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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002024-ME

CRYSTAL LYNN PRESLEY, NOW SMITH — APPELLANT

V.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
CIVIL ACTION NO. 99-CI-00159

JIMMY LEE PRESLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR JUDGE[1].

MINTON, JUDGE. Crystal Lynn Presley (now Smith) and Jimmy Lee Presley were divorced on January 10, 2001; and Crystal was awarded sole custody of their only child, a three-year-old daughter, Page. Crystal now appeals from two orders that

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

changed this custody order to joint custody and ultimately made Jimmy Page's primary residential custodian. We disagree with Crystal's argument that the circuit court applied the wrong legal standard in modifying custody. Therefore, we affirm the circuit court's modification.

Soon after her divorce from Jimmy, Crystal enlisted in the U.S. Navy. She testified that her decision was based on her desire to find a good job, to finish her education, and to provide for her child. As Crystal left for boot camp, she left Page with her mother, Elizabeth Little. She petitioned the district court to designate Elizabeth as Page's guardian. Jimmy was given short notice of the district court petition, but he appeared at the hearing and objected. For reasons that are not disclosed by findings found in this record, the district court determined that Elizabeth, a convicted felon who had served time in prison for manslaughter, was a more suitable guardian than Jimmy. Bitter conflict immediately erupted between Jimmy and Elizabeth over Jimmy's visitation with Page.

On August 6, 2002, Jimmy filed a motion in circuit court to modify the original custody order. In support of his motion, Jimmy and his mother, Shirley Presley, filed affidavits stating that Jimmy was the more appropriate custodian for Page. They said Page had not lived with Crystal for over four and a half months during which time Page had lived with Elizabeth, who

was a convicted felon. Another motion from Jimmy requested the court to hold a contempt hearing to require Elizabeth to show cause why she should not be held in contempt for failure to abide by Jimmy's visitation schedule.

The court responded to Jimmy's motion with an order increasing Jimmy's visitation with Page and directing that all visitation exchanges take place at the Fleming County Sheriff's Office. The court withheld a ruling on the motion for change of custody to allow a written response from Crystal. Several months later, the circuit court received a letter from the Captain of the USS George Washington stating Crystal was on a six-month deployment at sea aboard that ship so she could not attend a custody hearing. Citing the Soldiers' and Sailors' Civil Relief Act, the Captain requested that proceedings be stayed until Crystal could be present.

Following this letter, the circuit court ordered, on November 12, 2002, temporary joint custody by both parents. The court further ordered that Page would reside with Jimmy until Crystal returned to the United States from sea duty. Nine days later, the court ordered that Page be returned to Crystal, who had then returned to the United States. The court set a hearing on Jimmy's motion to change custody to be held on November 25, 2002.

Following that hearing, the circuit court made a new custody determination in an order, entered December 10, 2002. Finding that Crystal had placed Page with a de facto custodian (Elizabeth Little), the court concluded that under KRS[2] 403.340, modification of the original custody order was permissible. The court then ordered a modification to joint custody by Jimmy and Crystal. Crystal was made primary residential custodian while Crystal was on "*terra firma.*" Page was to reside with Jimmy whenever Crystal was at sea or whenever Crystal was unable to have "day-to-day" contact with the child.

On February 10, 2003, the court granted a temporary change in the December 10 order by changing primary residential custody from Crystal to Jimmy. The court's decision was based on the fact that Crystal, who was at again away at sea with no specific return date, had neglected to enroll Page in school. The court also found that Crystal had failed to abide by the established visitation schedule.

Six months later, on August 21, 2003, the court decided that joint custody should continue but that primary residential custody should permanently be given to Jimmy. The court found that Page had been subject to "mind poisoning" while in Crystal and Elizabeth's care and that both Crystal and Elizabeth had made false allegations to the Cabinet for Families

[2] Kentucky Revised Statutes.

and Children and to the Kentucky State Police that Page was being sexually abused and that Jimmy and his mother were feeding the child grass instead of food. The court also found that Page loved her father very much, that she was receiving stable and loving care from her father and her paternal grandmother, and that she was enrolled in a Head Start program. The court relied on evidence from Page's teachers that after spending time with Crystal and Elizabeth, Page would return to school "really hateful" and "mouthy." Finally, the court stated:

> The facts recited above leads the court to conclude that this child has been tossed about like a fishing bobber in turbulent water. While the court is impressed with and applauds the mother's efforts to raise herself on the economic and social ladder by improving her skills in the military service, the life of a seagoing navy person is for most purposes incompatible with the raising of a small child. This instability is clearly not in the child's best interests.

