

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-002020-ME
AND
NO. 2014-CA-002050-ME

JOHN B. DAY

APPELLANT

v.

APPEALS FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 13-CI-00068

CRYSTAL S. DAY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS AND JONES JUDGES.

COMBS, JUDGE: Appellant, John B. Day (Father) seeks review of Orders of the Scott Family Court in this consolidated appeal. Father contends that a motion for change of custody filed by Appellee, Crystal S. Day (Mother), was never properly

before the trial court. He also contends that the trial court erred in permitting Mother to relocate with the children and in granting her sole permanent custody. After our review, we affirm.

Background

In February 2013, Mother filed for dissolution and moved for temporary joint custody of the parties' two minor children, then ages ten and eleven. On April 12, 2013, Mother filed an *ex parte* emergency motion for a restraining order on ground that Father "was sending video of [Mother] having sex to [her] friends and family. He threatens this when he gets upset with [Mother]." The trial court ordered that Father refrain from making disparaging remarks; from disturbing, troubling, or interfering with Mother's peace and comfort; and prohibiting Father from contacting Mother's business associates, family members, or acquaintances. On April 17, 2013, the trial court entered an Agreed Order for Custody and Child Support. It provided that the parties should share joint custody with a timeshare rotation and that neither party would pay child support.

On November 13, 2013, the trial court entered a Decree of Dissolution in which it awarded joint custody with equal timeshare. The Court ordered the parents to communicate about the children by text message only.

The subsequent events leading to this appeal are summarized in the trial court's November 14, 2014, Findings of Fact, Conclusions of Law, and Final Order:

6. On December 18, 2013, ... Mother filed an Ex Parte Motion for Temporary Sole Custody and a Motion to Suspend Timeshare....[alleging] that there were allegations from ...Father's former step-daughter [from his previous marriage], ..., that she had been raped, sodomized and sexually molested as a child by ...Father.

7. Out of concern for the safety and well being of the children, [the trial] Court issued an Ex Parte Order on December 20, 2013, granting ... Mother temporary sole custody, suspending timeshare with ...Father until the matter could be heard in Court ... Father was further ordered to complete a sex offender assessment.

8. ... Father filed a Response to the motions on February 5, 2014[,] requesting that the previous motions and affidavits be stricken from the record as containing hearsay, that the Ex Parte order be withdrawn and timeshare be reinstated....

9. On February 13, 2014, ... Mother filed for a domestic violence petition on behalf of herself and [the] children... .[alleging that] Father had driven past the residence multiple times and had yelled and made inappropriate gestures to her. The petition also alleged that ... Father had tried to have contact despite a Court order prohibiting contact with the children. The petition alleged that the erratic behavior was escalating and that there were concerns for the safety of ... Mother and the children. On February 13, 2014, Scott District Court Judge Vanessa Dickson entered an Emergency Protection Order (EPO) [and] set the matter for hearing February 26, 2014. Following the hearing, a Domestic Violence Order was entered restricting contact between [Father and Mother] and the two minor children...until further orders; ...[and] ordering [Father] to complete a mental health assessment with David Waters and follow his recommendations. The DVO expires February 26, 2017.

10. On March 7, 2014, the matter came on for hearing for a Show Cause and Contempt and to review the Motion for Temporary Sole Custody and Supervised Timeshare. The Court entered orders that ...Father could

have supervised timeshare with the children unless the children's therapist made a report that such contact would negatively impact the children's well-being, emotionally, mentally or physically. The Court ordered both parties to cooperate in setting up supervised visitation

11. On March 17, 2014, a letter from Janet Vessels, the children's therapist was entered in the record[stating] that the children had stated they felt safe with their father and wanted to see him. The therapist went on to advocate for supervised contact, for court orders prohibiting the father from discussing the ongoing investigation with the children and stated that the children should not be encouraged to have any secret methods of communicating with their father....[Further,] that if negative reactions in the children occur after visitation with the father[,] that it may be an indication that the supervised visitation is detrimental or not in the best interest of the children.

12. On May 23, 2014, the Court interviewed the children to discuss what custody arrangement they desired and how they interacted with each parent. The children expressed a desire to see their father and that they no longer had safety concerns.

13. On May 28, 2014, ... Mother filed a motion requesting the permanent joint custody and current temporary sole custody ... be modified to a permanent sole custody order and motion for child support. The motion to modify custody was supported by affidavits of ...Mother and ... former step-daughter of ... Father. The affidavit detailed years of sexual abuse committed upon [former step-daughter] by [Father], from the time she was in third grade until her mother, [Father's] first wife, sent her to live with her grandmother in another state at the age of eleven or twelve. The abuse included repeatedly being raped, sodomized and sexually abused by [Father], as well as being verbally abused and harassed by him during the same time.

