RENDERED: AUGUST 9, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001892-ME

PATRICK D. COWAN APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 10-CI-00246

SONIA K. MURRAY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Patrick David Cowan (hereinafter "Father") appeals from an Order Modifying Custody of the Laurel Circuit Court, which sustained the Motion of Sonia Kay Murray (hereinafter "Mother") for joint custody of the parties' minor child Christian. Father argues that the circuit court misapplied KRS Chapter 403, and that the court's findings are clearly erroneous and do not warrant a

modification of custody. We find no error, and accordingly affirm the Order on appeal.

Mother gave birth to Christian on October 2, 2007. A subsequent DNA test determined that Patrick David Cowan (hereinafter "Father"), to whom she was not married, was the biological father. On December 12, 2007, Father filed a Motion in Madison Circuit Court seeking sole custody of Christian. In support of the Motion, Father alleged that on December 7, 2012, Mother took Christian to Maine to live "off the grid" with Christian's grandmother and aunts in a cabin with no running water or indoor sanitary facilities, and only about two hours of electricity per day. Father also alleged that Mother had a history of mental illness and had neglected her other child as well. The Motion was heard on December 17, 2007, at which Mother failed to appear. Father was awarded sole custody of Christian based on his testimony and affidavit.

Mother filed a Response and Counter Petition on January 3, 2008, alleging that Maine was the proper jurisdiction for the custody proceeding. About three weeks later, Mother returned to Kentucky with Christian and the parties attempted to reconcile and seek counseling, and Mother and Christian began residing with Father.

On March 5, 2008, Mother filed into the record a copy of an order and summary findings of Maine's Department of Health and Human Services indicating that there was no evidence to support any finding of abuse or neglect. Mother vacated the residence with Father on July 18, 2008, and sought an

Emergency Protective Order (EPO). The EPO request was later dismissed when it was determined that an EPO rendered in November of 2007 was still active.

On August 13, 2008, the parties entered into an Agreed Order setting out specific visitation pending mediation. The following month, Mother filed a Motion for Temporary Custody, which resulted in a hearing and subsequent entry of a Temporary Timesharing Order. At that time, the parties were also restrained from contacting each other. Various motions were filed and hearings conducted over the months that followed, culminating in a final hearing held on April 23, 2009, wherein the Madison Circuit Court awarded sole custody of the minor child to Father. In support of the Order, the court determined that sole custody in favor of Father was in Christian's best interest. This determination was made in part based on Mother's flight to Maine with Christian to live "off the grid", and her apparent ambivalence about having Christian immunized. Additionally, the court found that Mother was "incompetent" as a parent, and that her decision to live a spartan existence in Maine with Christian and without notifying Father was "seriously flawed". In sum, the court determined that based on KRS 403.270(2), sole custody in favor of Father was in Christian's best interest.

Mother appealed to a panel of this Court, which affirmed the award of sole custody by way of an Opinion rendered on December 30, 2009. Thereafter, various motions were filed as to time sharing, visitation and child support. On June 21, 2011, Mother filed a Motion to Modify Custody and establish herself as joint custodian and primary residential custodian. In support of the Motion,

Mother alleged that 1) she had a residence and was able to provide a stable environment for Christian and his two half brothers, 2) she earned a bachelor's degree and had stable employment as Director of Human Resources at a nursing home, 3) Father was without a permanent address and did not provide a stable home environment, 4) Father showed an unwillingness or inability to comply with court orders, and 5) Christian's best interests were served by granting the Motion.

On July 11, 2012, the Laurel Circuit Court rendered an Order Modifying Custody which sustained Mother's Motion. After the parties filed motions to alter, amend or vacate the Order, the circuit court rendered an Amended Order Modifying Custody on November 5, 2012, which set forth additional findings. In support of the Order Modify Custody and Amended Order Modifying Custody, the Laurel Circuit Court determined that Mother's Motion to Modify Custody was filed more than two years after the original award of custody, and that modification was in Christian's best interest based on the court's determination that Mother was able to provide a more stable home for Christian. This appeal followed.