On September 16, 2003, Crystal filed a motion to amend the December 10, 2002, and the August 21, 2003, orders to recite the words "This is a final and appealable order." On the same day, she filed her notice of appeal from both orders. The circuit court's Order Nunc Pro Tunc in response to this motion, entered September 25, 2003, added the requested language to the August order but left the December order unchanged.

At the outset of this appeal, we note that Crystal's motion to add the words "final and appealable" to the court's orders was unnecessary as to the August order and unavailing to resuscitate the December order for purposes of appeal. CR[3] 54.02 does state that judgments "shall recite that the judgment is final"; but the rule further states that in the absence of such recital, the judgment only remains interlocutory if it fails to "adjudicate[] less than all the claims or the rights and liabilities of less than all the parties . . . ." "In other words, the finality of an order is determined by whether it grants or denies the ultimate relief sought in the action."[4] Moreover, "[a]n order awarding the custody of a child is final, although the question of change in custody, if on a showing of a change in condition, may be entertained at a later date by the same court . . . ."[5]

The orders entered by the Fleming Circuit Court on December 10, 2002, and August 21, 2003, were each final at the time they were entered, despite the missing incantation "final

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[3] Kentucky Rules of Civil Procedure.

[4] State Farm Mutual Automobile Insurance Company v. Caudill, 136 S.W.3d 781, 783 (Ky. 2003).

[5] Marlar v. Howard, 312 Ky. 209, 226, S.W.2d 755, 757 (Ky. 1949); *see also*, Louise E. Graham and Hon. James E. Keller, Kentucky Practice: Domestic Relations Law, §13.1 (2d ed. Vol. 15) ("A judgment awarding custody is an appealable order, although not a final judgment in the constitutional sense.") *citing* Gates v. Gates, 412 S.W.2d 223 (Ky. 1967).

and appealable." Both orders related to custody of Page and both orders adjudicated the "ultimate relief" sought by the parties. Therefore, we conclude that Crystal's motion for this final-and-appealable language was unnecessary; and it had no effect upon the time for filing her notice of appeal.

So we must conclude that Crystal's notice of appeal of the December 10, 2002, order came too late. The notice was filed on September 16, 2003, some nine months after notice to Crystal of entry of the December 10, 2002, order. CR 73.02(1) states that "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order . . . ." CR 73.02(2) further maintains that "[t]he failure of a party to file timely a notice of appeal . . . shall result in a dismissal or denial." As stated by the Court in Electric Plant Board of the City of Hopkinsville v. Stephens,[6] "[t]he Rules of Civil Procedure provide a simple, specific, direct and exclusive method of taking appeals to this Court in civil cases. The right of appeal created by statute only exists upon compliance with certain procedural requirements of the Civil Rules."[7] Likewise, our Supreme Court has affirmatively stated that "a tardy notice of appeal is subject to automatic

[6] 273 S.W.2d 817 (Ky. 1954).

[7] *Id.* at 817, 818.

dismissal and cannot be saved through application of the doctrine of substantial compliance."[8]

We recognize that an appeal from a custody modification should be given due consideration and should not be dismissed lightly, even if a party fails to file the appeal in a timely manner. But we cannot disregard the nine-month delay in filing the notice of appeal. There is no evidence that the delay can be attributed to mere clerical or procedural error; nor do we believe that the delay can be credited to the absence of the words "final and appealable order." Simply put, Crystal failed to follow the "simple, specific, direct and exclusive" means of taking appeal dictated by the Rules of Civil Procedure. Therefore, her appeal from the December 10, 2002, order is subject to "automatic dismissal"; and we must decline to review it.

With regard to the second issue, the court's decision to award Jimmy primary residential custody, the record reflects that temporary primary custody was initially awarded to Jimmy on February 3, 2003. Crystal argues that the temporary order was erroneously entered because "there was no change of condition between the time of the implementation of the courts [sic] order of December and it's [sic] temporary order of February, [sic]

[8] Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713, 716-717 (Ky. 2000).

2003 . . . ." We disagree. A motion for temporary custody need only be accompanied by an affidavit "setting forth the facts supporting the requested order."[9] If a party objects, a hearing must be held; but if no objection is filed, "the court may award temporary custody on the basis of the affidavits alone . . . ."[10] Although both Jimmy and Shirley filed affidavits, there is no indication that Crystal filed any objections to the motion for immediate primary custody. Therefore, the court was acting within its province when it granted Jimmy temporary primary custody based on the facts stated in the affidavits.

