RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000480-MR

LORI LEA SPEARS, NOW MATHIS — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 03-CI-00008

GREGORY LEE SPEARS — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: ACREE AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

ACREE, JUDGE: Lori Spears, now Mathis (Mother) appeals a Boyd Circuit Court order modifying custody in favor of her former husband, Gregory Spears (Father). The original order incorporated agreements between Mother and Father and

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

provided for joint custody of their daughters, with Mother acting as primary residential custodian. Less than one year later, Father filed a motion for physical custody after Mother remarried. Father then sought permanent custody, which was granted over Mother's objection that Father's custody motion did not meet statutory requirements. She also appeals from a finding that Father owed no child support arrearage. We have considered the issues and the evidence and concluded that the circuit court acted outside its jurisdiction with regard to the custody modification. Consequently, the circuit court's order is affirmed in part, and reversed in part and remanded.

Mother and Father married in 1986 and are the parents of two daughters born in 1995 and 1997 respectively. The parties separated in December 2002, and Father filed for divorce the following month. After mediation, the parties were able to reach two agreements pertaining to custody, support, and property division. The first agreement, signed on March 16, 2005, stated that the parties will have joint custody and reserved issues of child support, maintenance, and the designation of a primary residential custodian to be decided by the circuit court. The following day, the parties entered a supplemental agreement designating Mother as primary residential custodian and recognizing her agreement to live in the marital residence with the girls until June 1, 2006. This agreement also provided that Father would continue to pay Mother's household expenses, plus an additional amount of family support.

The Domestic Relations Commissioner issued a report in April 2005 recommending entry of a decree dissolving the marriage and incorporating the agreements between the parties. The circuit court entered a decree that same day adopting the DRC's recommendations and reserving the issues of child support, maintenance, attorney's fees and costs for decision after the entry of the decree.

Father remarried in April 2005, one month after the divorce decree was entered. In response to Mother's request for child support and maintenance, the DRC issued a report in July recommending that the circuit court order Father to pay $2,000.00 per month in child support and $2,500.00 per month in maintenance until Mother had completed her degree and obtained employment as a licensed practical nurse. Both parties filed exceptions to the recommendations. The circuit court took no action with regard to the DRC's recommendations until the following year.

Mother remarried in December 2005, prompting Father to file a motion for physical custody of the girls only nine months after the original joint custody decree. The circuit court did not immediately rule on Father's motion. Soon, Mother and Father were experiencing substantial communications difficulties. Each party accused the other of making important decisions affecting the children's welfare without consulting the other parent.

On April 21, 2006, the circuit court finally addressed the DRC's report and recommendations from the previous July. The parties' objections to the report were overruled with the exception of the provisions regarding child support

and maintenance. The order postponed decision on these issues until after June 1, 2006 when, according to their agreement, Mother was to vacate the marital residence. Before that date arrived, Mother vacated the marital residence and moved with her new husband and the parties' daughters to Wayne, West Virginia. The crisis point was reached when Mother removed the girls from the Boyd County school system and enrolled them in schools in West Virginia. Father filed a second motion on April 24, 2006 requesting permanent custody of the girls with Mother to be granted visitation rights.

Neither of Father's motions to modify custody was accompanied by an affidavit, nor was there ever any allegation that the present custody arrangement posed a serious danger to the girls. Consequently, Mother argued that the motion should be denied for failure to comply with the procedural requirement of section (2) of KRS 403.340 governing motions to modify a custody decree brought less than two years after its date. Without addressing the procedural argument, the circuit court ordered a hearing to determine the motion's substantive issue.

On March 29, 2007, the DRC issued a lengthy report regarding Father's custody motion and Mother's request for child support. The DRC found that the original order of joint custody was based on an agreement between the parties and that Mother failed to uphold her end of the bargain when she moved to West Virginia with the children and attempted to enroll them in schools there. The DRC also noted Mother's failure to allow the children to fully participate in extracurricular activities in which their father had involved them. Finally, the

DRC opined that the parties were unable to communicate meaningfully regarding the children. In the end, the DRC determined that the children's best interests would be served by granting Father sole custody with Mother having visitation. Further, the DRC found Father did not owe any arrearages in child support, and recommended that Mother not be required to pay any child support for two years.

Eleven months later, the circuit court finally acted on the matter, entering an order which adopted the DRC's report. Both the DRC and the circuit court completely ignored the statutory requirements for modifying custody found in KRS 403.340(2).

On appeal, Mother argues that the circuit court had no jurisdiction to hear Father's custody motion since he failed to comply with the requirements of KRS 403.340(2) which provides as follows:

> (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.

