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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001182-ME

COURTNEY M. SPRAGENS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE GARBER, JUDGE
ACTION NO. 10-CI-501108

JOHN P. EADS and
PEGGY M. PICKETT — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

COMBS, JUDGE: Courtney Spragens appeals from orders of the Jefferson Family Court concerning the custody and residential status of the parties' minor child. After our review, we affirm.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Spragens and appellee John P. Eads were never married. They are the parents of P.D.E., an eleven-year-old boy diagnosed with Asperger's syndrome.[2] Both parties lived in Fayette County.

In 2001, an agreed order concerning the child's custody and control was entered in the Fayette Circuit Court. The parties agreed that P.D.E. would reside with Spragens and that Eads's visitation would proceed according to a schedule devised by the parties. In 2003, the Fayette Circuit Court awarded the parties temporary joint custody; Spragens was designated the primary residential custodian, and Eads's visitation schedule was established. Subsequently, Spragens became an officer in the United States Army.

Spragens moved to Tennessee in November 2009, and the parties agreed that P.D.E. would live with his maternal grandmother, appellee Peggy Pickett, in Spencer County during the week, throughout the school year. By that time, Eads had moved to Jefferson County but continued to work an evening shift at Toyota Motor Manufacturing in Scott County. The parties developed a time-sharing arrangement according to which Eads would care for P.D.E. every other weekend, and Spragens would care for him on the alternating weekends.

In April 2010, Eads filed a petition in Jefferson Family Court to establish permanent joint custody of the child. Spragens was scheduled to deploy to Afghanistan approximately one month later.

[2] Asperger's syndrome is an autistic spectrum disorder that involves difficulty with the development of communication and social skills. www.mayoclinic.com/health/aspergers-syndrome.

At a hearing held on April 23, 2010, Spragens objected to venue in Jefferson County. She argued that Spencer County was the only appropriate venue. Following the hearing, the Jefferson Family Court determined that venue was proper and awarded Eads "primary temporary residential custody."

Spragens was deployed as scheduled. She returned stateside upon learning that she was pregnant. In June 2010, Spragens filed a motion requesting that custody of the child revert to her pursuant to the provisions of Kentucky Revised Statute[s] (KRS) 403.340(5)(a), pertaining to the modification of a child custody decree based in whole or part upon the active duty of a parent deployed abroad as a regular member of the United States Armed Forces. Following a hearing, the family court rendered an order on August 9, 2010, directing that Eads would "continue as temporary primary residential parent." Spragens was awarded "parenting time" every other weekend.

A hearing to establish permanent custody and the child's residential status was held on April 22, 2011. Based upon the weight of the testimony of the witnesses and pursuant to the recommendations of a full custodial evaluation of the parties, the family court determined that it was in the best interests of the child for the parties to continue to exercise joint custody, with the child residing primarily with his father. The family court's order was entered on June 6, 2011. This appeal followed.

Spragens presents three issues for our review. First, she contends that the family court erred by determining that venue was appropriate in Jefferson

County. Next, she argues that certain procedural deficiencies precluded the relief that Eads sought: namely, his failure to disclose a prior custody action or to involve the maternal grandmother with whom the child was living. Finally, Spragens contends that the family court erred by failing to conclude that the provisions of KRS 403.340(5) governed, thus requiring that the parties revert to the prior custody arrangement.

Spragens contends that Spencer County was the proper venue for the custody action since the child attended school there and had lived there for much of the year by agreement of the parties. She argues that the Jefferson Family Court erred by deciding the parties' custody issue on the merits rather than deferring to the Spencer Family Court. We disagree.

Venue relates to the proper place for a claim to be heard. *Dollar General Stores, Ltd. v. Smith*, 237 S.W.3d 162 (Ky. 2007). In child custody cases, in which the best interests of a child are paramount, "looking to the 'more convenient and most interested' forum provides a common-sense approach." *Lancaster v. Lancaster*, 738 S.W.2d 116 (Ky. App. 1987), *citing Shumaker v. Paxton*, 613 S.W.2d 130 (Ky. 1981). Matters of venue are left to the family court's discretion and must be upheld absent an abuse of discretion. *Williams v. Williams*, 611 S.W.2d 807 (Ky. App. 1981).

The factual findings of the family court clearly indicate that it believed that Jefferson County had significant contacts with the child permitting the case to be heard in the county. The court found that Eads was a resident of Jefferson County

and that the child lived there every other weekend pursuant to the parties' time-sharing arrangement. It also found that Jefferson County was not an inconvenient forum for witnesses traveling from Spencer County, a short distance away. Furthermore, KRS 454.210(4) provides that where the exercise of personal jurisdiction of nonresidents is authorized, venue is proper in the county where the petitioner resides. The family court did not err as a matter of law, nor did it abuse its discretion by concluding that venue was proper in Jefferson County.

Next, Spragens argues that certain deficiencies in Eads's pursuit of the action (his failure to disclose a prior custody action or to involve the maternal grandmother with whom the child was living) precluded the relief he sought. We disagree.

