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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002665-ME

RICKY CAMPBELL — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CI-00061

SANDRA BROOKS
(FORMERLY CAMPBELL) — APPELLEE

OPINION
AFFIRMING IN PART AND
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.[1]

HENRY, JUDGE: Ricky Campbell appeals from a December 7, 2004 Order of the Montgomery Circuit Court awarding sole custody of his daughter to his ex-wife Sandra Brooks (formerly Campbell) and sole custody of his sons to himself. He further appeals from that court's decision not to impute income to Sandra for

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

purposes of calculating her child support obligation due to her voluntary underemployment. Upon review, we affirm in part and vacate and remand in part.

Ricky and Sandra were married on August 4, 1990 in Montgomery County, Kentucky. The marriage produced three children: Aarron Shane Forrest Campbell, born February 10, 1992; John Patrick Wayne Campbell, born November 27, 1995; and Elizabeth Frances Nicole Campbell, born July 22, 1998. Ricky and Sandra separated on February 15, 2003, and on March 12, 2003, Ricky filed a Petition for Dissolution of Marriage in the Montgomery Circuit Court.

On December 12, 2003, the trial court entered a Decree of Dissolution that incorporated a Settlement Agreement reached between the parties. The decree and agreement specifically set forth that Ricky and Sandra were to share joint custody of the children. They also included a timesharing arrangement that provided, in relevant part, as follows:

> TIMESHARING. For so long as the Wife works second shift and during the school year the children shall be with their Father from Sunday evening until Friday morning every week and one weekend per month. The children will be with their Mother at all other times but no less than three weekends per month from Friday afternoon until Sunday evening. Should a month have five weekends the children shall spend that weekend with their mother. It is understood that on Friday afternoons the children shall be with their maternal grandmother until Saturday

> morning when their mother will pick up the children from her home. The Father will pick up the children on Sunday evening from the mother's home.
>
> During summer vacation in even numbered years the children shall be with the Mother from the day after the last day of school until the Sunday after July 4th. The children shall then be with the Father from the Sunday after July 4th until they return to school. In odd number years it is reversed so that the Father has the children until the Sunday after July 4th and then the Mother until the start of school. During the summer the weekend visit remains the same.

The decree and agreement also set forth that Sandra would pay Ricky child support in the sum of $1,100.00 per month.

On June 25, 2004, Sandra filed a motion asking the trial court to enter an order amending the timesharing provision of the parties' Separation Agreement because she was no longer working second shift. The motion also requested an order modifying Sandra's child support obligation to Ricky and requiring that Ricky begin paying child support to her.

On August 25, 2004, the trial court conducted an evidentiary hearing. On December 7, 2004, the court issued an Order finding that the "parties are unable to cooperate, making joint custody unworkable." Ricky was given sole custody of Shane and Patrick, while Sandra was given sole custody of Nicole. The trial court concluded that it had "jurisdiction to alter the custodial time-sharing arrangement of the parties set

out in the parties' separation agreement based upon the language of the agreement in numbered paragraph 4a which conditioned the arrangement upon [Sandra's] working second shift."

The trial court also concluded that Sandra was entitled to a reduction in child support retroactive to July 1, 2004, and ordered her to pay $292.74 per month for the period between July 1, 2004 and August 25, 2004 and $233.37 per month from that point forward. As justification, it noted in its findings of fact that Sandra had worked for Toyota Motors Manufacturing for seven years prior to June 1, 2004, and had experienced recurring shoulder problems as a result of this employment. Because of this, she had been on long-term disability for a period of time, off work for a period of time, and on light duty for a period of time. The court then noted: "[Sandra] was in danger of being saddled with a permanent impairment for her shoulder injury which would have prevented her from obtaining employment as a school bus driver, her only previous significant employment. To avoid the loss of all earning capacity, [Sandra] ceased working at Toyota." The trial court also ordered Ricky to begin paying child support to Sandra at a rate of $249.17 per month as of August 25, 2004. This appeal followed.

