

RENDERED: DECEMBER 21, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-002324-ME

LEAH M. TACKETT (NOW LEAH QUESINBERRY)

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE D. MICHAEL FOELLGER, JUDGE  
ACTION NO. 07-CI-01985

AARON C. TACKETT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Leah M. Tackett (now Quisenberry, and hereinafter “Mother”) appeals from an Order of the Boone Family Court modifying child custody. She contends that the Order must be vacated because the movant and appellee herein, Aaron C. Tackett (hereinafter “Father”) failed to satisfy the minimal requirements necessary to vest jurisdiction with the Family Court. Mother also argues that she was denied due process of law, that the Order was

based on erroneous findings and incorrect law, and that the court failed to consider all relevant factors and make essential findings in violation of KRS 403.270(2) and KRS 403.340(3) and (4). We find no error, and accordingly affirm the Order on appeal.

Mother and Father were divorced by way of a Decree of Dissolution of Marriage rendered on June 8, 2008. The marriage produced one child who was born in 2006. At the time of dissolution, Mother resided in Lancaster, Kentucky, with her parents, and Father lived about an hour and one half away by car. The Family Court awarded joint custody and designated Mother as primary residential custodian. Father was granted reasonable visitation. The court found both parties to be loving and suitable parents. Mother subsequently married “Stepfather.”

On January 7, 2011, Mother notified Father by way of e-mail that she and Stepfather were moving to Florida. On January 12, 2011, and in response to Mother’s impending move, Father filed a *pro se* motion in Boone Family Court styled “Motion for Emergency Change of Custody Order.” The motion sought in relevant part the designation of Father as the primary residential custodian. In support of the motion, Father maintained that it was not in the child’s best interest to be removed from his father, that the child was integrated in the Northern Kentucky area and actively involved in sports with Father, and that the child had extended maternal and paternal family members in Northern Kentucky. Father argued that Mother had shown a lack of stability due to frequent moves, and

requested an Order providing that the child would live with him during the school year and with Mother during break periods.

A hearing on the motion was conducted on February 16, 2011, before Judge D. Michael Foellger. Judge Foellger noted that Father failed to produce an affidavit in support of the motion. After discussing the matter with the parties, the court characterized the issue as whether a change of custody was warranted and whether Mother would be permitted to relocate the child. The parties were then directed to mediate the matter, which resulted in a Temporary Agreed Order scheduling a hearing on “Father’s Motion to Modify Custody” on July 15, 2011.

Thereafter, Father obtained counsel who filed an “Amended Motion for a Change of Custody and Prohibition from Relocating the Minor Child to Another State.” The Amended Motion asserted that a change of custody was in the child’s best interest, and a supportive affidavit was tendered.

A hearing on the Amended Motion was conducted on July 15, 2011, where several parties testified. After considering the proof, Judge Linda Rae Bramlage rendered an Order sustaining Father’s motion and granting custody of the child to Father. In support of the Order, Judge Bramlage considered “all factors enumerated in KRS 403.270 and KRS 403.340,” and noted several findings of fact which she determined warranted a change in custody. She noted that the child was well integrated in day care and in his sports teams, and that most of his extended family resides in Kentucky. She found that Mother’s new husband “has a long criminal record of domestic violence and battery,” had a physical altercation with

Mother's older son, and impregnated Mother during her marriage to Father and assisted Mother in getting an abortion. The court found that Stepfather is not a good role model, and noted that he has produced no income in Florida. Judge Bramlage determined that "there was no reasonable basis or purpose to move to Florida," and concluded that it was in the child's best interest to remain with Father in Northern Kentucky.

The court's handwritten Order was memorialized with a formal Order on August 2, 2011. Father subsequently moved for and was granted detailed findings of fact and conclusions of law in support of the Order, and the court denied Mother's Motion to Alter, Amend or Vacate. This appeal followed.

Mother first argues that the Family Court's modification of custody must be vacated because Father's pleading failed to satisfy the minimal jurisdictional requirements necessary to vest jurisdiction with the court. She directs our attention to KRS 403.350 for the proposition that a party seeking to modify custody must 1) file a motion requesting custody modification, 2) attach at least one supportive affidavit and 3) give notice to other parties that a change of custody is sought. She contends that his failure to comply with any of these requirements divests the court of jurisdiction on the matter, and argues that Father failed to meet at least two of these requirements. First, she maintains that Father's pleading failed to request a change of custody; and second, she claims that Father failed to give her notice that a change of custody was being sought. Citing various published opinions, Mother asserts that Father's mischaracterization of his motion as a change of custody

motion did not transform it from a mere timesharing request. In sum, Mother contends that she reasonably believed that only a motion to modify timesharing was pending, and she seeks an order reversing the Order on appeal.

KRS 403.340 provides as follows:

(3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

- (a) Whether the custodian agrees to the modification;
- (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
- (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
- (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
- (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
- (f) Whether the custodian has placed the child with a de facto custodian.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

- (a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests[.]

