RENDERED: APRIL 14, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002446-MR

STACEY K. BLAKE (NOW HATCH) — APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 03-CI-00113

RONALD E. BLAKE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Stacey K. Blake (now Hatch) (hereinafter "Stacey") appeals from an opinion and order entered July 21, 2004, adopting the recommendations of the Domestic Relations Commissioner (hereinafter "DRC") that awarded the parties joint custody of their minor daughter with the father, Ronald E. Blake (hereinafter "Ron"), being the primary custodian and the child living primarily with her father. We affirm.

[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.

The parties hereto were married on April 8, 1995. Madeline Irene Blake (hereinafter "Madeline") was born on March 24, 1998. The parties subsequently separated on December 1, 2002, and Stacey filed a petition for dissolution on April 16, 2003. Ron, who was not represented by counsel, filed an entry of appearance at that time. On May 6, 2003, a settlement agreement was filed with the court. The agreement resolved all pending issues relative to the dissolution. As to custody, the parties agreed as follows:

> **CUSTODY**
>
> The parties acknowledge that they are [the] parents of one (1) minor child, MADELINE IRENE BLAKE, date of birth 3/24/98, Social Security Number []. The parties agree that they shall share joint legal custody with said minor child with the minor child primarily residing with the Wife in Charlotte, North Carolina.

Section 5 of the agreement dealt with timesharing of the child and awarded significant and detailed amounts of time when Ron would have Madeline in his custody. Furthermore, the agreement called for each party to drive approximately half way and meet in "Sevierville, Tennessee for the purpose of exchanging the minor child for timesharing." And in Section 6 of the agreement, the parties agreed to deviate from the child support guidelines (KRS 403.212) because of the "increased amount of timesharing which [Ron] shall be having with the minor child."

On July 15, 2003, Stacey filed a motion to submit the matter to the circuit court for ruling based upon the Deposition Upon Written Interrogatories which she filed at the same time. And on August 13, 2003, the court entered its recommended findings of fact, conclusion of law and decree granting the dissolution. In relevant part, the decree of dissolution stated:

> 3. That the Settlement Agreement entered into by the parties on May 1, 2003, and filed of record herein on May 6, 2003, has been reviewed by the Court and the same is determined not to be unconscionable and the same is hereby incorporated into this Decree as if fully set forth.
>
> 4. That custody of the minor child of the parties, Madeline Irene Blake, date of birth 3[/]24/98, SSN: [], be awarded jointly to [Stacey] and [Ron] with the said minor child primarily residing with [Stacey] in Charlotte, North Carolina.
>
> 5. That the parties shall share time with said minor child in accordance with the timesharing schedule set forth in the Settlement Agreement.

Immediately after the decree was entered, events occurred which led the court to eventually enter an order naming Ron as the primary residential custodian that is the source of this appeal.

On August 25, 2003, Ron filed a motion to alter, amend or vacate under CR 59.05, or in the alternative a CR 59.01 motion for a new trial. The motions addressed the issues of

child custody, support and timesharing. Ron alleged in his motion that on August 18, 2003, Stacey contacted him and informed him that she was quitting her job in North Carolina, taking her children (Madeline and another child she had by a previous marriage), and moving to California to live with a man she had first met on July 4, 2003.[2] The motion argued that:

> It would be a manifest injustice to require Ron to honor a Decree, which became obsolete within days, if not hours, of its entry.
>
> Ron asks the Court to alter, amend or vacate pursuant to CR 59.05 those portions of the final decree pertaining to Madeline, and award him sole custody of the parties' minor child. In support, Ron states that the entire agreement that the parties painstakingly worked out regarding Madeline is useless. The purpose of the Agreement was to provide a structure for decision-making, joint legal custody, and a timesharing arrangement, worked out in great detail, both of which have been unilaterally violated and ignored by Stacey. The provisions regarding custody have become irrelevant, the provisions regarding timesharing are impossible given the distance and the provisions regarding child [support] are now incorrect.
>
> In the alternative, Ron requests that the Court order a new trial pursuant to Civil Rule 59.05 (sic) and implement the structures requested in 2a-e, until the new trial may be held.
>
> In support, Ron states that the Agreement and Decree provided for joint custody with Madeline and Stacey living in

[2] That individual is Don Hatch who she subsequently married.

> North Carolina. It made no provision for Stacey or Madeline living anywhere else. If Ron had known that within a mere six days of finalization of the divorce that Stacey would relocate to California, he never would have executed the Agreement or allowed the divorce to go forward. Learning that Stacey was relocating to California with their child came as a surprise and incredible shock to Ron. Prior to Monday, August 18, 2003, Stacey had never mentioned moving to California. All discussions, and actions between the parties, had centered on the relocation to North Carolina. Suddenly, on August 19, 2003, Stacey informed Ron that she was taking Madeline to California.
>
> This information also constitutes newly discovered evidence that Ron could not possibly have known about prior to the entry of the Decree. No one shared the information with him until after the divorce was final. If Ron had known, he would not have executed the Agreement or authorized the divorce to be finalized.