On appeal, Ricky first argues that the trial court erred in modifying custody on its own ex parte motion when

Sandra's motion only asked for an amendment to the timesharing agreement set forth in the Separation Agreement. Specifically, the motion asked the trial court to enter an order "[a]mending numbered paragraph 4a of the parties' separation agreement providing for the timesharing of the children to reverse the times spent with the parties' minor children during the school year." The motion additionally noted: "The terms of the parties' separation agreement provide "*For so long as the Wife works second shift* and during the school year the children shall be with their father from Sunday evening until Friday morning every week and one weekend per month." (Emphasis in original). While we agree that trial courts do not have the authority to modify custody on their own ex parte motions, see Gladish v. Gladish, 741 S.W.2d 658, 661 (Ky.App. 1987), citing Chandler v. Chandler, 535 S.W.2d 71 (Ky. 1975), we are compelled to disagree with Ricky that this prohibited act has occurred here.

We instead believe that Sandra's motion to modify the timesharing arrangement set forth in the Separation Agreement should be properly viewed as a request to modify custody. In Crossfield v. Crossfield, 155 S.W.3d 743 (Ky.App. 2005), this court addressed a situation similar to the one at hand. There the mother sought to reverse a timesharing arrangement with the father, with whom the child spent the majority of the time, in a joint custody situation so that she would become the primary

residential custodian of the parties' child. We concluded that such a request amounted to a motion to modify custody because it would result in the mother assuming the primary role in the minor day-to-day decisions concerning the children, becoming primarily responsible for providing a residence for the children, and assuming their normal routine care and control. Id. at 746 (Citation omitted). Accordingly, we held that the motion was governed by the custody modification provisions of KRS[2] 403.340, as opposed to the visitation provisions of KRS 403.320. See id. at 745-46.

As Sandra's motion here sought a reversal of timesharing that would transfer physical custody to her for five (5) days per week and one (1) weekend per month, effectively giving her control over the children's day-to-day decisions and care, we believe Crossfield is applicable in this case. We reach this decision even though no official designation of "primary residential custodian" is set forth in the Separation Agreement and no designation change request was made in Sandra's motion, as it is abundantly clear from the timesharing agreement between the parties that Ricky had primary physical custody of the children given that they lived with him at least five (5)

[2] Kentucky Revised Statutes.

days per week during the school year, and that Sandra was seeking to reverse this arrangement.[3]

Accordingly, we conclude that Sandra's motion, and the trial court's treatment of it, must be examined in accordance with the custody modification requirements of KRS 403.340, and that the trial court did not act in an inappropriate ex parte fashion. In reaching this conclusion, we note that the motion was accompanied by two (2) affidavits, which are required to accompany any motion to modify custody filed within two (2) years of entry of a custody decree, so the trial court had subject matter jurisdiction to consider the motion. See Petrey v. Cain, 987 S.W.2d 786, 788 (Ky. 1999) (Citations omitted). This also serves as further indication that Sandra considered her motion as one to modify custody.

Ricky additionally contends that, because the custody decree was entered less than two (2) years before Sandra's motion was filed, KRS 403.340(2) is applicable to any attempt to modify custody. KRS 403.340(2)(a) sets forth that a motion to modify a custody decree cannot be made within two (2) years of its entry unless the trial court allows it to be made on the basis that there is reason to believe that "[t]he child's

[3] The Separation Agreement set forth that the children would spend a relatively equal amount of time with each parent during the summer.

present environment may endanger seriously his physical, mental, moral, or emotional health."[4]

Ricky argues that this provision "clearly provides that no modification of custody decree should be made earlier than two (2) years after its date unless the serious endangerment standard is met," but we believe that this interpretation does not comport with the clear language of KRS 403.340(2), which specifies that it applies to a trial court's decision as to whether a motion to modify should be permitted—not the ultimate merits of the motion itself. Once the decision to allow the motion is made by the trial court, the motion to modify should be examined in accordance with the entirety of KRS 403.340.

As a general rule, in custody matters tried without a jury, the family court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002) (Citations omitted). Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. Wells v. Wells, 412 S.W.2d 568, 571 (Ky. 1967) (Citations omitted). "A factual finding is not clearly

[4] KRS 403.430(2)(b) also allows modification if it is shown that "[t]he custodian appointed under the prior decree has placed the child with a de facto custodian," but there is no indication here that this has occurred.

erroneous if it is supported by substantial evidence." Sherfey, 74 S.W.3d at 782 (Citations omitted). "Substantial evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." Id. (Citations omitted). As stated in R.C.R. v. Commonwealth Cabinet for Human Resources, 988 S.W.2d 36 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." Id. at 39 (Citation omitted).