Additionally, KRS 403.270 provides the best interest test:

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved[.]

And finally, a motion to modify custody must comply with KRS 403.350, which provides that,

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. If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding. 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.

Mother's argument on this issue centers on her contention that Father's pleading failed to request a change of custody and give her notice of his intent to seek a change of custody, and that these factors prevented the circuit court from exercising jurisdiction. We have closely examined the record and the law, and do not find this argument persuasive. Father's *pro se* pleading was styled "Motion for Emergency Change of Custody Order." Prior to the hearing on the motion, Father obtained counsel. Though perhaps inartfully drafted, the record reveals that Father's counsel, Mother's counsel and the trial judge spent considerable time considering how to proceed with the motion, what Father was seeking and whether the motion met the relevant statutory guidelines. After examining the motion outside the presence of counsel, Judge Michael Foellger characterized it as a "motion for change of custody based on relocation," and subsequently noted that no affidavit was appended as required by statute. The Judge asked Mother's counsel if she wished to dismiss the motion, then opined that he would rather give Father the time to support the motion with an affidavit rather than dismiss it.

After mediation resulted in a temporary agreed order, Father, through counsel, filed a pleading styled "Amended Motion for a Change of Custody and Prohibition from Relocating the Minor Child to Another State." A supportive affidavit was appended to the motion. Finally, when the matter came for another hearing on July 15, 2011, Judge Foellger noted that the court was to consider a motion for change in custody, to which Mother did not object.

We find no basis for concluding that Father failed to seek a change of custody, nor that Mother received inadequate notice of it. The record as a whole reveals that Father properly alleged the nature of his action and gave Mother notice of the motion in conformity with KRS Chapter 403. Additionally, it is uncontroverted that an affidavit was appended to Father's Amended Motion as required by KRS 403.350. From the outset, it is evident from the record that Father sought an Order designating "him as primary residential custodian." We cannot conclude that Mother was unaware of what Father was seeking, and find no error.

Mother next argues that the Family Court's modification of custody must be vacated because Father failed to comply with Family Court Rules of Procedure and Practice ("FCRPP") 7(1). FCRPP 7(1) is a local rule providing that

[i]n any action in which the permanent custody of the child(ren) is in issue, each parent shall, not less than 14 days prior to the day set for hearing, provide the other parent with a list of the name and addresses of every person and a short statement of the subject of their testimony . . . as well as a list of exhibits to be entered.

Specifically, she objects to Stepfather being called as a witness, and to his criminal record being raised as an issue. As a way of explaining why she did not raise this issue below, Mother maintains that if she "thought that a permanent change of custody was truly being sought, she would have insisted and expected compliance with FCRPP 7(1)." She contends that this failure constitutes a basis for reversing the Order on appeal.



Mother's argument on this issue centers on her contention that she was wholly unaware that Father was seeking a change of custody, and that she would have demanded compliance with FCRPP 7(1) had she so known. As noted above, however, this contention is refuted by the record. Father's decision to seek a change of custody is memorialized in both the transcript of record and the pleadings, beginning with his *pro se* motion asking the court "to designate him as primary residential custodian." She also acknowledges that she made no objection on this issue. Based on the totality of the record we find no error, and in the alternative cannot conclude that this rises to the level of palpable error.

Mother next contends that the Order on appeal must be reversed or vacated because it is based on clearly erroneous findings and incorrect law, and that it amounts to an abuse of discretion. She directs our attention to the elements of custody modification set out in KRS 403.340, and contends that the circuit court's judgment and order fails to set forth any essential findings addressing custody. Mother argues that the findings only address timesharing, and that the court misapplied the law in granting Father's motion for a change of custody. We find no error on this issue.

In both the initial handwritten Order rendered on July 15, 2011, and the subsequent formal Order rendered on August 2, 2011, the circuit court expressly considered all factors enumerated in KRS 403.340 (modification of custody decree) and KRS 403.270 (factors establishing the best interests of the child). It found no reasonable basis for Mother's relocation to Florida and noted that the

move has generated no income for Stepfather. The court found that the child is “extremely well integrated” in his day care and with his sports teammates, and that most of his extended family lives in Kentucky. As noted above, the court also determined that Stepfather is not a good role model based on his criminal history, altercation with Mother’s teenage son and failure to generate an income. The court found that when considering all factors, Mother and Stepfather “would not provide child a positive living environment.” In applying KRS 403.340 and KRS 403.270, the court concluded that it was in child’s best interest to remain in Northern Kentucky. We cannot conclude that the circuit court made erroneous findings or misapplied the statutory law in its determination of the child’s best interests. Accordingly, we find no error on this issue. Additionally, we find as unpersuasive Mother’s contention that the findings relied on were insufficient to support the court’s conclusion.

For the foregoing reasons, we affirm the Findings of Fact and Order of the Boone Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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