RENDERED: JULY 26, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001230-ME

BRIAN SCOTT MAGGARD — APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NO. 16-CI-00005

ASHLEY HARGUS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, SPALDING AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Brian Scott Maggard ("Appellant") appeals from findings of fact, conclusions of law and order entered by the Ohio Circuit Court on August 8, 2018, granting primary custody of the parties' minor child to Ashley Hargus ("Appellee"). Appellant argues that the circuit court lacked jurisdiction, wrongfully restricted visitation, and that its findings are inadequate. He also contends that the court abused its discretion, entered an erroneous finding of

contempt, and erred in ordering retroactive child support. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

This proceeding commenced in 2016 with the filing of Appellee's petition for dissolution of marriage in Ohio Circuit Court, Family Division. An extensive procedural history followed, which initially resulted in a temporary award of joint custody. Appellee was designated as primary residential parent of the parties' female child (hereinafter referred to as P.M.)[1] and Appellant was designated as the primary residential parent of the parties' male child (hereinafter referred to as R.M.). Hon. Laura Eaton was appointed guardian *ad litem*, and made various recommendations to the court throughout the proceedings.

The parties were extremely contentious, with the circuit court characterizing Appellant's behavior as particularly vitriolic. Both parties were sentenced to serve jail time for contempt,[2] and a domestic violence order was issued against Appellant. During the course of the extensive proceedings that followed, Appellant accused Appellee of using methamphetamine, which resulted in two police investigations, but no finding of illegal drug use. Due to the parties' behavior, Ohio Circuit Court Judge Michael McKown threatened to place both children in the care of the Commonwealth, and opined that the court could not rely

[1] In accordance with the policy of this Court, the names of the minor children will not be used.
[2] Service of the sentences were suspended.

on either party's testimony. A final order was entered on August 18, 2017, in which the circuit court made permanent the temporary custody award.

On August 2, 2018, the circuit court conducted a hearing on 1) Appellee's motion for contempt, 2) Appellee's motion to appoint her as primary residential parent for R.M., and 3) Appellant's motion to be appointed primary residential parent for P.M. Both parties sought attorney fees. Upon taking proof, the Ohio Circuit Court, with Judge Timothy Coleman now presiding, rendered findings of fact, conclusions of law and order on August 8, 2018. This order forms the basis for the instant appeal. The court found in relevant part that Appellant's motivation for contacting law enforcement on two occasions to allege Appellee's drug usage was not based on a legitimate concern for P.M.'s safety, but rather was to embarrass and harass Appellee. Based on this finding, in addition to other instances where the court determined that Appellant made false or misleading statements, Judge Coleman held Appellant in contempt. The court sentenced Appellant to twenty days in jail with work release. Based on additional findings, the court overruled Appellant's motion to be designated primary residential parent of P.M..

The court went on to award "primary custody" of R.M. to Appellee upon concluding that this arrangement was in R.M.'s best interests. Until such time family counseling was initiated and the counselor recommended visitation,

the court ordered that Appellant was not entitled to visit either child. Finally, the court ordered Appellant to pay child support in the amount of $1,379.95 per month, made retroactive to the July 13, 2018 filing of Appellee's motion. This appeal followed.

Appellant first argues that the Ohio Circuit Court lacked jurisdiction to modify custody. He directs our attention to Kentucky Revised Statute ("KRS") 403.340(2) for the argument that no motion to modify custody shall be made earlier than two years after its date, unless it is accompanied by affidavits giving reason to believe that the child's present environment seriously endangers his physical, mental, moral or emotional health. As the modification at issue was made within two years of the original order, and based on KRS 403.340(2), Appellant argues that the circuit court lacked jurisdiction over this matter and that the order on appeal must be reversed.

We must first note that Appellant has not complied with Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v), which requires the appellant to state at the beginning of the written argument if the issue was preserved and, if so, in what manner. We are not required to consider portions of the appellant's brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Pierson v. Coffey*, 706 S.W.2d 409, 413 (Ky. App. 1985).