The motions were scheduled for a hearing on September 10, 2003. The docket sheet signed by the judge on that date states, “send back to Domestic Relations Comm. to hear as to the change of circumstances. Plaintiff [Stacey] ordered to comply with Decree and agreement as set forth.” Thereafter, on September 30, 2003, the court entered a written order which addressed Ron’s motions and stated:

> This cause having come before the Court upon the Respondent’s motion to alter, amend or vacate judgment or, in the alternative, for a new trial, with respect to the issues of custody, the Petitioner having appeared by counsel and the Respondent having

> appeared in person and by counsel, and the Court being otherwise sufficiently advised,
>
> IT IS HEREBY ORDERED AND ADJUDGED as follows:
>
> 1. The Court does not grant the Motion to alter, amend or vacate the Decree, but hereby directs this matter to the Domestic Relations Commissioner for an evidentiary hearing to determine if there are sufficient grounds to change the Decree with respect to custody maters(sic); and
>
> 2. The Petitioner is directed to comply with the existing Decree with respect to visitation in all respects.

While the order denied the motion to alter, amend or vacate (CR 59.05), it did not directly rule on the alternate motion for a new trial (CR 59.01) but did direct the matter to the DRC for an evidentiary hearing with respect to the custody issue.

A hearing was held before the DRC on November 10, 2003. However, the record does not contain a written or video transcript of said hearing and Stacey's certification of record on appeal filed July 29, 2005, does not reference this hearing. Following the hearing, each party filed a brief memorandum with the DRC stating their position as to the custody issue. On May 13, 2004, the DRC entered his recommendations in the record. The DRC found that Stacey acted in bad faith by concealing her intent to move to California within days of the decree being entered. He further found that Stacey's move to California made it impossible for the parties to comply with the basic premises

(joint custody and liberal visitation) upon which the custody and visitation agreement had been based. Based upon these findings, the DRC determined that the agreement as it relates to custody and visitation should be set aside.

Once the DRC set aside those portions of the agreement, he stated that the issue to now be decided was custody under KRS 403.270. As to custody, the DRC made the following findings:

> The Commissioner having recommended that setting aside of the agreement, the issue then becomes custody under KRS 403.270. As in most cases it is obvious that both parties love their child and it is obvious that the child loves both parents. When reviewing the elements of KRS 403.270, the parties are equal in the Commissioner's mind until one gets to the mental health of the parties. The problem here is that [Stacey], while negotiating a move to North Carolina to be close to her family which [Ron] thought would benefit the child, announces plans within just a few days of her decree being entered that she and [her] daughter along with her son which [Ron] is not the father of, are going to move across the country so that she may marry a man she met in July of that year and whom her daughter had only met once. The fact that [Stacey] wanted to remarry and move to California is not troubling. The troubling issues are one, it appears that [Stacey] intended on doing this but concealed it until the decree was signed and two, the speed in which [Stacey] made such decision as to her willingness to make major changes in the young child's life at what appears to be at a drop of a hat. This clearly shows the lack of stability that [Stacey] has and her willingness to put her happiness utmost

> before reviewing the possible effects on the child.

Based upon the above findings the DRC recommended the parties be awarded joint custody with Ron being named primary care custodian with the child living primarily with him.

Stacey filed exceptions and objections to the DRC's report. In an opinion and order entered July 21, 2004, the circuit court denied Stacey's exceptions and objections and adopted the recommendation of the DRC. Stacey then filed a timely CR 59.05 motion to alter, amend or vacate which the circuit court denied on October 29, 2004. This appeal followed.

On appeal, Stacey argues that the circuit court's opinion and order was entered in error because it "failed to give recognition to the principles enunciated by the Supreme Court of Kentucky in Fenwick v. Fenwick, Ky., 114 S.W.3d 767 (2003)." Stacey contends that Ron's objections to her relocating to California amounted to a custody modification and KRS 403.340 and Fenwick are applicable. Fenwick held in relevant part:

> Although the relocation will, as a practical matter, impact a non-primary residential custodian's ability to share physical custody of the children, the relocation does not extinguish the non-primary residential custodial parent's *rights* with regard to shared physical custody, nor would the relocation affect the essential nature of the joint custody – i.e., the parents' shared decision-making authority. Thus, a

> non-primary residential custodian parent who objects to the relocation can only prevent the relocation by being named the sole or primary residential custodian, and to accomplish this re-designation would require a modification of the prior custody award. He or she must therefore show that "[t]he child's present environment endangers seriously his physical, mental, moral, or emotional health, *and* the harm likely to be caused by a change of environment is outweighed by its advantages[.]"
>
> . . . .
>
> We realize that relocation often causes a hardship or inconvenience on the noncustodial parent's ability to exercise time-sharing with his or her child, but that fact, in itself, does not constitute a valid reason to prohibit relocation. Modern American society is increasingly mobile, and therefore, as the Wilson [v. Messinger, 840 S.W.2d 203 (Ky. 1992)] Court stated, "a custodial parent cannot, in today's mobile society, be forced to remain in one location in order to retain custody." We agree with this observation in Wilson and would add that the realities of today's mobile society should also militate against de facto limitations – such as tying the primary residential custodian designation to willingness to remain in a particular location – on primary residential custodians' ability to relocate.

