

RENDERED: SEPTEMBER 5, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001913-MR

JESSICA ADAMS

APPELLANT

v.
APPEAL FROM LAWRENCE FAMILY COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 04-J-00101

JOHN MAYO

APPELLEE

OPINION
VACATING AND REMANDING

*** * * * *

BEFORE: DIXON AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellant, Jessica Adams *pro se*, appeals from findings of fact, conclusions of law, and order of the Lawrence Family Court modifying a prior agreed child custody order and designating Appellee, John Mayo, as the residential custodian of the parties' minor child. Because the record

¹ Senior Judge Daniel T. Guidugli 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.

indicates that John's motion for modification failed to comply with the requirements of KRS 403.340(2), we are compelled to conclude that the trial court lacked jurisdiction to consider the motion. Therefore, the trial court's order granting the requested modification must be vacated.

The parties are the parents of one minor child, Addison Lynn Mayo, born September 1, 2004. Shortly after the child's birth, John filed a complaint in the Lawrence Circuit Court to establish paternity. On October 19, 2004, an agreed judgment was entered granting the parties joint custody with Jessica designated as the primary residential custodian. John was awarded standard visitation at his mother's home.

On August 9, 2005, John filed a motion for a change of custody. In his supporting affidavit, John alleged that Jessica had a criminal history; that she slapped the child; that she and her mother, who served as a babysitter, were drug users and sellers; that Jessica's residence was unsanitary, infested with bugs and animal feces; that the child was exposed to cigarette smoke in the home; and that Jessica had repeatedly violated all visitation orders. During a subsequent hearing, the trial court heard the testimony of numerous witnesses for both parties. Thereafter, the trial court entered detailed findings of fact and concluded that as a matter of law "the child's present environment seriously endangers the child's

physical, mental, moral, and emotional health.” Primary residential custody was awarded to John. Jessica thereafter appealed to this Court.

KRS 403.350 provides:

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 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.

Further, KRS 403.340(2) provides:

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 the child's present environment may endanger seriously his mental, moral, or emotional health.

In *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999), our Supreme Court held that when “[r]ead together, these two statutes² require that 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 its date, it must be accompanied by at least two affidavits. If the applicable requirement is not met, the circuit court is without authority to entertain the motion.” (Internal citations omitted). *See also Copas v. Copas*, 699 S.W.2d 758 (Ky. App. 1985).

² At the time the *Petrey* decision was rendered, KRS 403.340(2) was numbered as KRS 403.340(1). The statute was amended in 2001 and renumbered accordingly.

Clearly, the statutory requirements apply not only to a modification of sole custody, but also to modification of joint custody through a change in the primary residential custodian. *Fenwick v. Fenwick*, 114 S.W.3d 767, 783-84 (Ky. 2003); *Crossfield v. Crossfield*, 155 S.W.3d 743, 746 (Ky. App. 2005). Thus, if the requirements of KRS 403.340(2) are not satisfied, the trial court lacks subject matter jurisdiction to consider a motion for the modification of custody. *Petrey, supra*, at 788; *Copas, supra*, at 759. Such is true even if the error is not preserved for review, as in this case. Defects in subject matter jurisdiction cannot be waived and may be raised by the parties or courts at any time. *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001).

John's August 2005 motion for a modification of the custody decree was filed within two years of the October 2004 agreed judgment establishing joint custody with Jessica as the residential custodian. Thus, KRS 403.320(2) required John's motion for modification to be accompanied by two or more affidavits showing that "[t]he child's present environment may seriously endanger his physical, mental, moral, or emotional health[.]" John, however, only submitted his own affidavit in support of his motion. Absent compliance with the statutory mandates, the trial court lacked jurisdiction to entertain the motion for modification. It follows, therefore, that the trial court's findings of fact, conclusions of law, and order must be vacated, leaving in place the original agreed judgment naming Jessica as the child's primary residential custodian.

The order of the Lawrence Family Court is vacated and this matter is remanded for further proceedings.

WINE, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS AND FILES A SEPARATE OPINION.

DIXON CONCURRING: Although our decision is mandated by the statutory requirements and case precedent, I would note that the trial court herein had the opportunity to evaluate the evidence and the credibility of the witnesses.

See Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). In my view, the trial court's findings and conclusions were supported by substantial evidence and we reverse merely due to a technical error. *Id.* While our decision results in vacating the family court's custody determination, John is not without immediate recourse. Either KRS 610.050 or KRS 620.060 may provide an immediate remedy upon remand.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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