

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002528-ME

J.M.A.H.

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE MARGARET RYAN HUDDLESTON, JUDGE
ACTION NO. 03-CI-00496

M.G.A.

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: MOORE, NICKELL, AND STUMBO, JUDGES.

STUMBO, JUDGE: J.M.A.H. (hereinafter Mother) appeals from “Amended Findings of Fact, Conclusions of Law and Decree Modifying Custody to Respondent” of the Warren Circuit Court arising from the motion of M.G.A. (hereinafter Father) to modify custody. Mother argues that the findings of fact contained in the order on appeal are not supported by substantial evidence, and she

seeks an order reversing the order and re-establishing the prior joint custody arrangement. For the reasons stated below, we affirm.

On October 14, 2004, the Warren Circuit Court rendered a Decree of Dissolution of Marriage dissolving the marriage of Mother and Father. The parties concurrently agreed to a joint custodial arrangement of their only child, A.G.A. (hereinafter Child), who was born on September 26, 2001.

On November 3, 2006, Father filed a Motion for Change of Custody in Warren Circuit Court pursuant to KRS 403.340. As a basis for the motion, Father tendered an affidavit setting forth various claims regarding Child's safety while in the care of Mother, and he argued that an award of sole custody in his favor would be in Child's best interest. Father set forth a number of allegations in support of his motion, including the claim that Child was burned with a cigarette and contracted anal warts from a male sexual perpetrator while in the care of Mother.

On January 11, 2007, the court rendered an Ex-Parte Temporary Removal and Temporary Child Custody Order placing Child in the care of Father. A hearing on the Motion for Modification of Custody began on February 1, 2007, and after some delays was concluded on June 28, 2007. On November 11, 2007, the circuit court rendered Amended Findings of Fact, Conclusions of Law and Decree Modifying Custody. The decree sustained Father's motion and awarded sole custody of Child to him. As a basis for the order, the court found that Mother 1) persisted in smoking tobacco in Child's presence, which caused him medical

problems, 2) neglected Child's medical care by failing to provide him regular examinations and immunizations, 3) failed to determine the cause of Child's anal warts or to treat them, 4) exposed Child to adults "who have likely done physical abuse, by cigarette burns and inappropriate physical spankings, and possible sexual abuse" of Child, 5) has "ignored" the emotional needs and care of Child, and 6) has criticized Father in front of Child resulting in damage to the relationship. The court went on to find that Child's present environment seriously endangered his physical, mental, moral or emotional health, and that a modification of the custodial arrangement was necessary to serve the best interests of the child. It also ruled that Mother was entitled only to supervised visitation with Child. This appeal followed.

Mother now argues that the circuit court erred in sustaining Father's motion seeking sole custody of Child. The corpus of her argument is her claim that the circuit court's findings of fact are not supported by substantial evidence. She notes, for example, that while it is uncontroverted that Child had anal warts, "the source of the warts is very much in debate." She also points out that while a Dr. Lowery found the warts to be in a ring configuration around the anus suggesting that they were caused by sexual contact, a subsequent examination by Dr. Asriel indicated that the warts were clustered 3 or 4 centimeters away from the anus which did not indicate sexual abuse. Similarly, she claims that any relationship between her smoking and Child's respiratory health issues occurred

prior to the dissolution of their marriage and is not relevant for purposes of Father's motion to change custody.

Mother goes on to challenge the other findings upon which the circuit court's ruling was based. She maintains that the claim that Child was burned by a cigarette was investigated by the Cabinet for Health and Human Service and found to be unsubstantiated. As for the claim that Mother failed to have Child immunized in a timely manner, she argues that the immunization at issue were done prior to the order making Mother the residential custodian and again is not relevant for purposes of Father's motion to change custody. Similarly, Child's treatment for bug bites occurred, according to Mother, before the dissolution and is not relevant for purposes of the instant motion. Lastly, Mother argues that Child's anxiety at being dropped off at her house is a normal childhood response to stress, and that the claim that Child was sexually abused was found by a social worker to be unsubstantiated. In sum, Mother contends that the order on appeal is not supported by the record and should be reversed.