As it appears from the record that this matter was raised and addressed below, and as Appellee so acknowledges, we will consider the issues now before us.

Appellant directs our attention to KRS 403.340, which states:

> (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[.]
>
> . . .
>
> (4) 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.

Conversely, Appellee asserts that she sought and received only a change in R.M.'s *residency*, not custody, and that the two-year window of KRS 403.340 and the requirement of affidavits are therefore not implicated. We must consider whether the Ohio Circuit Court awarded a modification of custody or merely a modification of residency.

Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008), disposes of this issue. In *Pennington*, the Kentucky Supreme Court examined the historical development of custody and visitation issues, and distinguished between a modification of custody and a modification of timesharing. Said the court,

> when 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. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so.

Pennington, 266 S.W.3d at 765.[3] The court went on to state that,

> Prior to 1972, trial courts in Kentucky could modify custody decrees upon proof that the conditions under which the original decree was entered were

[3] KRS 403.320(3) states that, "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]"

changed. *See Skidmore v. Skidmore*, 261 Ky. 327, 87 S.W.2d 631, 634 (1935); *Williams v. Williams*, 290 S.W.2d 788, 789 (Ky. 1956); *Hatfield v. Derossett*, 339 S.W.2d 631, 632–33 (Ky. 1960); *Ward v. Ward*, 407 S.W.2d 709, 710 (Ky. 1966). Though the "change of conditions" standard still plays a role in the consideration of custody modifications, modification must now be evaluated under the terms of KRS 403.340, originally enacted in 1972, which contains a two-year limitation period on modification of custody from the date of the custody decree. In 1973, this Court applied the statute when it first held that a custody decree cannot be modified within the two-year limit unless one of the two . . . statutory exceptions, serious endangerment or abandonment to a de facto custodian, is established. *Day v. Day*, 490 S.W.2d 483 (Ky. 1973). This was reaffirmed in 1976 when the Court held that a trial court's sua sponte review and modification of a custody order within the two year period was in error. *Chandler v. Chandler*, 535 S.W.2d 71 (Ky. 1976). Visitation, on the other hand, can be modified upon proper showing, at any time, having no two-year restriction pursuant to KRS 403.320. And, after two years from the date of the custody decree, the standard reverts to review of the best interests of the child, either under KRS 403.270 or KRS 403.340(3).

Since Kentucky accepted joint custody as a custodial arrangement equally tenable and commensurate with sole custody, and given that very individualized time-sharing arrangements have developed under shared joint custody or split sole custody, whether a custodian's relocation with the minor child changes the inherent nature of the custody the parties have or merely affects timesharing/visitation has become a frequent and pertinent question. This issue has been commonly approached in two ways. Litigants have characterized the motion as one to modify visitation pursuant to KRS 403.320 or one to modify custody pursuant to KRS 403.340.

> The obvious problem is that parties often ask for one thing when they are actually seeking the other, due to the unique nature of their shared (joint) custody or split (sole) custody. Courts have struggled ever since the concept of joint custody emerged with what part physical or residential possession of the child plays in each type of custody. However, a modification of custody means more than who has physical possession of the child. Custody is either sole or joint (or the subsets of each) and to modify it is to change it from one to the other. On the other hand, changing how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree. This is true whether the parent has sole or joint custody: decision-making is either vested in one parent or in both, and how often the child's physical residence changes or the amount of time spent with each parent does not change this.
>
> This is perhaps too legalistic in a reality-based world. To most people, having custody means having possession of the child. Parties have addressed this understanding by applying terms such as "primary residence" or "residential parent," in their agreements. This type of thinking is often inconsistent with the legal meaning of joint custody, wherein both parents are equal legal custodians, but is nonetheless prevalent.

Pennington, 266 S.W.3d at 766-67 (footnotes omitted).

Appellee's motion sought to denominate her as R.M.'s primary residential parent. The Ohio Circuit Court characterized this pleading as a "Motion for Modification of Custody" of the minor child, and ultimately "awarded primary custody of the minor child."[4]

[4] August 8, 2018 findings of fact, conclusions of law and order at paragraph 6.

