

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002004-ME

VIRGINIA EVA CROUCH

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-00728

CHARLES JACKSON CROUCH, II

APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.
McANULTY, JUDGE: Virginia Eva Crouch (hereinafter appellant) appeals the judgment of the Boyd Circuit Court modifying its child custody order, pursuant to KRS 403.270(2), and granting her former husband, Charles Jackson Crouch (hereinafter appellee), physical custody of the parties' daughter. In a settlement agreement incorporated with the dissolution decree entered December 17, 1996, the trial court awarded the parties joint custody, care and control of the child, with appellant to have actual physical custody of the child and appellee given

liberal visitation. That arrangement continued until 2003 when appellant was called to active duty as a member of the state National Guard unit. On February 10, 2003, the parties entered into an agreed order as a result of her being called to active military duty. They agreed they would continue to have joint custody of their daughter, but that the child should "be allowed to reside with the Petitioner [appellee] until further Orders of the Court." Appellee's child support obligation was suspended by the same agreed order.

Appellant was not, as had been anticipated and feared, required to serve overseas in Iraq, but remained in Kentucky, albeit on active duty. Upon her completion of active duty in January 2004, appellant and appellee agreed between them that appellant would take the opportunity to attend a four-month officers' training camp while the child was staying with appellee and still in school. According to appellant, attendance at the officers' training camp was mandatory at some point in her career, but not necessarily at that time. Appellant completed this assignment in July of 2004.

In their conversations, appellee did not broach with appellant his desire to keep the child following appellant's completion of active duty and officers' training. On July 20, 2004, when appellant asserted a right to return of the child, appellee informed her that he intended to keep their daughter

with him and would require an order from the court for her return to her mother.

Appellant filed a motion on July 27, 2004, for an order directing the return of physical custody of the child pursuant to the agreed order and the decree of dissolution. Appellee's response stated that physical custody was transferred to him until further orders of the court, that appellant was scheduled to be called to active duty again, and that the child did not want to return to live with her mother in Lawrenceburg, but wanted to continue to live with her father and go to school in Raceland. The court held a hearing on appellant's motion. The court also held an in camera interview with the child, then age nine; however, there is no record of the child's conversation with the court as required by KRS 403.290(1) in the record on appeal.

On August 30, 2004, the trial court entered an order finding that it was in the best interests of the child to stay with appellee. The court first found that when the agreed order was executed it was the intent of both parties that the child would be returned to appellant's physical custody after her military activation. The court considered the agreed order to be an agreement to modify the terms of the original arrangement contained in the settlement agreement, and decided that it was for the court to consider the criteria of KRS 403.270(2) to

determine whether the arrangement should return to the original terms of the settlement agreement. The court found that the child's expressed preference for staying with her father due to her adjustment to a new school system, and her integration into a new school and community weighed favorably for her best interests to be with her father. The court emphasized that the daughter's preference had nothing to do with any negative attitude about living with her mother, and commented favorably on the mother's parenting skills and the job she performed raising the daughter. The court, therefore, ordered the child to continue to reside with appellee.

Appellant filed a motion to alter, amend, or set aside the court's order as being against the weight of the evidence and as condoning the breach of an agreement by a party to it. The trial court denied the motion to alter the court's order. Appellant appeals the order giving physical custody of the child to appellee and the denial of the motion to alter, amend or set aside the court's order.

Appellant's primary argument is that the intent of the parties was for the child to return to her under the agreed order, and appellee never moved the court for a change of custody. Although she acknowledges that the agreed order contemplated further orders of the court, she asserts that since the parties had a settlement agreement affording her physical

custody and the parties had an understanding that she would resume physical custody, appellee was required to move for modification if he wanted a change. We agree.

KRS 403.340 sets forth the procedure for modification of a permanent custody order. Gladish v. Gladish, 741 S.W.2d 658, 661 (Ky.App. 1987). The statutory scheme requires that a party file a motion for modification which is submitted with supporting affidavits pursuant to KRS 403.350. Appellee made no motion for modification of custody nor, needless to say, did he file any affidavit. Appellant objected in arguments before the court, and asserted that she expected to have the child returned to her under the original settlement decree, which was the understanding behind the agreed order.

We conclude that the court proceeded incorrectly in this case in deciding the issue as it did not have jurisdiction to proceed as it did. Without a motion to modify before it, the court effectively modified the custodial arrangement on its own motion. A trial court is prohibited from so proceeding on its own motion. Gladish, 741 S.W.2d at 661; Chandler v. Chandler, 535 S.W.2d 71 (Ky. 1975). The statutory requirements are a matter of subject matter jurisdiction, and if they are not met the circuit court is without authority to modify. Petrey v. Cain, 987 S.W.2d 786, 788 (Ky. 1999). Furthermore, the court did not employ the correct standard in its ruling, as it did not

consult KRS 403.340. The court proceeded to decide the custody determination anew under KRS 403.270 as if there had been no permanent custody order in place.

Because there was a final custody order in place, appellant should have been returned custody of the child. We find this necessary despite the fact that the parties' agreed order contemplated further orders of the court. As a result, we find it necessary to reverse the order of the Boyd Circuit Court and remand this case for an order restoring custody to Appellant under the original decree.

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard A. Hughes
Ashland, Kentucky

BRIEF FOR APPELLEE:

Jeffrey L. Preston
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