We have closely examined the record and the law, and find no basis for reversing the order on appeal. As the parties are well aware and properly note in their appellate briefs, the trial court's findings of fact shall not be set aside unless they are clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the weight and credibility of the witnesses. CR 52.01; *A.D.B. v. Commonwealth, Cabinet for Health and Family Services*, 205 S.W.3d 255 (Ky. App. 2006). A finding of fact is not clearly erroneous if supported by

substantial evidence, which is evidence of substance of relevant consequence sufficient to induce conviction in the minds of reasonable people. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998). A custody award will not be set aside unless it constitutes an abuse of discretion. *A.D.B., supra*.

KRS 403.340 states,

- (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.
- (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, 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) 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.
- (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, without good cause as specified in KRS 403.240, 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, as defined in KRS 403.720, 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.

On a motion to change child custody filed more than two years after date of original custody decree, the statutory requirement that the child's present environment endanger seriously his physical, mental, moral, or emotional health applies before considering whether modification is necessary to serve best interest of child. *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990).

In the matter at bar, Father's motion to modify custody was filed on November 3, 2006, more than two years after the original custody decree was rendered on October 14, 2004. The dispositive question, then, is whether the circuit court properly found that a change has occurred in Child's circumstances

and that modification is necessary to serve his best interests. Pursuant to KRS 403.340, this determination must be made by considering the factors set out in section (3).

We must answer this question in the affirmative. Dr. Mark Lowry, a board-certified pediatrician, testified that he examined Child on September 6, 2006, and diagnosed perianal warts. The warts were caused by HPV (i.e., human papilloma virus) which Dr. Lowry opined was likely transmitted by sexual contact. He further stated that while HPV could be transmitted from mother to child at birth, Child did not acquire it at birth as there was no record of HPV in Child's medical history until September 9, 2006. He also stated that the timing and distribution of the warts did "not lend itself to anything other than some sort of penetrative sexual contact."

Additional evidence was adduced that Father became suspicious in December, 2004, that Child was being sexually abused after Child complained of pain and burning in the afflicted area. Father responded by referring the matter to his church counselor and later to Social Services. It is noteworthy that this occurred approximately four months after Mother's boyfriend, M.K., moved into Mother's mobile home. Mother testified that she allowed M.K. to remain in the home for 2 months after she learned that he possessed and viewed child pornography, and when pressed she stated that there were times when M.K. was alone with Child and her other children from another father. Other testimony was offered that another "family friend" of Mother, namely T.C., possessed child

pornography and spent time alone with Child and the other children. While there was no direct evidence that M.K. or T.C. sexually abused Child, the circuit court relied on this testimony to conclude that Mother failed to properly care for Child “by exposing him and other members of her family to inappropriate adults who have likely done physical abuse, by cigarette burns and inappropriate physical spankings, and possible sexual abuse of the infant, [Child].”

We may not address the weight and credibility of this evidence, as that determination is left to the sound discretion of the circuit court. *A.D.B., supra*. We may determine, however, whether the evidence is sufficient to induce conviction in the minds of reasonable people and therefore constitutes substantial evidence sufficient to satisfy CR 52.01. *Id.* The evidence relating to Child’s exposure to HPV, the child pornography possessed by M.K. and T.C. - who on occasion spent time alone with Child and the other children - coupled with testimony that Child had a cigarette burn on his stomach and bruises on the back of his legs, constitutes substantial evidence in support of the circuit court’s findings. Furthermore, witness Barbara Sprouse of the Family Enrichment Center introduced a report concluding that Child should never be left alone with Mother. The circuit court expressly examined this evidence in the context of KRS 403.340 in concluding that Child’s present environment seriously endangered his physical, mental, moral or emotional health. Since substantial evidence exists in the record to support the circuit court’s findings of fact, and because those findings were

properly examined in the context of KRS 403.340, we find no error in the order on appeal.

For the foregoing reasons, we affirm the Amended Findings of Fact, Conclusions of Law and Decree Modifying Custody to Respondent of the Warren Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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