RENDERED: SEPTEMBER 14, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001079-ME

KIMBERLY LYNN HALL (NOW TURNER) APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 10-CI-00116

JOHN HALL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kimberly Lynn Hall (now Turner) brings this appeal from a March 17, 2017, Order of the Laurel Circuit Court, Family Court Division, denying her motion to modify custody of the parties' three minor children. We affirm.

Kimberly and John Joseph Hall were married on May 9, 2001. Three children were born of the parties' marriage – T.W.H. and T.J.H. were both born on June 2, 2001, and J.J.H. was born on August 21, 2002. On February 3, 2010, Kimberly filed a Petition for Dissolution of Marriage in the family court. A Separation Agreement was subsequently entered into whereby the parties agreed to share joint custody of their three children. Kimberly was designated the primary residential parent, and John was granted time-sharing pursuant to Rules of the Knox and Laurel Family Court (RKLFC) 902. And, John was ordered to pay child support to Kimberly. On May 12, 2010, Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage were entered, and the Separation Agreement was incorporated therein.

On August 12, 2014, John filed a *pro se* motion to modify custody. By order entered June 24, 2015, the family court continued the parties' joint custody but modified time-sharing. Pursuant to the order, neither party was designated the primary residential parent; instead, both parties were granted equal time-sharing. The family court also terminated child support payable to Kimberly.

On September 26, 2016, Kimberly filed a Motion To Modify Custody. John filed an Objection to Motion to Modify Custody wherein he alleged Kimberly's motion to modify custody was "not supported by the requisite affidavits, nor [did] it allege adequate grounds to modify custody within two (2)

years of the last custody Order." Then, on October 21, 2016, Kimberly filed a Supplemental Motion to Modify Custody. Therein, Kimberly asserted the children's present environment may seriously endanger their physical, mental, moral, or emotional health. Kimberly's motion was accompanied by one affidavit, her own. On November 4, 2016, John filed an Objection to Supplemental Motion to Modify Custody. John also filed a motion to hold Kimberly in contempt for her failure to abide by the June 24, 2015, order granting him equal time-sharing.

Following a hearing upon the parties' motions and by order entered March 17, 2017, the family court held:

> IT IS HEREBY ORDERED that [John's] Motion for Directed Verdict on the issue of change of custody is hereby GRANTED. The last custody determination in this action was on June 24, 2015, wherein the parties were granted joint custody of the minor children with an equal parenting schedule. On October 24, 2016, [Kimberly] again sought to modify custody based upon serious endangerment. Said motion was verified but not accompanied by the requisite affidavits. Counsel for [John] [o]bjected based upon insufficiency of the motion pursuant to KRS 403.340. On November 14, 2016, a Supplemental Motion to Modify Custody was brought for hearing by [Kimberly]. It was supported by one (1) separate affidavit of [Kimberly]. No other affidavits were filed. Pursuant to KRS 403.340, no motion to modify custody "shall be made earlier than two (2) years after its date" unless it is proven that the "child's present environment may endanger seriously his physical, mental, moral, or emotional health." The party seeking modification of custody bears the burden of proof. [Kimberly] and her witnesses failed to establish facts warranting a change of custody pursuant to KRS

> 403.340. While [Kimberly] alleged that [John] posed a serious danger to the three (3) children who are 15 and 16 years of age respectively, she failed to provide proof of same. The only real allegation was that the children were permitted to walk to a local fast food restaurant approximately one-half (1/2) mile from [John]'s home. The Court heard from the children's counselors and neither reported that the children were in serious danger when in the custody of [John]. Therefore, the Court finds that [Kimberly] did not meet her burden to prove that the minor children were in serious physical, mental, moral, or emotional danger pursuant to KRS 403.340. Moreover, [Kimberly]'s Motion to Change Custody was only supported by one (1) affidavit, and it is well settled that two (2) affidavits are required in support of a Motion to Change Custody based upon serious endangerment within two (2) years. For the reasons set forth hereinabove, [John's] Motion for Directed Verdict is GRANTED. Likewise, [Kimberly]'s Motion for Change of Custody is DENIED.

March 17, 2017, Order at 1-2. This appeal follows.

