RENDERED: MARCH 27, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000859-ME

BRIAN MORGAN APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 08-CI-501439

STEPHANIE MORGAN APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: DIXON, KELLER, AND WINE, JUDGES.

DIXON, JUDGE: Brian Morgan appeals from a judgment of the Oldham Circuit Court,[1] modifying custody, modifying visitation, and establishing child support for his two children with his ex-wife, Stephanie Morgan.

[1] After the judgment was rendered, Judge Feeley transferred the case from Oldham Circuit Court to Jefferson Circuit Court.

In April 2006, Brian filed a petition seeking sole custody of his children in Oldham Circuit Court. At that time, Stephanie lived in Strawberry Plains, Tennessee, and the children resided with Brian in Oldham County.[2] The lengthy record reflects that an acrimonious relationship existed between the parties during the litigation. On April 26, 2006, the court granted Brian temporary custody of the children and allowed Stephanie supervised visitation.

In October 2006, the court ordered a custody evaluation of both parties and modified the custody arrangement to allow joint custody with Brian as the primary residential custodian. Thereafter, in April 2007, the court modified the visitation arrangement after Brian alleged the children had been abused while visiting Stephanie in Tennessee. The court restricted Stephanie's visitation with the children to supervised visits in Oldham County. In October 2007, the court granted Brian's motion for a permanent custody order. The court awarded Brian sole custody of the children and allowed Stephanie to continue restricted, supervised visitation in Oldham County. Stephanie did not appeal the final custody order.

In December 2007, Brian renewed an earlier motion for child support, and the court held an evidentiary hearing on December 21, 2007. Stephanie, whose attorney had withdrawn, appeared *pro se* at the hearing. Stephanie complained that she had not seen her children in two months. The court set child

[2] The parties were married at the time the petition was filed. Brian filed for divorce in Knox County, Tennessee, and the final judgment of divorce was rendered in September 2007, during the pendency of the custody action.

support at $305.00 per month, retroactive to October 16, 2007. The court also set a future hearing date to address Stephanie's concerns regarding visitation.

The court held a hearing on February 29, 2008, and heard testimony regarding child support and visitation. The court rendered an order March 17, 2008, noting that it had reviewed a report tendered by the custodial evaluator, Dr. Cebe. The court ordered Brian and Stephanie to share joint custody of the children, with Brian serving as primary residential custodian. The court further ordered that Stephanie could have three days of supervised visitation per month, in Tennessee. The court also left in place its previous order on child support, which required Stephanie to pay $305.00 per month.

Brian filed a motion to alter, amend, or vacate, arguing the court impermissibly modified custody and visitation and erroneously established the retroactive date for child support. The court denied Brian's motion, and this appeal followed.

I. Custody

We recognize that the trial court enjoys broad discretion in resolving matters relating to child custody. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Accordingly, this Court will not set aside those findings unless they are clearly erroneous. *Id*.

Brian contends the court impermissibly modified a permanent custody decree without following the relevant statutory procedure. Brian points out that the trial court rendered an order on October 19, 2007, which awarded Brian sole

custody of the children. That order was final and appealable, though Stephanie took no appeal. Thereafter, in March 2008, the court rendered an order awarding Brian and Stephanie joint custody of the children. After thoroughly reviewing the record, we agree with Brian that the court committed reversible error.

Modification of a custody decree "falls exclusively within the purview of KRS 403.340 and 403.350[.]" *Robinson v. Robinson*, 211 S.W.3d 63, 70 (Ky. App. 2006). KRS 403.350 states:

> A party seeking . . . modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting . . . modification . . . . 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.

KRS 403.340 provides, in relevant part:

> (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.

Together, the statutes require that two affidavits must accompany a motion to modify custody if it is within two years of a prior custody order. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). In the case at bar, the record reveals that

Stephanie neither filed a motion to modify custody, nor submitted affidavits supporting a modification. Rather, at the child support hearing in December 2007, Stephanie complained she had not visited with her children in two months.

Thereafter, on February 29, 2008, the court held a hearing to address Stephanie's concerns as to visitation. Following the hearing, and despite Stephanie's failure to meet the statutory requirements for modifying custody, the court rendered an order on March 17, 2008, awarding joint custody to the parties and reinstating Stephanie's out-of-state visitation.

In *Gladish v. Gladish*, 741 S.W.2d 658 (Ky. App. 1987), this Court stated that, where the mandates of KRS 403.340 were not followed, "the trial court was without authority to modify the custody decree . . . on its own motion." *Id*. at 661. Further, in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), our Supreme Court recently noted "that a trial court's *sua sponte* review and modification of a custody order within the two year period was in error." *Id*. at 767, *citing Chandler v. Chandler*, 535 S.W.2d 71, 72 (Ky. 1976).

