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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000249-ME

G.A.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 09-J-503420-001

M.R.; COMMONWEALTH, CABINET FOR
HEALTH AND FAMILY SERVICES;
AND K.A., A MINOR CHILD

APPELLEES

AND

NO. 2015-CA-000250-ME

G.A.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 09-J-503421-001

M.R.; COMMONWEALTH, CABINET FOR
HEALTH AND FAMILY SERVICES;
AND J.A., A MINOR CHILD

APPELLEES

AND

NO. 2015-CA-000251-ME

G.A.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 09-J-503422-001

M.R.; COMMONWEALTH, CABINET FOR
HEALTH AND FAMILY SERVICES;
AND M.D., A MINOR CHILD

APPELLEES

NO. 2015-CA-000252-ME

G.A.D.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 09-J-503424-001

M.R.; COMMONWEALTH, CABINET FOR
HEALTH AND FAMILY SERVICES;
AND A.A., A MINOR CHILD

APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** ** ** **

BEFORE: D. LAMBERT, STUMBO AND THOMPSON, JUDGES.

D. LAMBERT, JUDGE: This is an appeal from an order of the Jefferson Family Court denying a father's motion to alter, amend or vacate the family court's previous decision to modify child custody. After review, we vacate the family court's order and remand for further proceedings.

I. DISCUSSION

Appellant (Father) and Appellee (Mother) were born in Sudan. After they married, they fled to Egypt to escape an ongoing civil war. While in Egypt, they had three children. The family eventually immigrated to America and settled in Louisville, Kentucky. Father became an American citizen. The couple had two more children while living in Louisville before their marriage fell apart.

In August 2009, the Cabinet for Health and Family Services initiated a dependency, neglect, and abuse proceeding against Mother. After conducting a hearing, the family court granted Father custody and allowed Mother to have supervised visits with her five children. The family court also ordered Mother to pay child support.

In 2011, Father left Louisville for Sudan. He took the children with him. He also petitioned the family court to allow the children to remain in Sudan with his relatives. Father later returned to America to complete his degree at National College; however, the children remained in Sudan.

After a hearing, the family court found Father in contempt for taking the children to Sudan. Nevertheless, the family court allowed Father to cure the contempt order by paying for a round-trip flight for Mother to visit the children in Sudan within 30 days. This remedy was recommended by the children's guardian *ad litem*. Mother never traveled to Sudan.

In October 2012, Mother moved the family court to terminate her child support obligation and order Father to return her children. Her youngest child had died while in Sudan, and she explained that she did not travel to Sudan because it was such a dangerous place. The family court held a hearing on this motion in February 2013, but did not render a decision.

In October 2013, Mother filed a motion to modify her children's custodial arrangement. After a number of responses from Father, and a December 2013 hearing during which the issue of child custody modification was never addressed, the family court finally granted Mother's motion to modify the children's parenting schedule in January 2014.¹

¹ The family court later clarified that this was a mistake and that it had actually modified child custody.

In his timely motion to alter, amend, or vacate the family court's order, Father argued that Mother had only asked the trial court to terminate her child support obligation and order her children's return in her October 2012 motion—not modify the custody arrangement. According to Father, the family court violated his due process rights by modifying child custody based on the language of Mother's October 2012 motion. Father also argued that the family court improperly determined a child custody modification was in the children's best interests based on the findings contained in its order. Finally, Father argued the family court no longer had jurisdiction to modify child custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because a Sudanese court had ordered Father to have custody of the children. The family court rejected these arguments. This appeal followed.

II. STANDARD OF REVIEW

“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.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

III. DISCUSSION

On appeal, Father essentially presents the same arguments that he did in his motion to alter, amend, or vacate. First, he argues he did not have a fair chance to contest the child custody modification based on the language of Mother's October 2012 motion. Second, he argues the family court abused its

discretion in modifying child custody by relying on insufficient factual findings. For the following reasons, we agree that Father did not have a fair opportunity to challenge the modification.

As an initial matter, we note that the trial court properly exercised jurisdiction under the UCCJEA. Although Father did not present this argument on appeal, we nevertheless agree that Kentucky courts have exclusive, continuing jurisdiction with respect to this case under KRS 403.824. The trial court found that Mother still lives in Kentucky and thus has a substantial connection with the forum that made the initial child custody determination. Moreover, we agree with the trial court's analysis pursuant to KRS 403.806 that the Sudanese child custody determination was not made under factual circumstances that substantially conform to those of Kentucky. Mother did not have an opportunity to participate in the proceedings, and the order failed to address any jurisdictional objections Mother might have under the laws of this Commonwealth. Instead, the order only concluded, without explanation, that Father “[has] a strong dream for [his children's] future” and that the child custody modification “will allow [them] to concentrate in [sic] [their] education.” Having resolved this jurisdictional concern, we now turn to Father's arguments on appeal.

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(internal quotations omitted). In *Lynch v. Lynch*, 737

S.W.2d 184, 186 (Ky. App. 1987), this Court held that a family court must provide parents “a fair opportunity to present evidence at a meaningful hearing” before modifying a child custody decree. The due process violation at issue in that case occurred when the trial court prepared an order changing the custody arrangement from sole custody to joint custody before hearing a final day of testimony on the matter. This Court reversed after deciding the previously-prepared order “create[d] the appearance that [the trial court] had made up its mind before it had all of the evidence.” *Id.*

Here, we observe a situation that sufficiently parallels *Lynch* in that Father did not have an opportunity to present evidence at a meaningful hearing before the family court modified the custody arrangement. No hearing was ever conducted relating to child custody modification. The issue of child custody modification was not addressed during the February 2013 hearing, as Mother’s October 2012 motion only sought the return of her children from Sudan. Nor, was the issue addressed after October 2013, when Mother petitioned to modify child custody for the first time. Nevertheless, the family court apparently awarded custody to Mother based on evidence presented during the February 2013 hearing. Accordingly, the family court’s decision to modify the child custody arrangement at least appeared to be predetermined. This violated Father’s due process rights and compels this Court to vacate the family court’s December 2014 order. We

therefore remand this matter to the family court for a proper hearing as to the pleading filed by the parties.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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