]" In her affidavit, Riggs stated that the shared parenting schedule set up by the parties had been working well. Her concern was that, due to McCaffrey's move, they would no longer be able to split their time with the child evenly. She also mentioned her other two children and the bond between them and their half-sister. The crux of Riggs' affidavit was her assertion that

> we provide her with a stable environment. The father of the child has moved in with his girlfriend who has four children and frankly I am not sure whether or not she is divorced or what her marital status is. I have concern about the stability of the child in that environment and believe that the best interest of the child would be served by staying with me.

Further, Riggs asserted that, being a stay-at-home mother, she would be able to spend more time with her daughter than McCaffrey.

The family court determined that it was required to deny the motion for custody modification because Riggs' affidavit did not establish adequate cause for a hearing. KRS 403.250. The court's order analyzed the affidavit and found that

> KRS 403.350 requires a party seeking a change in custody to submit an affidavit with his motion setting forth *facts* supporting the requested change. Such facts must establish adequate cause for a hearing. Lacking such facts, the court is required to deny the motion

> without a hearing. Adequate cause, in this context, requires more than prima facie allegations that might permit inferences sufficient to establish grounds for a change in custody. Roorder v. Roorder, 611 P.2d 794, 796 (Wash.App. 1980). Given the trial court's reluctance to change custody, the movant must present facts in her affidavit that compel the court's attention. . . . The purpose of KRS 403.340 and 403.350 is to maximize the finality of a custody decree without, of course, jeopardizing the health and welfare of the child. . . . [Riggs] could have filed a motion regarding custody prior to the move, yet she did not. Since [McCaffrey] has already moved, if there was in fact, anything that was negatively impacting the minor child, then [Riggs] could have supplied these facts in her affidavit, but there were no facts alleged.

Riggs argues that our decision in *Fowler v. Sowers*, 151 S.W.3d 357 (Ky.App. 2004), supports her contention that the family court erred in finding that her affidavit did not establish sufficient cause for a hearing. While it is true that this Court vacated the family court's order dismissing a motion for custody modification without an evidentiary hearing in *Fowler*, the facts in that case established the father's right to such a hearing. In *Fowler*, the father alleged that, since their divorce, his ex-wife had moved with their child no fewer than six times, given birth to another child out of wedlock, remarried, moved to North Carolina, and planned to move to Alaska with her new husband. We determined that the move to Alaska represented a change in the child's circumstances and that removing him from his father and entire extended family, on both sides, raised a question as to whether his best interests were served by custody modification.

In the case at hand, Riggs did not allege any such instability in McCaffrey's lifestyle. While the child's father has moved in with his fiancée and her children, Riggs has added a new husband and baby to her family. Further, McCaffrey's move from Hardin County to neighboring Meade County need not deprive the child of regular contact with her mother and half-siblings. The language in the family court's order reflects, almost verbatim, our decision in *West v. West*, 664 S.W.2d 948 (Ky.App. 1984), wherein we sustained a trial court's finding that affidavits supporting a custody modification motion were insufficient to provide adequate cause for a hearing. "While the affidavits may have created an inference for change, they did not compel a finding of adequate cause sufficient to warrant a hearing. Lacking this finding, this Court will not find an abuse of discretion." *West*, 664 S.W.2d at 950. Similarly, in the case at hand, Riggs' affidavit did not compel a finding in her favor on the issue of the family court's refusal to hold a hearing.

For the foregoing reason, the judgment of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barry Birdwhistell
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Kimberly Lynne Staples
Radcliff, Kentucky