Crystal further argues that the August 21, 2003, order erroneously awarded Jimmy permanent primary residential custody. Jimmy's request for primary custody was made on January 8, 2003. In support of his request, Jimmy stated that Crystal failed to abide by the court's visitation schedule and that Crystal's "persistent actions in denying [Jimmy] his visitation rights with his minor daughter, has and is causing emotional damage to the child, and clearly is not in the best interest of the child." The reason for Jimmy's motion stemmed from an incident at the beginning of January 2003. Jimmy's mother and father drove to Norfolk, Virginia, from their home in Kentucky, to pick up Page for a scheduled visit. However, upon their arrival,

[9] Graham, *supra*, at §21.2.

[10] *Id.*

Crystal claimed Page had a cold and refused to allow the child to see her grandparents or to leave with them.

Crystal claims that although a hearing was held on August 8, 2003, the court failed to make the "threshold finding[s]" required before custody may be modified. Specifically, Crystal argues that there was no "specific finding that the child's present enviornment [sic] endangers seriously her physical, mental, moral, or emotional health and that the harm likely to be caused by a change of environment is outweighed by it's [sic] advantages to her." We disagree.

In making this argument, Crystal relies on KRS 403.340(2). Her reliance on this statute is misplaced. KRS 403.340(2) states:

> 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.

We agree that this standard was proper for the original modification made by the court in December 2002. The initial change in custody was made before the running of the two-year period cited in KRS 403.340(2) and, therefore, was subject to a

stricter standard. But since the original custody decree was entered on January 10, 2001, the August 2003 order came well after the two-year period. Thus, KRS 403.340(3)(a)-(f), rather than KRS 403.340(2), provides the proper statutory standard for the August modification. That section reads:

> 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:
>
> (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.

The relevant factors set forth in KRS 403.270(2), referenced in subsection (c) of KRS 403.340(3), are as follows:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

Because a child cannot simultaneously reside in two homes, joint custody decrees often require the court to designate one parent as a "primary residential custodian."[11] The term is generally interpreted to indicate the party "with whom the child will primarily reside. In such situations, the other parent is awarded what is referred to as 'visitation,' 'time-sharing,' or 'parenting time.'"[12] Joint custodians share major decision-making authority; however, the primary residential custodian is necessarily given greater autonomy over day-to-day child-rearing decisions. Because of this, "a trial court must again consider the child's best interests in connection with its decision to designate one of the parties as the primary

[11] Fenwick v. Fenwick, 114 S.W.3d 767, 778 (Ky. 2003).

[12] *Id.* at 779.

residential custodian."[13] Likewise, "[b]ecause . . . joint custody is itself a custody award . . . any modification must come within the purview of KRS 403.340 . . . ."[14]

After reviewing the videotape from the August 2003 hearing and reading the entirety of the record, we believe the trial court properly evaluated the factors set forth in KRS 403.340 and KRS 403.270 in determining that Jimmy should have primary residential custody of Page. At the hearing, Jimmy, Crystal, and Shirley testified, along with Page's Head Start teacher, Crystal Applegate, and the social worker charged with investigating the claims of child abuse, Mary Claire Moon. The testimony of each of the witnesses was duly noted by the circuit judge and taken into consideration in rendering the final order.

The court determined that Page loved her father and was receiving stable and loving care in his home; that she was enrolled in school and had demonstrated good progress; that she was a "happy, bright and well-adjusted child"; that after visiting with her mother and maternal grandmother, Page was often "hateful" and "mouthy"; that Elizabeth, a convicted felon, had "stood at every turn of the road . . . to exacerbate the differences between the parties"; that unsubstantiated charges

[13] *Id.*

[14] *Id.* at 783.

of child abuse had been made to the authorities by Crystal and Elizabeth; and that “mind-poisoning” and “spite” had “obviously occurred in the mother’s home.”

We believe that this evidence sufficiently satisfies the “threshold” findings required for modification. The trial court obviously found that Jimmy, who had already been awarded temporary primary residential custody, was providing the child with a safe and stable home environment and that Page was interacting well with her father and paternal grandmother. The evidence introduced at the hearing also provided sufficient proof that Page was well adjusted to her home and school environments and that changing Page’s current status could cause her harm. The court also indicated that allowing Page to live with Crystal and Elizabeth could be detrimental to her emotional health. Evaluating these factors as a whole, the court determined it was in the best interest of Page to live primarily with her father. This decision was supported by the evidence.

Because we believe the court made the requisite findings and that the award of primary residential custody to Jimmy was proper, we affirm the decision of the Fleming Circuit Court.

ALL CONCUR.

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