14. On June 9, 2014, the Court issued a temporary order immediately suspending all contact between the children and ...Father, until the concerns raised by the motion for permanent sole custody and affidavit could be heard.

15. On June 20, 2014, a final hearing was conducted to consider the following issues: contempt, child support, permanent custody of the two minor [children] and bankruptcy issues. The matter was taken under consideration following testimony, introduction [of] documentary evidence and argument of counsel.

On August 26, 2014, Mother filed a Notice of Relocation. On September 12, 2014, Father filed a Verified Motion to Contest, which was docketed for the October 15, 2014, motion hour. The trial court permitted Mother to relocate with the children. On November 13, 2014, Father filed a Notice of Appeal from that October 15, 2014, order. (2014-CA-002020-ME).

On November 14, 2014, the trial court entered its Findings of Fact, Conclusions of Law, and Final Order granting sole permanent custody to Mother.

The trial court found that:

17. Pursuant to KRS^[1] 304.340(3) a court shall not modify a prior custody order 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 children or his custodian, and that the modification is necessary to serve the best interests of the children. When determining if a change has occurred and whether a modification of custody is in the best interest of the children, the court shall consider: the factors set forth in KRS 403.270(2) to determine the best interest of the children; whether the custodian agrees to the modification; whether the children have been integrated into the family of the petitioning party with the

¹ Kentucky Revised Statutes.

consent of the custodian; whether the children's present environment endangers seriously their physical, mental, moral, or emotional health; and whether the harm likely to be caused by a change of environment is outweighed by its advantages.

18. At the time of entry of the initial custody order the circumstances of the sexual abuse by ...Father upon his minor step-daughter, ..., now an adult, were unknown by this Court. Today, [former step-daughter] is a successful television producer in New York City and there has been no motive put forth why she would come forward now to tell of her victimization except to protect another child from the same fate. During her testimony at hearing, Father's reaction was not one of anger for being wrongly accused, if he was, but rather he giggled and smirked throughout her time on the witness stand, and when his attorney had the opportunity to challenge her testimony, his attorney seemed more focused on whether there was water in a family pool or not. [We note that in describing where she lived as a child, the former step-daughter testified there was a pool, but it did not have water in it.] ... [The former step-daughter] is a credible eyewitness to ... Father's sodomy, sexual abuse and verbal abuse upon her.

19. Since the initial custody order ... Father has repeatedly violated this Court's order regarding contact with the children and he has gone so far as to encourage the children to be deceitful as well. The Court also learned at hearing that ... Father purchased and maintains a cell phone for the little girl who lives next door to him. What's concerning about this is that this child has also been a victim of sexual abuse.

20. The children are thriving emotionally, physically and academically ... in Mother's home as she has been in the role of temporary sole parent and as she wishes to remain [sic].

21. ...Father's contemptuous behavior since the initial order; his prior sexual abuse of his step-daughter; his failure to complete a sexual offender assessment as

ordered to do so nearly a year ago; his bizarre, harassing behavior towards ... Mother, her paramour and her sister; his violation of court orders to not put the children in the middle of the controversy and to not expose them to negativity about their mother; his violation of the no contact orders; and the findings above make it clear that these parents cannot joint parent and that it would be in the best interest of the children ...to be permanently in the sole custody of ... Mother.

22. Further, because of the severe sexual abuse perpetrated by ... Father upon his former step-daughter and his failure to complete a sex offender assessment as ordered makes contact between ...Father and the children ... unsafe at this time. Therefore, until such time that ... Father completes a sex offender assessment with a mental health provider qualified to do such assessment and to whom the affidavit of ... [former step-daughter] is provided for consideration during such assessment, there shall be no contact between ... Father and the children ... as such contact would seriously endanger their physical, mental or moral well-being.

With respect to contempt motions and attorney's fees, the trial court further found that "Father repeatedly scoffed at the Court's orders, including making sexual gestures to ... Mother and her family within minutes of the Court's order to refrain from such negative conduct and having contact with the children when ordered not to do so."

