RENDERED: JULY 2, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001755-ME

C. L. M. APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 07-J-00054

N. R. APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND KRAMER, JUDGES.

CLAYTON, JUDGE: C.L.M. appeals the September 29, 2014 Webster Circuit Court order modifying custody and parenting time. The motion to modify custody was submitted within two years of the original custody order. After careful consideration, we reverse the order of custody and remand.

FACTUAL AND PROCEDURAL BACKGROUND

C.L.M. is the biological mother, and N.R. is the biological father of J.M. J.M., a daughter, was born in June 2006. The parties were never married. N.R.'s paternity was established in 2007, and an order of child support was also entered at that time. Subsequently, in July 2012, the case was reopened by the mother, who was represented by the county attorney, to review the amount of child support being paid by N.R. (hereinafter "the father"), who lived in Madison County, Ohio. Thereafter, the father responded to the motion and made his own motion requesting, among other things, a temporary order of joint custody, plus a determination of child support and parenting time with the child. During the pendency of the action, C.L.M. (hereinafter "the mother") was awarded temporary sole custody.

On November 8, 2012, the family court conducted an evidentiary hearing on disputed issues including custody and parenting time. In the order, entered on November 20, 2012, the family court awarded sole custody of the child to the mother and provided the father with an unsupervised parenting time schedule, which took into account the six-hour travel distance between Webster County, Kentucky and Madison County, Ohio. The child, however, primarily lived with her mother in Webster County, Kentucky.

Next, on July 18, 2014, which was within two years of the November 2012 order granting the mother sole custody, the father filed a "motion for custody and timesharing modification," which was accompanied by a single affidavit, his

own. The family court then ordered an evidentiary hearing. Approximately ten days prior to the hearing, the mother filed a motion requesting additional time to secure the funds for an attorney. Her motion was denied. Further, the family court did not appoint a guardian *ad litem* for the child.

The hearing was held on September 29, 2014; the father was represented by counsel, and the mother was *pro se*. At the conclusion of the hearing, the family court ruled from the bench and directed that the mother's sole custody be modified to joint custody and changed the child's primary residence to the father, who as noted, resides in Ohio. Additionally, the family court judge requested that father's counsel prepare an order representing the family court's rulings. The mother now appeals from this order.

STANDARD OF REVIEW

Appellate review of a family court's decision on custody-related issues is limited to a clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings of fact are clearly erroneous if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005).

Additionally, the clearly established law of this Commonwealth dictates that it is the trial court, not the appellate court, that has the sole authority to

determine the credibility of the witnesses, to draw reasonable inferences from the evidence, and to weigh conflicting evidence. *See Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

In sum, "[t]he test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008).

With this standard in mind, we review the matter before us.

ANALYSIS

On appeal, the mother maintains that the family court erred because it failed to make specific findings of fact concerning the requirements of Kentucky Revised Statutes (KRS) 403.340. She also argues that the family court did not protect her interests when it did not grant her additional time to retain counsel. Further, the child's interests were not protected when the family court failed to appoint a guardian *ad litem* to investigate more fully the situation of both parents. The father responds that the mother's brief does not comport with CR 76.12; there are no reviewable issues; mother may not raise new issues on appeal; and that the appointment of a guardian *ad litem* was unnecessary.

Modification of child custody is governed by KRS 403.340. An original award of custody is subject to the jurisdiction of circuit or family court and may be modified upon showing a change of circumstances. *Cherry v. Cherry*, 634 S.W.2d 423, 426 (Ky. 1982). The general parameter of custody modification is

found in KRS 403.340(3). But when a motion to modify custody is made earlier than two years after a prior decree, KRS 403.340(2) permits a court to review such a motion only in two situations, including when "[t]he child's present environment may endanger seriously his physical, mental, moral, or emotional health[.]"[1] The rationale behind KRS 403.340(2) is to provide stability and finality to a custody decree. *See S. v. S.*, 608 S.W.2d 64, 65 (Ky. App. 1980). The statute provides in pertinent part 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
> . . . .

KRS 403.340(2).

In the past, appellate courts have strictly enforced the rule requiring multiple affidavits; however, in *Masters v. Masters*, 415 S.W.3d 621 (Ky. 2013), the Kentucky Supreme Court held that a failure to provide multiple affidavits in a custody modification, which is sought less than two years after an initial decision, does not impact a family court's subject matter jurisdiction but rather relates to its case-in-particular jurisdiction. Hence, the requirement for two affidavits is waived if an objection is not raised in a timely manner. Mother, who was unrepresented, failed to object to the lack of the requisite affidavits at the trial level, and consequently, waived the error. In *Masters,* the Court also noted that since subject

[1] KRS 403.340(2) is also relevant when the prior appointed custodian places the child with a *de facto* custodian.

matter jurisdiction is not implicated when a party does not file two affidavits, the error, which does not implicate subject matter jurisdiction, shall not be raised *sua sponte* by an appellate court. *Id*.

