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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000177-MR

RANDALL J. HARVEY — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE T. STEVEN BLAND, JUDGE
ACTION NO. 96-CI-00631

MARIA C. HARVEY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

DYCHE, JUDGE. Randall and Maria Harvey were married in 1991; their marriage was dissolved in 1996. The separation agreement, incorporated into the decree of dissolution, conferred joint custody of the parties' twin sons, with Maria to be the primary custodian.

In April 2001 Maria moved the Hardin Circuit Court for an increase in child support. Randall countered with a motion for change of custody, alleging, among other things, that Maria

abused the twins and resorted to inappropriate corporal punishment.

The domestic relations commissioner held a hearing and entered a report recommending that the parties remain joint custodians, with Maria having primary care of the twins. The trial court considered Randall's exceptions and objections before adopting the commissioner's report. Randall appeals.

He first argues that the trial court erred in not granting primary custody to Randall. In support of this he reiterates all the evidence before the domestic relations commissioner and trial court, urging that it warranted a different result. We cannot agree. The record indicates, and appellant fails to convince us otherwise, that the domestic relations commissioner and the trial court gave due regard to the evidence and weighed it in accordance with the statutory considerations. See Kentucky Revised Statute (KRS) 403.340; and Scheer v. Ziegler, Ky. App., 21 S.W.3d 807 (2000).

Nor do we find error in the award to Maria of $500.00 toward attorney fees. While we feel there is an issue concerning naming appellee's counsel as a party to this appeal (and note appellant's belated attempt to do so, contrary to his arguments now), the matter can easily be affirmed for the simple reason that appellant has demonstrated no abuse of discretion by the trial court. KRS 403.220.

The order of the Hardin Circuit Court is affirmed.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN RESULT.

KNOPF, JUDGE, CONCURRING IN RESULT: I reluctantly concur in the result reached by the majority, but I write separately to state my reservations about the trial court's decision. All custody determinations, whether made during the initial proceedings or on a motion for modification, present difficult issues for a trial court. Unfortunately, as is the case here, the parents' acrimony may spill over into their dealings involving the children. A trial court is in the best position to observe the conduct of the parties in deciding the best custody arrangement. As an appellate court, we owe substantial deference to the trial court's conclusions.

I agree with the majority that the evidence of record did not compel a change of custody. Nonetheless, in this case, Randall presented evidence which would justify significant and serious concerns about Maria's conduct toward him and the children. While some of this evidence was contested, and Randall is not entirely blameless himself, I am troubled by the commissioner's apparent dismissal of these concerns. Furthermore, I would also find that the trial court's award of attorney fees was not justified. But because Randall failed to

name Maria's attorney as a party to this appeal, I must concur with the result reached by the majority.

In Scheer v. Zeigler,[1] this Court correctly came to the conclusion that an award of joint custody, even one made pursuant to an agreement by the parties, is subject to the custody modification standards set forth in KRS 403.340, and that there is no threshold requirement for modifying joint custody other than such requirements as may be imposed by the statutes.[2] Under KRS 403.340, a motion to modify a custody decree may not be granted within two years from entry of the order unless the court finds that the child's present environment may endanger seriously his physical, mental, moral, or emotional health, or the custodian appointed under the prior decree has placed the child with a de facto custodian. Even after that two-year period, KRS 403.340(3) and (4) provide in pertinent part that:

> the court shall not modify a prior custody decree 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 child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

[1] Ky. App., 21 S.W.3d 807 (2000).
[2] Id. at 814.

(a) Whether the custodian agrees to the modification;

(b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

(c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;

(d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;

(e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a de facto custodian.

(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.

KRS 403.340 places the burden of proof on the parent seeking to modify custody in order to encourage stability in the custodial relationship.[3] Because ongoing litigation over custody is counterproductive to this end, and because the best interests of the child are most often served by forcing quarreling parents to accept the finality of the decree, the statutes were structured to discourage post-judgment litigation except where a party seeking to change custody can first cross one of the thresholds set out in KRS 403.340.[4] Furthermore, on appellate review, a decision regarding custody will not be set aside unless it is based upon clearly erroneous factual findings, or if it constitutes an abuse of discretion. [5]

Accordingly, the questions presented for our review concern whether the commissioner's findings were clearly erroneous and whether the trial court's decision to deny Randall's motion to modify custody was an abuse of discretion based upon the standards set out in KRS 403.340. The majority concludes that the commissioner's factual findings were supported by substantial evidence, and that those findings did not compel a different result. Although I agree that the

[3] Quisenberry v. Quisenberry, Ky., 785 S.W.2d 485, 488 (1990).
[4] Squires v. Squires, Ky., 854 S.W.2d 765, 773 (1993).
[5] CR 52.01; Bickel v. Bickel, Ky., 442 S.W.2d 575, 577 (1969).

ultimate result did not constitute an abuse of discretion, I find certain aspects of the commissioner's findings to be baffling.

Most notably, Wanda McIntyre, a social worker for the Cabinet for Families & Children, testified that the Cabinet investigated reports that Maria had used inappropriate corporal punishment on the twins. In April of 1999, the twins' school reported finding scratches and bruises on the children. A Cabinet investigator concluded that the reports of abuse were substantiated. Indeed, the investigator found bruises on the children; the twins stated that Maria punished them by pinching them severely (hard enough to draw blood) and by hitting them with a plastic spoon. Maria admitted to this conduct, and the investigator's report was introduced into evidence. McIntyre testified that she and Maria worked on a case plan, and that Maria agreed to use non-aggressive forms of discipline for the children.