The trial court concluded that "it is in the best interest of the childrento be in the permanent sole custody of their Mother" The trial court ordered as follows:

1. Pursuant to KRS 403.270 and 403.340 and the above findings, the Court has determined that the parents are incapable of exercising joint custody. **THE COURT FINDS IT IS IN THE BEST INTEREST OF THE**

CHILDREN ... THAT PERMANENT SOLE
CUSTODY IS HEREBY GRANTED TO THEIR
MOTHER

2. The children shall exclusively reside with their mother ...
.
3. Said custody includes sole authority and obligation to make medical, education and other decisions relating to the child's best interests, until the child reaches eighteen (18) years age [sic] or graduates from high school. This custody shall continue until further orders of this Court or a Court with jurisdiction modifies the custody arrangement.
4. Further, there shall be no contact between ... Father and the children ...until such time that ... Father completes a sex offender assessment with a mental health provider qualified to do such assessment and to whom the affidavit of ... [former step-daughter] is provided for consideration during such assessment, and the Court has an opportunity to consider the full sex offender assessment of ... Father.
...

Father also appealed from the November 14, 2014, Order (2014-CA-002050-ME) and subsequently moved to consolidate the appeals.

On March 10, 2015, Father filed a Motion for Immediate Relief in this Court seeking an injunction to prevent Mother from moving with the children to Canada, pending appeal.

On March 11, 2015, a panel of this Court rendered an Opinion in 2014-CA-000511-ME affirming the DVO, which Father had also appealed.

On May 13, 2015, a panel of this Court entered an Order in 2014-CA-002020-ME, noting that “[o]n October 15, 2014, the trial court entered an

order allowing [Mother] to relocate to Canada with the children.” The Court granted Father’s Motion to Consolidate and denied his Motion for Immediate Relief to prevent Mother from relocating with the children pending appeal. “Our Supreme Court has rejected the argument that alleged errors concerning a child custody and visitation determination constitute irreparable injury.” *Lee v. George*, Ky. 369 S.W.3d 29 (Ky. 2012).

Father raises three issues on appeal: (1) that the issue of change of custody was never properly before the trial court; (2) that permission to relocate with the children was improperly granted; and (3) that the trial court applied the incorrect legal standard and abused its discretion by granting Mother permanent sole custody following the June 20, 2014, hearing.

Analysis

Father contends that the issue of change of custody was never properly before the trial court.

KRS 403.340(2) applies where -- as here -- modification of custody is sought less than two years after the date of the initial custody decree. The statute provides:

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.

The statute requires more than one affidavit. *Copas v. Copas*, 699 S.W.2d 758, 759 (Ky. App. 1985).

Father submits that the trial court committed reversible error in granting Mother's December 18, 2013, Ex Parte Motion for Temporary Sole Custody, because it was based upon a single affidavit (that of mother) and because it otherwise failed to comply with the statute. In *Masters v. Masters*, 415 S.W.3d 621, 624 (Ky. 2013), the Supreme Court explained that "an error with respect to KRS 403.340 does not divest [the court] of subject matter jurisdiction. Instead, the failure to comply with the statute simply gives the aggrieved party the opportunity for relief based upon the court's improper exercise of its judicial power."

On February 5, 2014, Father filed a Response raising the deficiencies in Mother's Motion for Temporary Sole Custody; however, on May 28, 2014, Mother filed a Motion for Permanent Sole Custody accompanied by the requisite two affidavits, her own and that of former step-daughter. On June 20, 2014, the trial court conducted a hearing and subsequently entered its Final Order granting Mother permanent sole custody.

As we explained in *Gladish v. Gladish*, 741 S.W.2d 658, 661-62 (Ky. App. 1987):

Although we agree that the trial court proceeded erroneously in conducting a hearing to modify temporary custody on the barren affidavits and further abused its discretion in modifying the custody arrangement, we

cannot afford the appellant any relief as the temporary order has been replaced by a permanent custody decree. [W]e cannot set aside the final custody award because of irregularities in the temporary custody phase of the litigation.

(footnote omitted). The irregularity of submission of one affidavit in the temporary custody phase was cured and corrected before the court entered its order of permanent custody. We have no basis to warrant setting aside the permanent custody award.

Next, we address the issues that Father raises in regard to the trial court's final custody award. Father asserts that the trial court applied an incorrect legal standard and that it abused its discretion in granting Mother sole permanent custody. Specifically, he contends that the court did not make a finding that the children's present environment seriously endangers their physical, mental, moral, or emotional health. He also contends that the harm likely to be caused by a change of environment is outweighed by its advantage. Furthermore, he claims that the trial court applied the incorrect legal standard by citing the best interest standard.

In *Pennington v. Marcum*, 266 S.W.3d 759, 765-66 (Ky. 2008), the Supreme Court explained as follows:

[W]hen a final custody decree has been entered, as in this case, ... any post-decree determination made by the court is a modification, either of custody or timesharing/visitation. If a change in custody is sought, KRS 403.340 governs. ... This pre- or post-decree designation is important when modification of custody is sought, because ... the standard the trial court must apply when a change is

sought within two years of issuance of the custody decree, [is] ... serious endangerment

In the case before us, we agree that the correct standard for modification of custody that is that of serious endangerment. “Since ‘serious endangerment’ ... is not defined, it is left to the sound discretion of the trial court whether the party ... has met his burden on ... a modification of custody” *Pennington*, at 769. Clearly, the trial court was persuaded that Mother met her burden of proving serious endangerment.