Here, as in *Gladish*, *supra*, not only were the statutory requirements ignored by the court, there was no evidence that Stephanie *wanted* to modify the custody decree. *Id*. The record reveals only that Stephanie was dissatisfied with the visitation restrictions. Since the issue before the court concerned only visitation, the court clearly erred by modifying its prior permanent custody order, *sua sponte*. *Id*. Consequently, as there was "no semblance of compliance with" the relevant statutes, *Chandler*, 535 S.W.2d at 72, we vacate that portion of the

court's March 17, 2008, order awarding joint custody and remand this case with instructions to reinstate the October 19, 2007, order awarding Brian sole custody of the children.

II. Visitation

Brian next argues that the court improperly modified visitation without making a finding that it was in the best interests of the children. We disagree.

Pursuant to KRS 403.320(3), "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child."

It is well-settled that "this Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

In the case at bar, the trial court held a hearing, heard testimony, and accepted evidence from the parties. *See* CR 52.01. Additionally, the court relied on Dr. Cebe's custodial evaluation, which was prepared after Dr. Cebe interviewed Stephanie and Brian.

After thoroughly reviewing the record, it is apparent that the court's order supports a conclusion that the modification of visitation was in the best interests of the children. The court was clearly concerned for the children to have opportunities to bond with their mother, and the court cautiously set forth

additional restrictions on Stephanie's parenting time while allowing three days of visitation in Tennessee. Under the facts presented here, we are not persuaded that the trial court abused its discretion by modifying Stephanie's visitation rights.

III. Child Support

Finally, Brian raises two issues relating to child support. He contends the court incorrectly calculated the amount of child support and erroneously established the retroactive date.

Brian's argument as to the amount of child support is not preserved for our review. At the child support hearing in December 2007, Brian opined that he was entitled to $977.50 per month based on the needs of the children. *See* KRS 403.211(5). The court disagreed and instead imputed minimum wage to Stephanie and set child support at $305.00.

Thereafter, at the hearing on February 29, 2008, Brian argued he was entitled to $426.74 in monthly support. The court again disagreed with Brian and concluded $305.00 per month was the appropriate amount of child support.

Brian now contends that the court erroneously calculated child support and that he is actually entitled to $977.50 per month. However, Brian neither challenged the court's calculation in his CR 59.05 motion to amend, nor requested specific findings from the court as to its calculation. Consequently, any error is waived, and we decline to consider this argument on appeal. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *See also Johnson v. Johnson*, 232 S.W.3d 571, 575 (Ky. App. 2007).

Brian also challenges the retroactive date established by the court for child support. KRS 403.160(2)(b) provides that, a "child support order entered following [a] hearing shall be retroactive to the date of the filing of the motion for temporary support unless otherwise ordered by the court." Brian opines that he first filed a motion requesting child support on July 14, 2006; however, child support was never awarded. More than one year later, Brian renewed his request for child support in a motion tendered October 16, 2007. In consideration of Brian's renewed motion, the court held that, upon receipt of Stephanie's wage information, child support would be established retroactive to July 14, 2006.

Thereafter, on December 12, 2007, Brian filed a third motion requesting child support, and the court held an evidentiary hearing on December 21. The court rendered an order establishing child support of $305.00 retroactive to October 16, 2007, the date Brian renewed his motion for child support.

Brian contends the court clearly erred by contradicting its prior order and establishing October 16, 2007, as the retroactive date for support. We disagree.

The trial court enjoys broad discretion in establishing child support. *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000). As a reviewing court, we defer to the trial court's discretion as long as its decision was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Likewise, we are mindful that the

lower court had the opportunity to weigh the evidence and determine the credibility of the testimony. CR 52.01; *Reichle*, 719 S.W.2d at 444.

Under the circumstances presented here, we are not persuaded that the court abused its discretion in establishing the retroactive date for support. Although KRS 403.160(2)(a) provides that support “shall” be retroactive to the date the motion was filed, the statute also vests the court with authority to order a different date for support to commence. Here, the court heard testimony from Stephanie regarding her employment history and her ability to pay support. In light of the evidence and testimony presented, we conclude the court did not abuse its discretion by establishing October 16, 2007, as the retroactive date for support.

For the reasons stated herein, we vacate the portion of the order modifying custody and remand with instructions to reinstate the October 19, 2007, order awarding Brian sole custody of the children. We affirm the remaining portions of the order relating to visitation and child support.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jonathan O. Wells
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BRIEF FOR APPELLEE:

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Louisville, Kentucky