KRS 403.838 requires each party in a child custody proceeding to give information in his or her first pleading concerning the child's present address and the names of the persons with whom the child has lived during the preceding five (5) years. The provision also requires the party to disclose whether he or she has participated in any other proceeding concerning the custody of or visitation with the child and to provide the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights to the legal or physical custody of the child.

In his petition for custody, Eads disclosed that the child was in the care and control of the parties but that he stayed with his maternal grandmother during the school week according to agreement of the parties. He also disclosed the

occurrence of the 2003 Fayette Circuit Court action. Eads denies that his failure to alert the Jefferson Family Court to a 2001 Fayette County action in his petition was the result of a deliberate deception.

We are not persuaded that Eads's failure to provide the information cited by Spragens precluded the court from rendering a decision in this matter. KRS 403.838 provides that if the required information is not furnished, the court, upon motion of party or its own motion, may stay the proceeding until the information is furnished. The required information was adequately furnished to the court, and any technical errors in reporting the information did not preclude the relief that Eads requested.

Spragens also contends that Eads's failure to have the petition properly served upon her and the child's maternal grandmother meant that the court never had personal jurisdiction over them. We disagree.

Since Spragens is a resident of Tennessee, the Office of the Secretary of State was served with a summons and copy of the petition for custody pursuant to the requirements of KRS 454.210. On April 26, 2010, the Office of the Secretary of State indicated to the Jefferson Circuit Clerk that it had served Spragens by sending a copy of the summons and petition by certified mail, return receipt requested, on April 2, 2010. The mail was returned as "undeliverable as addressed."

When the matter was initially heard by the court on April 23, 2010, Spragens appeared and objected to the court's jurisdiction over her. In June, she responded to the petition, preserving her defense of lack of personal jurisdiction.

Personal jurisdiction over Spragens, a nonresident, is authorized by the provisions of KRS 454.210. Summons was properly issued and executed, and service of process was properly affected upon her through the Secretary of State's Office. While the return of the Secretary of State was not filed until April 26, 2010, it was prepared on April 20, 2010. Pursuant to the provisions of KRS454.210(3)(b), the summons was deemed served as of that date. Spragens had actual notice of the proceedings, and the family court did not lack personal jurisdiction over her.

Since the child's maternal grandmother shared physical custody of the child and co-parented him with his parents, she had standing to bring an action seeking his custody. *See Mullins v. Picklesimer*, 317 S.W.3d 569, 575 (Ky. 2010), as modified on denial of reh'g (Aug. 26, 2010). And, in a separate action in Jefferson Family Court, she did so. Under these circumstances, we are not persuaded that Eads's failure to serve the child's maternal grandmother with his petition has any bearing on the issues raised by Spragens in this appeal.

Spragens also contends that the family court erred by admitting a custody evaluation prepared by a licensed psychologist because it included hearsay statements made by the child and was outside the scope of the evaluation that the court had ordered. In making a custody or visitation determination, a family court

"may seek the advice of professional personnel. . . ." KRS 403.290(2). In addition, the provisions of KRS 403.300(2) authorize a trial court to appoint a custodial evaluator and to consider the evaluator's report as evidence in making custodial arrangements.

Spragens has not identified the specific statements in the psychologist's report to which she objects. Nevertheless, we conclude that the out-of-court statements made by the child and others to the psychologists and included in the report submitted to the court are not hearsay. These statements were not offered to the court for the truth of the matters asserted. Instead, they were offered only to explain the psychologist's findings and recommendations. The court did not err by considering the report in its entirety.

Finally, Spragens contends that the family court erred by failing to conclude that the provisions of KRS 403.340(5) governed the action and required that the parties revert to the prior custody arrangement following her return from Afghanistan.

KRS 403.340(5)(a) provides, in pertinent part, as follows:

> any court-ordered modification of ***a child custody decree***, based in whole or in part on (1) the active duty of a parent . . . as a regular member of the United States Armed Forces deployed outside the United States . . . shall be temporary and shall revert back to the previous child custody decree at the end of the deployment outside the United States . . . as appropriate. (Emphasis added.)

Spragens contends that this statute requires that upon her return from deployment, the parties' custody arrangement had to revert to its pre-deployment

status; *i.e.*, with Spragens designated the primary residential parent. We do not agree that KRS 403.340(5)(a) is implicated at all. As the Jefferson Family Court observed in its order entered August 24, 2010, no custody decree as referenced in KRS 403.340(5)(a) was in effect when the court entered two orders (May 17, 2010, and August 10, 2010) as to ***temporary*** joint custody. Eads did not seek a change in custody but rather sought to establish a time-sharing schedule pursuant to KRS 403.320(3), which provides "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child…." Consequently, we conclude that the court's decision to designate Eads as the primary residential parent did not violate the provisions of KRS 403.340(5)(a) since they were never relevant.

We affirm the order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Louisville, Kentucky

BRIEF FOR APPELLEE EADS:

Bryan D. Gatewood
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