The trial court found that the former step-daughter was a credible witness. “[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Considering Father’s sexual abuse of his step-daughter and his failure to undergo the court-ordered sex offender assessment, the trial court determined that contact between Father and the children was “unsafe at this time.” The trial court specifically found that “such contact would seriously endanger the children’s physical, mental or moral well-being.”

Although the trial court alluded to the best interests of the child standard and cited KRS 403.270, it also cited KRS 403.340. KRS 340.340(4) provides that:

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;
- (b) The mental and physical health of all individuals involved;
- (c) Repeated or substantial failure, without good cause as specified in KRS 403.240, of either parent to observe visitation, child support, or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis of which parent is more likely to allow visitation or pay child support;
- (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

The trial court made extensive findings consistent with the KRS 403.340(4) factors. It found that the children were thriving emotionally, physically, and academically in Mother's home since she had been granted temporary sole custody. The trial found that Father had demonstrated bizarre, harassing behavior towards Mother, her paramour and her sister. The trial court observed Father's reaction during the step-daughter's testimony, noting in particular that "he giggled and smirked throughout her time on the witness stand..." The trial court expressed its concern that Father maintains a cell phone for a young girl who lives next door to him who was also a victim of sexual abuse. The trial court found that Father had repeatedly violated its order regarding contact with the children. The trial court also found that Father had not contributed to the

children's support. In addition, the trial court noted the DVO against Father, which remains in effect until February 2017.

Civil Rule 52.01 states in pertinent part, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Furthermore, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky.1967). These directives are clearly applicable to child custody cases. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky.1986). When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky.1974).

Frances v. Frances, 266 S.W.3d 754, 756 (Ky. 2008). Having carefully reviewed the record, we cannot say that the trial court's findings were clearly erroneous or that it abused its discretion in awarding Mother permanent sole custody.

Father also contends that the trial court improperly granted Mother permission to relocate with the children.

FCRPP² 7 provides:

(2) (a) Before a joint custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-relocating joint custodian. Either party may file a motion for change of custody or time-sharing within 20 days of service of the notice if the custodians are not in agreement; or, the parties shall file an agreed order if the time sharing arrangement is modified by agreement. See *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008) and *Wilson v. Messinger*, 840 S.W.2d 203 (Ky. 1992).

² Kentucky Family Rules of Practice and Procedure.

(b) Before a sole custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-custodial parent. If the court ordered visitation is affected by the relocation, the non-custodial parent may file a motion contesting the change in visitation within 20 days of service of the notice.

Mother complied with the notification requirements. In his Verified Motion to Contest Relocation, Father simply opposed relocation outside of Scott County. Father asserted that Mother only had temporary custody; that the Court had not yet rendered a decision on change of custody following the June 20, 2014, hearing; and that it was not in the children's best interests to be removed from Scott County where they had lived their entire lives, attended school, and had friends and family. The Motion came before the trial court at the October 15, 2014, motion hour.

The typewritten portion of the docket order reflects that there was a motion to contest relocation. According to the parties' briefs, Mother was permitted to relocate; however, the handwritten portion of the docket order only addresses marital debt. We have no video record of the October 15, 2014, motion hour. Father appealed from the October 15, 2014, docket order.

On November 14, 2014, the trial court entered its Findings of Fact, Conclusions of Law, and Final Order, which incorporated and made enforceable "[a]ll orders set forth in the above findings which may not be specifically set forth in this Order...." That order apparently includes the relocation order because the

trial court refers to motion dockets on various dates, including October 15, 2014.

Father also appealed from the November 14, 2014, Final Order.

Father contends that he was never given a proper evidentiary hearing because relocation was not before the Court at the June 20, 2014, hearing; further, that through relocation, Mother effectively sought a modification of custody, which should be subject to the serious endangerment standard, citing *Pennington*, 266 S.W.3d 754. Without question, Mother was seeking a modification of custody. We have already concluded that the trial court did not abuse its discretion in awarding permanent sole custody to Mother based on the serious endangerment standard. We disagree that Father was entitled to a second evidentiary hearing under the facts of this case. The trial court had already conducted a full evidentiary hearing and was fully informed of the issues involved, before rendering its Final Order on November 14, 2014.

We affirm the orders of the Scott Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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