Once the family court determines that affidavit(s) implicate KRS 403.340(2), a court may order a hearing on the custody modification, which is the situation herein. Because the motion for modification was filed within two years of the original order, the father must establish that the child is or may be in serious endangerment. KRS 403.340(2). The party making the motion, here the father, has the burden of proof under general rules applicable to litigation. CR 43.01. Moreover, our Court articulated that a change in the primary residential custodian amounts to a modification of the joint custody arrangement. *Crossfield v. Crossfield*, 155 S.W.3d 743,745 (Ky. App. 2005). Thus, the change in the primary residential custodian is also subject to the provisions of KRS 403.340.

We now address the findings of fact provided by the family court to support its decision to modify custody and change the child's primary residence. The mother contends that the findings do not address whether the child's present environment endangers or may endanger her. Nor, she alleges, do the findings highlight a change in circumstances in the last year and a half since the entry of the original decree.

A review of the findings is necessary in this case. The findings provide a summary of both parents' living situations. The mother has been working and was starting a new job. The mother has three other children, the

child's siblings. She has been in several relationships and currently has a fiancée. Yet, it was not delineated that other than a job change, these circumstances had changed since the last order. A finding that mother has had several relationships does not, in itself, indicate an environment where the child might be endangered. In addition, the family court noted that the father is in a stable relationship and has a job as a mechanic.

Next the family court observes in the findings that disputed testimony exists as to the child's need to wear eyeglasses, but neither party provided a statement by an eye care provider that definitively established the manner in which the glasses should be worn.

Regarding school, the child's teacher testified telephonically. The teacher spoke highly of the child but, according to the findings, the child had some issues at school including inattention. The teacher noted that she had recommended that the child repeat a school year but the mother did not consent to this request. However, no professional opinion was provided that indicated the disagreement was any more than a parent's opinion being different than a teacher's opinion. Further, the findings mentioned that tutoring was unavailable in the child's school district. This fact has no relationship to the mother's ability to parent. None of this testimony, including the lack of tutoring, suggests that a change of custody is warranted. Lastly, the findings stated that the child enjoys time with all her siblings.

Relying on these findings, the family court changed custody from the mother having sole custody and serving as the primary residential custodian to joint custody and the father serving as the primary residential custodian. The family court order expressed that it would be in the child's best interests for both parents to have joint custody and for the primary residence to be with the father.

Our review, however, leads us to the conclusion that these findings, prepared by father's counsel, do not support the requirement under KRS 403.340(2) that "the child's present environment may endanger seriously her physical, mental, moral, or emotional health." and further, do not provide substantial evidence to support a modification of custody. First, these findings only address the best interest standard for the change in both custody and primary residence. But since the custody modification was within a two-year window, the best interest standard alone is not the correct standard. *See* KRS 403.340(2). Nor did the family court provide any findings that the child's present environment may endanger seriously her physical, mental, moral, or emotional health. In addition, we believe that the findings regarding the child's best interest were clearly erroneous because substantial evidence did not support them. Therefore, we reverse the family court order modifying custody and remand for proceedings consistent with this opinion.

Because we have reversed this order, it is not necessary for us to address the other issues proffered by the mother including whether a guardian *ad litem* should have been provided or she should have been given additional time to

find counsel. Currently, no authority in Kentucky exists for the mandatory appointment of a guardian *ad litem* in a child custody case. Rather, the family court rules state that a court may order or a parent may request a guardian *ad litem* in contested child custody cases.

In father's appellee brief, he asserts several arguments impugning the mother's appeal. Because the case is being remanded, these arguments are not persuasive. Our determination primarily is based on the family court's failure to address KRS 403.340(3)(d) and the lack of substantial evidence provided in determining the best interest standard. The findings are deficient legally because they do not address whether the child's environment may endanger her welfare and clearly erroneous because the best interest of the child's situation was not supported by substantial evidence. This issue is clearly preserved for our review. Thus, our ruling is based on a *de novo* and clearly erroneous review.

Whether the mother's failure to respond to interrogatories etc., resulted in admissions pursuant to CR 36.02, does not render the family court decision proper. Indeed, these alleged admissions are not pointed out in the findings, and further, had she been given time to obtain counsel, it is likely she would have responded.

CONCLUSION

The Webster Family Court order is reversed and remanded for proceedings consistent with our decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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