This Court is compelled to recognize that certain procedural aspects of this case are highly irregular and otherwise improper. The family court conducted an evidentiary hearing pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 and *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). However, the family court then inexplicably rendered a directed verdict for John as set forth in the March 17, 2017, order. It is well-established that "a directed verdict is clearly improper in an action tried by the court without a jury." *Brown v. Shelton*, 156 S.W.3d 319, 320 (Ky. App. 2004) (citing *Morrison v. Trailmobile Trailers, Inc.*, 526 S.W.2d 822 (Ky. 1975)). In a bench trial, the proper procedural mechanism

for early dismissal is found in CR 41.02(2). Here, the family court directed a "verdict" in its order ruling on the merits of the case. We note that neither John nor Kimberly raised this procedural error at the hearing or on appeal. Given that the family court ultimately denied the motion to modify custody in this case based upon applicable law, we conclude that the error was harmless.

Additionally, we note that John has not filed an appellee's brief in this case. Under CR 76.12(8)(c) a "range of penalties . . . may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). This Court may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." *Id.* at 732; CR 76.12(8)(c). For purposes of this appeal, we accept Kimberly's statement of the facts, subject to our own independent review of the entire record on appeal. We shall now address Kimberly's allegations of error.

Kimberly asserts the family court erred by denying her motions to modify custody. For reasons hereinafter elucidated, we believe the family court properly denied Kimberly's motions.

When ruling upon motions related to child custody or time-sharing, the family court is required to make written findings of fact and conclusions of law consistent with its duty under CR 52.01. *Anderson v. Johnson*, 350 S.W.3d 453, 456 (Ky. 2011); *Keifer v. Keifer*, 354 S.W.3d 123, 125-26 (Ky. 2011). Our review under CR 52.01 provides that the family court's "[f]indings 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." CR 52.01; *see Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). And, findings of fact are not clearly erroneous if supported by substantial evidence. *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

However, in this case, the family court's ultimate denial of Kimberly's motions primarily looks to compliance with statutory mandates rather than the sufficiency of the court's findings based on the evidence presented. In other words, the issue looks to a question of law. In this context, our review proceeds *de novo* as to whether the family court correctly applied the law to the facts in this case. *Ball v. Tatum*, 373 S.W.3d 458 (Ky. App. 2012).

Modification of child custody is controlled by Kentucky Revised Statutes (KRS) 403.340. It reads, in relevant part:

> (1) As used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties.

> (2) 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.

Under the terms of KRS 403.340(2), a motion to modify custody must be accompanied by at least two affidavits if the motion is filed earlier than two years from the date of the last custody decree. *Masters v. Masters*, 415 S.W.3d 621, 624-25 (Ky. 2013).[1] And, relevant herein, these affidavits must demonstrate that the child's physical, mental, moral, or emotional health may be endangered.

In this case, the last custody order was entered on June 24, 2015, and Kimberly filed her motions to modify custody on September 26, 2016, and October 21, 2016. As Kimberly's motions to modify custody were filed before two years from the custody order (June 24, 2015), Kimberly was required to submit two affidavits with her motion per KRS 403.340(2). However, Kimberly only filed one affidavit. By failing to submit two affidavits, Kimberly violated the plain terms of

[1] In *Masters v. Masters*, 415 S.W.3d 621, 624-25 (Ky. 2013), the Kentucky Supreme Court overruled long-standing case precedent interpreting Kentucky Revised Statutes 403.340(2) and held that the lack of two affidavits to support a motion to modify custody does not deprive the family court of subject matter jurisdiction when the motion is filed earlier than two years from the date of the last custody decree. Rather, the Court held that the lack of two affidavits to support the motion merely constitutes a violation of the statute and forms the basis of a denial of the motion to modify custody. *Id.*

KRS 403.340(2), and based thereupon, the family court properly denied her motions. *See Masters*, 415 S.W.3d 621. Additionally, in her motions and affidavit to modify custody, Kimberly failed to demonstrate the children's present environment seriously endangered their physical, mental, moral, or emotional health as required under KRS 403.340(2)(a). Likewise, there was no evidence presented at the hearing to comply with this statutory requirement. Accordingly, we conclude that the family court did not err as a matter of law by denying Kimberly's motions to modify custody.

For the foregoing reasons, the Order of the Laurel Circuit Court, Family Court Division, is affirmed.

SMALLWOOD, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Joe T. Roberts
London, Kentucky

NO BRIEF FOR APPELLEE.