"After a trial court makes the required findings of fact, it must then apply the law to those facts. The resulting custody award as determined by the trial court will not be disturbed unless it constitutes an abuse of discretion." Sherfey v. Sherfey, 74 S.W.3d at 782-83. (Citations omitted). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Id. at 783 (Citation omitted). Essentially, while "[t]he exercise of discretion must be legally sound," Id. (Citation omitted), in reviewing the decision of the circuit court, the test is not whether the appellate court would have decided it differently, but whether the findings of the circuit judge were clearly erroneous or that he abused his discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982) (Citation

omitted). Mere doubt as to the correctness of the trial court's decision is not enough to merit a reversal. Wells, 412 S.W.2d at 571 (Citation omitted).

In reviewing the record on appeal, including the videotape of the August 25, 2004 evidentiary hearing, we are unconvinced that the trial court followed, or even considered, KRS 403.340 in reaching its decision to modify custody. The need to do so is obvious, as our case law clearly holds that custody modification falls exclusively within the purview of KRS 403.340 and 403.350, and any other judicially-created "gateways" to custody modification are inapplicable. Fenwick v. Fenwick, 114 S.W.3d 767, 784 (Ky. 2003).

KRS 403.340 reads, in its entirety, as follows:

> (1) As used in this section, "custody" means sole or joint custody, whether ordered by a court or agreed to by the parties.
>
> (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; or
>
> (b) The custodian appointed under the prior decree has placed the child with a de facto custodian.
>
> (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, 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:

(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.
>
> (5) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

In making a decision as to whether or not to modify custody, a trial court is required to weigh all of the factors encompassed by this statute. Fowler v. Sowers, 151 S.W.3d 357, 359-60 (Ky.App. 2004), citing West v. West, 664 S.W.2d 948 (Ky.App. 1984).

However, at no point during the evidentiary hearing and nowhere within its Order of December 7, 2004 did the trial court even mention KRS 403.340 or the factors set forth therein.

Instead, the court simply set forth that the "parties are unable to cooperate, making joint custody unworkable." A simple lack of cooperation between the parties is not grounds for custody modification unless it rises to the statutory level required for modification of custody under KRS 403.430. Fenwick, 114 S.W.3d at 784. The trial court did not make any determination as to whether this standard was met or if it was even considered.

The trial court also found that Ricky was the "fit and proper person to have the sole care, custody and control" of Shane and Patrick, while Sandra was the "fit and proper person to have the sole care, custody and control" of Nicole, and did set forth in its conclusions of law that this was in the "best interests of the parties' children," but it failed to expound upon this conclusion and provide a basis for it. Such cursory statements are frowned upon given the requirement of specific findings set forth by CR 52.01. See McFarland v. McFarland, 804 S.W.2d 17, 18 (Ky.App. 1991), citing Stafford v. Stafford, 618 S.W.2d 578 (Ky.App. 1981) (overruled on other grounds by Largent v. Largent, 643 S.W.2d 261 (Ky. 1982)).

Sandra argues that Ricky failed to object to the sufficiency of the trial court's findings or to request more specific findings; therefore, CR 52.04 precludes a challenge of the trial court's judgment. Normally, we would agree that this should be the case, as CR 52.04 provides: "A final judgment

shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02." A failure to bring such an issue to a court's attention generally constitutes a waiver of the argument. Cherry, 634 S.W.2d at 425.

However, in Hollon v. Hollon, 623 S.W.2d 898 (Ky. 1981), our Supreme Court held that CR 52.04 does not apply if a trial judge's findings fail to satisfy basic statutory requirements, thus allowing review of certain cases even if no motion for more specific findings is filed by an appellant pursuant to CR 52.02 and CR 52.04. Id. at 899. We believe that this case fits within the Hollon exception given the trial court's cursory findings and its failure to establish anywhere within the record that it was following the custody modification statutes in rendering its decision.

Sandra also argues that, in paragraph 4a of the Separation Agreement, the parties "effectively created their own standard for modification of custody." The trial court appeared to adopt this position, as its Order sets forth: "The Court has jurisdiction to alter the custodial time-sharing arrangement of the parties set out in the parties' separation agreement based upon the language of the agreement in numbered paragraph 4a

which conditioned the arrangement upon the Respondent's working second shift." However, as Fenwick makes abundantly clear, the only standards that can be used in making a custody modification determination are those set forth in KRS 403.340. The fact that the trial court appeared to ignore this in its Order and create its own basis for jurisdiction only adds to our concern that the custody modification statutes were not properly considered.