The circuit court's custody decree was entered less than two years prior to either date on which Father filed his motions to modify custody. Neither motion satisfied the requirements of KRS 403.340(2).

The standard of review in this case is "whether the findings of the trial judge were clearly erroneous or he abused his discretion." *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974) (citation omitted).

Unfortunately, and despite the clarity of the statute, this issue has been before our appellate courts many times. In *Robbins v. King*, 519 S.W.2d 839 (Ky. 1975), the Kentucky Supreme Court, faced with just such a situation, reached the following conclusion:

> The statute unequivocally requires that the motion be denied unless the court finds that adequate cause for a hearing has been established by the affidavits. As there were no affidavits filed, the court had nothing to consider and was therefore required to forthwith deny the motion.

Id. at 840. A decade later, this Court was faced with the same issue. In analyzing the purpose behind the legislature's decision to enact KRS 403.340(2), we opined

> The legislature wants stability to come into the lives of those affected by a custody decree, and it has provided for a two-year period of postdecree adjustment for the children. There is a safety valve built into the statute for situations of present environmental endangerment to the child. The endangerment, which must be of a serious nature, must be presented to the circuit court by motion "made on the basis of affidavits."
>
> If the statute required only one affidavit the circuit courts would be continually harassed by the loser in the prior custody battle with a demand for modification. The wisdom of the legislature was to provide for stability and continuity in the child's life for at least a two-year period, while on the other hand not forgetting the child's interest if a matter of urgency arises which endangers, or threatens to endanger, the child. As the modification of the custody decree here was done in disregard of the

> procedural mandates of KRS 403.340(1), the circuit court was without authority to consider a modification of custody.

Copas v. Copas, 699 S.W.2d 758, 759 (Ky.App. 1985). Nevertheless, confusion appears to have remained.

One year after *Copas*, this Court opined in *Benassi v. Havens*, 710 S.W.2d 867 (Ky.App. 1986) that KRS 430.340 did not apply to motions to modify *joint* custody. We thought "modification should be made anew under KRS 403.270 as if there had been no prior custody determination [since] joint custody is no award at all when considering modification of the arrangement." *Benassi* at 869; *see also Erdman v. Clements*, 780 S.W.2d 635, 637 (Ky.App. 1989), *abrogated by Fenwick v. Fenwick*, 114 S.W.3d 767, 781 (Ky. 2003).

In *Mennemeyer v. Mennemeyer*, 887 S.W.2d 555 (Ky.App. 1994), we retreated slightly from that position, stating joint custody could only be modified over either party's objection "if the court first finds that there has been an inability or bad faith refusal of one or both parties to cooperate." *Mennemeyer* at 558.

Then in 2000, we finally recognized that these decisions had created an impermissible scheme for modifying custody which ignored the requirements of KRS 403.340(2). *Scheer v. Zeigler*, 21 S.W.3d 807, 811-12 (Ky.App. 2000)(en banc). In *Scheer*, this court overruled *Benassi* and *Mennemeyer* and held "that joint custody is an award of custody which is subject to the custody modification statutes set forth in KRS 403.340 and KRS 403.350 and that there is no threshold

requirement for modifying joint custody other than such requirements as may be imposed by the statutes." *Scheer* at 812-14.

Our decision in *Scheer* leaves no doubt that the circuit court in this case abused its discretion by addressing the substantive issue of Father's motions before Father satisfied the threshold requirement of the statute.

No doubt this Court's decisions prior to *Scheer* did not provide the clearest guidance. However, *Scheer* rectified that lack of clarity so that it is time to repeat Justice Palmore's admonition.

> It would be very helpful, and might sometimes obviate the time and expense of appeals, if lawyers and judges would pay some attention to the statutes governing matters of this sort. The statute applicable to this proceeding is KRS 403.340. It sets forth the only way in which a custody decree may be modified within two years after its date. This record discloses no semblance of compliance with it.

Chandler v. Chandler, 535 S.W.2d 71, 72 (Ky. 1976), *see also*, *Robinson v. Robinson*, 211 S.W.3d 63, 67 fn.6, 69 (Ky.App. 2006)(KRS 403.340 and KRS 403.350 "establish certain clear prerequisites to the modification of a prior custody decree where the modification is sought earlier than two years after its entry.").

Father argues in support of the circuit court's decision that the previous award of custody based on the parties' written agreements was temporary in nature. Thus, he contends that no error occurred in basing the decision to grant him sole custody on the best interests standard found in KRS 403.270(2). We cannot agree.

