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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000186-ME

CARMEN GERACI

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE JO ANN WISE, JUDGE
ACTION NO. 05-CI-03491

JULIA BETH GERACI

APPELLEE

OPINION
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Carmen Geraci appeals the Fayette Circuit Court's order denying his motion to appoint a guardian ad litem and to have an updated custodial evaluation performed by a doctor. After careful review, we affirm.

On October 19, 2006, the Fayette Circuit Court entered a combined supplemental findings of fact, conclusions of law and decree providing for

timesharing, child support, property and debt distribution, and a decree dissolving the marriage of Julia Geraci (hereinafter “Julia”) and Carmen Geraci (hereinafter “Carmen”). The decree provided for timesharing of the parties’ minor child but did not provide for equal time sharing, and the issue was to be addressed again in May 2007. This was to allow the parties to demonstrate whether they could handle equal time sharing.

Furthermore, the decree provided that Carmen was to pay child support to Julia and that Julia was to take a “cooperative parenting class or an alternative class approved by the Court.” Julia completed an online cooperative parenting class on August 2, 2007. Carmen claims that a psychiatrist involved in the divorce proceedings recommended that the child not be exposed to Julia’s mother on a regular basis. However, the report and recommendations of the psychiatrist did not directly state that Julia’s mother, Ms. Clark, should not be allowed to see the child but instead found that Ms. Clark’s obvious disdain for Carmen might increase the possibility of alienation between the child and Carmen.

On October 11, 2007, Carmen Geraci filed a memorandum in support of increase in his share of timesharing, arguing that Julia was intentionally not cooperating with him in order to prevent him from getting increased time with their daughter. Carmen argued that Julia had failed to participate in the court required parenting class; that Julia had continued to expose their daughter to her mother, Ms. Clark; and that Julia had been disciplined by the Fayette County School System and resigned due to inappropriate behavior toward her students. On

December 3, 2007, Carmen filed a motion for appointment of a guardian ad litem and a motion to have Dr. Feinberg perform an updated evaluation. In these motions, he argued that because the parties were having trouble communicating and participating, a guardian ad litem was necessary, as was an updated evaluation by Dr. Feinberg.

The motion for a guardian ad litem and updated evaluation came before the court on December 7, 2007. The court denied the motion and stated that absent a proper showing it would not order equal timesharing. Finally, it directed that per the October 19, 2006, divorce decree, a parenting coordinator would address issues of timesharing. Carmen now appeals the December 2007 order.

Carmen argues that the Fayette Circuit Court abused its discretion in denying his motion for a guardian ad litem and for an updated custodial evaluation given the evidence of Julia's "egregious behavior." He argues that there are serious questions about whether or not Julia's behavior and lack of cooperation will endanger the welfare of their minor child. Specifically, Carmen argues that Julia verbally abused the children she taught within the Fayette County School system. He further argues that she did not follow the court's directive to take a parenting class and that she failed to undergo the court's recommended counseling sessions.

In reviewing a child custody decision, the test is not whether we would have decided differently, but whether the findings of fact of the trial judge were clearly erroneous or he abused his discretion. *Hamilton v. Hamilton*, 458

S.W.2d 451 (Ky. 1970). Here, the court made no findings of fact, having made all necessary findings of fact in its Decree, from which neither party appealed. Therefore, its rulings on Carmen's motions may be disturbed only if Carmen shows that the court abused its discretion.

In its decree, the trial court provided that "neither party will file any motions regarding their child until the parenting coordinator has addressed the issue." It does not appear from the record that Carmen addressed any of the issues on appeal with the parenting coordinator. Furthermore, while Carmen's motion for a guardian ad litem and for an updated custodial evaluation were not styled as motions for modification of custody or visitation, the court properly treated them as such given Carmen's immediately preceding memorandum of law in support of equal time sharing, where he argued the same issues. The Court found in its order that absent a proper showing, it would not order equal time-sharing.

KRS 403.340(2) provides that:

[n]o 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.

Given that the original child custody decree was entered on October 19, 2006, and Carmen's motion to modify timesharing was filed on June 11, 2007, he was clearly within the two year time period described in the statute. His motion, however, was

not accompanied by the requisite affidavits. Even assuming his memorandum can be considered an affidavit, the court did not find reason to believe that the child was in serious danger. Essentially, when Carmen was not granted equal timesharing, he filed motions to appoint a guardian ad litem and to have an updated custodial evaluation performed in an attempt to have another bite at the apple. None of the proffered reasons in his motions or memorandum persuaded the court that the child was in any danger based on Julia's behavior. Accordingly, equal timesharing was properly denied and the court properly declined to modify custody. We find no abuse of discretion.

We additionally find Julia's argument that this Court should dismiss Carmen's appeal because the order appealed from is not a final and appealable order is without merit. The January 4, 2008, order adjudicated all of the rights of the parties at the December 7, 2007, proceeding and as such, was a final and appealable order as defined by CR 54.01.

For the foregoing reasons, the order entered by the Fayette Circuit Court is hereby affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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