Fenwick, 114 S.W.3d at 786, 788-89. (Emphasis in original); (footnotes omitted). KRS 403.340 sets forth several factors which the court must consider in addressing custody modification.

Ron, on the other hand, argues that the circuit court was not modifying custody but actually determining custody after

having set aside the separate agreement relative to custody. In fact, the circuit court's July 21, 2004, opinion and order states:

> As a result of that hearing on May 13, 2004, the DRC issued his recommendations in which he discussed the issue of whether there was a valid settlement agreement concerning custody and visitation and whether the father had met his burden to justify a modification of custody. The DRC found that there was not a valid settlement agreement, because Petitioner had withheld the information that she was moving to California from Respondent and the Court and had acted in bad faith. The DRC recommended that the settlement agreement as to custody and visitation be set aside. After making that decision, the DRC reviewed the custody issue as an initial custody decision and not as a modification of a prior custody settlement. The DRC recommended that the parties retain joint custody with the father being the primary custodian and the child living primarily with her father. The basis of his recommendation was the lack of stability shown by Petitioner's decision to move to California "at the drop of a hat" and concealing information from Respondent and the Court. Petitioner objects to that determination. (Emphasis added).

The filing of timely CR 59.01 and CR 59.05 motions by Ron prevented the August 13, 2003, decree from becoming final. This issue was recently addressed in Gullion v. Gullion, 163 S.W.3d 888 (Ky. 2005). Gullion, like this case, involved a custody ruling that was challenged by the filing of a CR 59.05 motion. In Gullion, the Kentucky Supreme Court held:

CR 59.05 states that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." The language of the rule contains no affidavit requirement. However, this Court has made clear that a ruling on a post-judgment motion is necessary to achieve finality, and procedurally, a CR 59.05 motion stays finality until the motion is ruled upon. [See, Kurtsinger v. Bd. of Trs. Of Kentucky Ret. Sys., 90 S.W.3d 454, 458 (Ky. 2002)]. CR 59.05 may be used to dispute an order or judgment a party believes to be incorrect, and a trial court has "unlimited power to amend and alter its own judgments."

The requirements of CR 59.05 and that of KRS 403.340 are entirely different procedurally with regards to jurisdiction and finality. As such, each must be allowed to individually serve its own purpose. The reasoning of Dull v. George, [982 S.W.2d 227, 229 (Ky.App. 1998)] supports the proposition that if affidavits are not required for CR 60.02 motions, then likewise they should not be required for CR 59.05 motions. And we hereby adopt that reasoning upon the premise that CR 59.05 permits the trial court to continue jurisdiction over its orders while the motion is pending. While jurisdiction under a KRS 403.340 motion to modify custody order is exerted only when the requirements of that statute are met, there is no conflict between KRS 403.340 and CR 59.05 because the affidavit requirements of KRS 403.340 are not implicated unless the original custody order is final and the CR 59.05 motion has been ruled upon. Simply put, a custody modification cannot be requested unless there is a final custody order to modify. It is not within the province of this Court to create or apply statutory requirements in contravention to long established procedural rules.

Gullion, 163 S.W.3d at 891-92. (Footnotes omitted). Ron filed a timely motion for the court to reconsider the previously entered decree as to the custody issue thus preventing the decree from becoming final. Although the court's order of September 30, 2003, denied Ron's motion to alter, amend or vacate (CR 59.05) it did not dispose of his alternate motion for a new trial (CR 59.01) on the custody, support and timesharing issues. Instead that motion was referred back to the DRC "for an evidentiary hearing to determine if there are sufficient grounds to change the Decree with respect to custody mat[t]ers[.]"

Once the matter was referred back to the DRC, new hearings were held as to the validity of the separation agreement and the custody of Madeline. Both the DRC's recommendations and the circuit court's opinion and order clearly reference that they were addressing this as an initial custody determination under KRS 403.270. We believe this was the proper legal standard to be applied in this matter. See Gullion, supra. Further review of the DRC's recommendations indicates that the DRC considered the relevant nine factors in determining custody pursuant to KRS 403.270(2). The DRC report specifically found the parties equal parents in all aspects except as to Stacey's mental health. In reviewing the DRC's

recommendations, the circuit court adopted the finding that Stacey's actions raised legitimate concerns about her suitability as the primary custodian. In that these findings were based upon substantial evidence found in the record they will not be disturbed on appeal.

For the foregoing reasons the July 21, 2004, and October 29, 2004, opinions and orders for the Woodford Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Michael R. Moloney Lexington, Kentucky	Sheila M. Donovan Lexington, Kentucky