Father now argues that the Laurel Circuit Court erred in sustaining Mother's Motion to Modify Custody. As a basis for this contention, he maintains that the court's findings of fact are not supported by substantial evidence and are therefore clearly erroneous. Father argues that the trial court did not specifically find that there had been a change in circumstances sufficient to demonstrate that it was in the minor child's best interest to modify custody and timesharing. He notes that the Order rendered on November 4, 2012, does not mention a change in

circumstances. Additionally, Father argues that Mother's affidavit in support of her Motion was not adequate or otherwise sufficient to support the Motion.

Father also argues that Mother's Motion is procedurally deficient and should not have been considered by the circuit court. On January 5, 2011, the parties entered into an Amended Order Amending Visitation and Exchange Point, wherein the court affirmed the parties' agreement making changes in the previously ordered visitation and exchange point. Father now asserts that because Mother's Motion to Amend Custody was filed within two years of this January 5, 2011 Order, KRS 403.340(2) operates to require proof that the child's present environment may seriously endanger his physical, mental, moral or emotional health. In Father's view, since Mother's Motion to Amend Custody did not make this allegation, it was procedurally deficient. Alternatively, Father argues that even if Mother's Motion was filed more than two years after the original custody order, she failed to demonstrate that a change in the circumstances of the child or his custodian has occurred such that modification was necessary to serve the child's best interest. Mother has not filed a responsive brief.

KRS 403.340 addresses modification of child custody. Section (3) provides the general parameters of modification, stating that:

> 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.

Additionally, KRS 403.340(2) provides that,

> 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.

At issue is whether Mother moved for modification earlier than two years after the original custody decree was rendered. Father contends that she did so

move, thus implicating the provisions of KRS 403.340(2). We do not agree. The original decree was rendered on May 19, 2009, and Mother moved to modify custody more than two years later on June 21, 2011. Father contends that a visitation Order rendered on January 5, 2011, began the running of the two year clock for purposes of KRS 403.340(2). That Order held in relevant part that, "Plaintiff/Petitioner [Father] is to continue to have sole custody of the parties' minor child with Defendant/Respondent [Mother] as outlined below." This January 5, 2011 Order, though, focused on the modification of visitation and merely reaffirmed Father's status of sole custodian. The original custody order was rendered on May 19, 2009, and it is on that date that the two year provision of KRS 403.340(2) commenced.

Thus, Mother's motion to modify custody was filed more than two years after the entry of the original custody order; therefore, KRS 403.340(2) is not implicated. Rather, the general provisions of KRS 403.340(3) apply. As noted above, KRS 403.340(3) provides that modification shall not be awarded unless, after a hearing, the court finds that a change in the circumstances of the child or his custodian has occurred, and that modification is in the best interest of the child. Father correctly argues that in addressing Mother's motion to modify custody, the circuit court did not expressly recite the "change in the circumstances" language set out in KRS 403.340(3).

Nevertheless, it is readily apparent from the circuit court's analysis that it did examine both Mother and Father's change in circumstances relative to their

status at the time of the original decree, and it was upon their changed circumstances that modification was granted. As opposed to her status at the time of the original decree, for example, when the court found that Mother's "judgment as a parent is incompetent" and her decision-making ability "seriously flawed", the court found in the instant matter that Mother can now provide a more stable environment for the child. Additionally, whereas in the original custody decree the court found as untenable Mother's decision to live in Maine "off the grid" in a home with no indoor facilities and only two hours of electricity per day, in the instant matter the court found that Mother "has a more stable home" than Father. Further, the court found that Father's circumstances had somewhat deteriorated in that the minor child now often stayed with his paternal grandfather and "did not have a stable schedule while in the sole custody of the father."

Thus, though the court did not explicitly recite the statutory language "that a change has occurred in the circumstances of the child or his custodian", it is clear from the court's analysis that it did indeed find that such a change had occurred and that this was the basis for its ruling. The court also complied with KRS 403.340(3) by finding that "it is in the best interests of the minor child that the Motion to Modify Custody be granted." Accordingly, we conclude that the Laurel Circuit Court properly applied KRS Chapter 403 to the matter before it, and that its findings were supported by substantial evidence of record. We find no error.

For the foregoing reasons, we affirm the Order of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Nanci M. House
Winchester, Kentucky

NO BRIEF FOR APPELLEE.