But because neither McIntyre nor Randall actually saw the bruises, the commissioner dismissed the allegations that Maria had used excessive corporal punishment as "not substantiated by any credible evidence." The commissioner was not bound to accept Randall's allegations that Maria had inappropriately disciplined the children after April of 1999. However, given the uncontested evidence of record, the

commissioner's categorical finding that Maria has not abused the children is troubling.

By themselves however, Maria's past mistakes with the children do not compel a change in custody. Indeed, Maria, to her credit, has gained better control of her temper and improved her parenting skills. The Cabinet received no further allegations of abuse after April of 1999, and McIntyre testified that the children are currently in no danger living with their mother. Furthermore, there was substantial evidence that Maria is currently providing a supportive and nurturing home for the twins. Although Randall could better provide for the children in his household (particularly with regard to their educational needs), the record did not compel a finding that the children's present environment may endanger seriously their physical, mental, moral, or emotional health.

Randall has also pointed to a significant pattern of uncooperative behavior by Maria with regard to the children. Randall complains that Maria has failed to follow the pick-up and drop-off times set out in the parties' agreement. He also states that Maria has failed to keep him informed about the children's school events and meetings. In August of 2001, Randall found it necessary to obtain a court order preventing Maria from interfering with the children's appointments with their psychologist. On several occasions, Maria has removed the

children from Kentucky without giving Randall timely and written notice. Such conduct was in violation of the trial court's prior written orders. And of greatest concern are Maria's threats to remove the children to the Philippines, which is her native country. These comments were reported both by Randall and by the Cabinet investigator.

Nevertheless, a court may not modify custody based only upon a repeated failure to observe visitation or other custody provisions.[6] The court entered orders specifying how and when the exchange of custody for visitation should happen. The court also directed Maria not to interfere with the children's appointments with their psychologist. Hopefully, these orders will resolve the problems which have occurred in the past. Likewise, while Maria's actions in taking the children out of state without giving timely and written notice are grounds for serious concern, the trial court's order clearly and specifically addresses this issue. With respect to Randall's complaint about Maria not keeping him advised about the children's school events and meetings, the commissioner responded that "Randall was awarded joint custody of the children and there is nothing to prevent him from contacting the school and receiving information about his children." Under the circumstances, I agree with the majority that the trial court's

[6] KRS 403.340(4)(c).

handling of these disputes did not constitute an abuse of discretion.

At the same time, I must emphasize that a non-custodial or non-residential parent should not have to continually return to court to enforce a custody order against an uncooperative former spouse. Scheer v. Zeigler expressly recognizes that courts retain the authority to modify joint custody in situations where the parties are unable to cooperate.[7] Although the situation between Maria and Randall may not have reached that point yet, the court should make it clear that custody can be changed if the parties are unable to work together in the best interests of their children. Furthermore, Maria's threats to remove the children from the country should not be tolerated.

I also believe that the trial court abused its discretion by requiring Randall to contribute a total of $1,500.00 toward Maria's attorney fees. KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorney fees of the other party,

[7] 21 S.W.3d at 814. *See also* Chalupa v. Chalupa, Ky. App. 830 S.W.2d 391, 383 (1992), which stated: "In finding a preference for joint custody is in the best interest of the child, even in a bitter divorce, the court is encouraging the parents to cooperate with each other and to stay on their best behavior. Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy".

but only if there exists a disparity in the relative financial resources of the parties in favor of the payor. But even if a disparity exists, the trial court is not required to award attorney fees.[8] The purpose of KRS 403.220 is to prevent one party to a divorce action from controlling the outcome solely because he or she is in a position of financial superiority, whether because he has control of the marital assets or because he has the more lucrative position of employment. In that situation, the trial court is authorized to order the financially superior party to bear the cost of the litigation, including the other party's reasonable attorney fees.[9]

However, KRS 403.220 was not intended merely as a device to shift attorney fees to the party who has failed to prevail on a motion to modify custody. Although the evidence did not compel a finding that a change in custody was warranted, Randall presented substantial evidence showing Maria's lack of cooperation with regard to visitation, as well as other conduct which needed to be brought to the court's attention. In fact, the trial court found it necessary to enter specific orders involving visitation and conditions under which the children could be removed from the state. Under the circumstances, the

[8] Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 519 (2001) (citing Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 514 (1975); Russell v. Russell, Ky.App., 605 S.W.2d 33, 37 (1980); and Beaver v. Beaver, Ky.App., 551 S.W.2d 23, 25 (1977)).
[9] Neidlinger, at 521

award of attorney fees seems simply to penalize Randall for bringing the motion.

Nevertheless, I must conclude that this issue is not properly presented for our review. The trial court directed that Randall pay those fees directly to Maria's attorney. In such cases, the attorney is the real party in interest and is a necessary and indispensable party to any appeal from that order.[10] Since Randall failed to name Maria's attorney as a party to this appeal, he is not entitled to challenge the award now.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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[10] Id. at 519.