The question for our consideration, then, is whether the Ohio Circuit Court's award of "primary custody" of R.M. to Appellee on August 8, 2018, constitutes a "change in custody" implicating the serious endangerment standard set out in KRS 403.340, or is only a modification of timesharing/visitation requiring application of the KRS 403.320 "best interest" standing. Having closely studied the record and the law, we conclude that the August 8, 2018 order on appeal awarded a modification of timesharing/visitation and does not constitute a "change in custody" implicating KRS 403.340. Though the Ohio Circuit Court employed the phrase "modification of custody" to characterize its award, the practical effect of the award was to modify only R.M.'s residency. This conclusion is bolstered by the circuit court's acknowledgement that the award was "subject to time-sharing of the Respondent [Appellant] as set-forth below." Further, the order on appeal at paragraph 10 states that, "Petitioner [Appellee] shall be allowed to enroll the minor child in Ohio County Schools, as she is the *primary* [as opposed to sole] residential parent of said child." (Emphasis added.)

The *Pennington* court recognized that because each family structure and parenting arrangement is unique, the application of statutory terminology in the context of custody proceedings is often fluid and imprecise. *Pennington*, 266 S.W.3d at 767. Such is the case herein, as the terms "custody," "residence" and "residential" have been applied somewhat interchangeably. When distilled to its

constituent components, however, the Order on appeal awarded a change in R.M.'s primary residence subject to Appellant's "time sharing." This, we conclude, constitutes a modification of residency and timesharing as opposed to a modification of "custody" as set out in KRS 403.340. Accordingly, the KRS 403.320 "best interest" standard applies. This standard was employed by the Ohio Circuit Court to address R.M.'s change in residency, and as such we find no error. We do not conclude that the Ohio Circuit Court's findings are inadequate, nor that its determination constituted an abuse of discretion. *See generally, Futrell v. Futrell*, 346 S.W.2d 39, 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

Appellant goes on to argue that the circuit court improperly restricted his visitation by failing to apply the serious endangerment standard as set out in KRS 403.320(3). We find no error on this issue. The circuit court effectively held in abeyance the issue of Appellant's visitation or timesharing pending the recommendation of a family counselor. That recommendation had not been made, entered into the record nor relied upon by the circuit court as of the entry of the order on appeal. As such, we cannot conclude that the Ohio Circuit Court improperly failed to apply KRS 403.320(3), as no final visitation or timesharing award was set out in the order on appeal.

Appellant next argues that circuit court's finding of contempt was erroneous. He asserts that there is no basis for finding either direct or indirect criminal contempt which constitutes an affront to the dignity of the court. Appellant has not revealed if this matter was preserved for appellate review nor, if so, in what manner. CR 76.12(4)(c)(v). As noted above, we are not required to consider portions of the appellants' brief not in conformity with CR 76.12, and may summarily affirm the trial court on the issues contained therein. *Pierson*, *supra*. Accordingly, we summarily affirm the circuit court on this issue.

Lastly, Appellant argues that the Ohio Circuit Court erred in ordering child support made retroactive to Appellee's motion for modification. Again, Appellant has not complied with CR 76.12(4)(c)(v), and has not cited any case law in support of his claim of error. "A reviewing court should defer to the lower court's discretion in child support matters whenever possible. . . . The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (footnotes omitted). We find no abuse of discretion in the entry of child support made retroactive to the filing of the motion, as such retroactivity is expressly provided for in KRS 403.213(1) ("The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for

modification[.]"). Further, KRS 403.213(1) allows for modification of child support upon a showing of a material change in circumstances that is substantial and continuing. Making Appellee R.M.'s primary residential parent constitutes such a change. We find no error.

For the foregoing reasons, we AFFIRM the August 8, 2018 findings of fact, conclusions of law and order of the Ohio Circuit Court.

GOODWINE, JUDGE, CONCURS.

SPALDING, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Daniel Sherman, Jr. Greenville, Kentucky	Dan Jackson Hartford, Kentucky