The parties' agreements do not suggest that the arrangement was temporary. The circuit court's decree dissolving the parties' marriage specifically found that the agreements were not unconscionable and incorporated these terms into its decree. Nothing in the decree suggests the custody arrangement was temporary. Father's argument fails.

Father next claims that Mother's move to Wayne, West Virginia (a distance of only thirty miles) shows both that she never intended to honor her agreement to reside in the marital residence until June 1, 2006, and that she failed to cooperate with Father in making decisions affecting their children. This, he argues, justifies the circuit court's order. *Scheer*, he claims, supports his argument that the circuit court could consider the parties' inability to cooperate when modifying joint custody orders. We cannot agree.

First, Father ignores our holding in *Scheer* that a party seeking modification must satisfy that threshold requirement. *Scheer* at 814. Subsequent cases have referred to this as a jurisdictional requirement of KRS 403.340(2). *Robinson*, 211 S.W.3d at 69 ("The filing of affidavits, therefore, is a jurisdictional requirement."), *citing Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky.2006)("[T]rial court had no jurisdiction to modify the [permanent custody] order unless a motion to modify, along with a supporting affidavit, was filed in the case."). Father filed no affidavits in this case and therefore, the trial court could not proceed to the substance of Father's argument.

Second, the Kentucky Supreme Court has already determined that the relocation of the primary residential custodian by itself is insufficient to support an order modifying custody. *Fenwick v. Fenwick*, 114 S.W.3d 767, 771 (Ky. 2003).

Finally, Father contends that the circuit court's decision granting him sole custody was consistent with the children's best interests as determined under KRS 403.270(2). He points out the DRC's conclusion that the parties cannot communicate and presents this Court with a litany of Mother's alleged misdeeds. Once again, this is irrelevant to the analysis required by the statute. Since a permanent custody decree had been entered less than two years before Father's motions to modify custody were filed, the circuit court was required to deny his motions without a hearing. *Robbins v. King*, 519 S.W.2d 839, 840 (Ky. 1975)("As there were no affidavits filed, the court had nothing to consider and was therefore required to forthwith deny the motion."). Consequently, the order modifying custody and awarding Father sole custody is reversed with directions that the previous award of joint custody with Mother as primary residential custodian be reinstated.

Mother next contends that the circuit court erred in not awarding her child support, both past and present. The parties participated in hearings before the DRC which resulted in their signing two agreements later incorporated into the decree. Father testified that in March 2005 he was paying all of Mother's household bills in addition to giving her $1,000 per month. Their agreement required him "to continue to pay family support in generally the amount and for

the items he is now paying plus an additional $160.00 per month for housekeeping help." (Supplemental Agreement dated March 17, 2005).

The DRC recommended that Father be required to pay Mother a total of $4,500 in child support and maintenance per month. (DRC's report dated July 1, 2005). However, the circuit court never incorporated this recommendation in any order. The DRC's report of March 2007 noted that Mother had filed a motion the preceding August requesting that child support arrearages be determined according to the terms of an agreement between the parties setting child support at $2,500 per month from January through May 2006, and $2,000 per month thereafter. Unfortunately for Mother, the circuit court never incorporated that term in any order either. Thus, Father remained obligated to pay according to the more inexact terms of the parties' agreements reached in March 2005.

In her brief, Mother alleges that Father unilaterally stopped providing any child support or maintenance following her remarriage in December 2005. The DRC found that Father continued to pay all of the children's expenses, including medical insurance, medical, dental, and ocular expenses, school expenses, and clothing, for 2006. Further, he continued to pay all expenses associated with the former marital residence despite the fact that Mother's new husband and stepchildren resided there with her from December 2005 through the middle of following February. When Mother and daughters vacated the residence and Father moved in with his new wife, he was required to spend approximately $23,000.00 to repair damage to the home. Consequently, the DRC found that

Father owed no arrearages and recommended that neither party be obligated to pay support for the next two years.

We are unable to find that the circuit court abused its discretion in adopting the DRC's finding that Father owed no child support arrearages to Mother. *Eviston*, 507 S.W.2d at 153 (Ky. 1974)(citation omitted). However, given the fact that we have determined the circuit court improperly granted Father's motion for a change of custody, we must reverse that portion of the order stating neither party shall owe child support for two years. On remand, the circuit court is directed to restore the original custody award of joint custody with Mother as the primary residential custodian and to enter such orders regarding child support as may be appropriate under KRS 403.212.

For the foregoing reasons, the order of the Boyd Circuit Court is affirmed in part, reversed in part and remanded with directions.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Roger W. Hall
Catherine C. Hughes
Ashland, Kentucky