We again feel the need to impress upon trial courts and litigants the great importance that appellate courts place upon the specific and detailed findings of fact and conclusions of law that are required by CR 52.01 in our review of child custody cases. See McFarland, 804 S.W.2d at 18 (Citation omitted). "The cornerstone of CR 52.01 is the trial court's findings of fact," as they give this court "a clear understanding of the grounds and basis of the trial court's judgment...." Stafford, 618 S.W.2d at 580. It is expected that courts "'... will give more careful consideration to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it.'" Id., quoting U.S. v. Merz, 376 U.S. 192, 84 S.Ct. 639, 11 L.Ed.2d 629 (1964). "[O]ur Supreme Court, in its rule making and supervisory capacity, has placed the utmost trust and responsibility in the trial courts by adopting CR 52.01. The rule states that the facts shall be found 'specifically.' The

rule is mandatory on the trial courts." Id., citing Fleming v. Rife, 328 S.W.2d 151 (Ky. 1959); Standard Farm Stores v. Dixon, 339 S.W.2d 440 (Ky. 1960). With this noted, we vacate and remand the judgment of the Montgomery Circuit Court as to the issue of custody modification with directions that findings of fact and conclusions of law as to this matter be entered in specific accordance with KRS 403.340 and 403.350, as well as CR 52.01.

Ricky's final contention is that additional income should have been imputed to Sandra for purposes of calculating her child support obligation. As noted, the trial court set a new child support obligation for each party based upon Sandra's current employment as a school bus driver with the Scott County school system, where she earns approximately $975.00 per month. Sandra's obligation was reduced from $1,100.00 per month to $292.74 per month for the period between July 1, 2004 and August 25, 2004 and $233.37 per month from that point forward. Prior to her bus driving job, Sandra had worked on an assembly line with Toyota for approximately seven (7) years and, at the time she voluntarily left employment there, she was earning approximately $4,343.90 per month. Ricky argues that Sandra's decision to leave Toyota and take a lesser-paying job was an effort to avoid child support and constitutes voluntary

underemployment as contemplated by KRS 403.212(2)(d), which provides:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

Stated more succinctly, KRS 403.212(2)(d) allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed.

Whether a child support obligor is voluntarily underemployed is a factual question for the trial court to decide. Gossett v. Gossett, 32 S.W.3d 109, 111 (Ky.App. 2000). Such a finding cannot be set aside on appeal if it is supported by substantial evidence. Id., citing CR 52.01; see also Polley v. Allen, 132 S.W.3d 223, 227 (Ky.App. 2004) ("[T]he court must consider the totality of the circumstances in deciding whether to impute income to a parent."). At the evidentiary hearing,

Sandra testified that her leaving Toyota was the ultimate result of continued complications from a work-related shoulder injury that she had suffered years earlier. She explained the efforts that she had undertaken to continue in her job—including modified duties and a transfer request—but she eventually made the decision to leave Toyota due to her fear of becoming permanently disabled from any employment, including driving a school bus, a job with which she had previous experience.

Ricky contends, however, that Sandra's shoulder injury had nothing to do with her leaving Toyota. He cites to evidence that the last medical treatment she received on her shoulder was on April 1, 2001, and that she subsequently worked for at least two (2) years without missing a day of work because of that injury. He also points to records in Sandra's personnel file with Toyota showing that she requested no accommodations because of her shoulder, that she never filed a workers' compensation claim, that no medical issues were addressed with the human resources department at Toyota, and that "personal reasons" is cited as her reason for leaving the company. Ricky also points out that the affidavits filed by Sandra and her new husband with their motion to modify child support both indicated that she could no longer work second shift for Toyota due to concern for her children. However, we note that Sandra's affidavit also

specifically references her shoulder issues and their effect on her ability to work.

As previously noted, the trial court decided to reduce Sandra's child support obligations, concluding that her decision to leave Toyota was justified due to medical necessity because she was "in danger of being saddled with a permanent impairment for her shoulder injury which would have prevented her from obtaining employment as a school bus driver, her only previous significant employment." Given the conflicting evidence presented on this issue and the considerable discretion afforded the trial court as fact-finder, we cannot find that the factual finding in this respect is unsupported by substantial evidence. Accordingly, as to this issue, we affirm the decision of the trial court.

In summary, we vacate the order of the trial court as to its modification of child custody and remand this case for findings consistent with this opinion, and we affirm the trial court's findings as to the issue of Sandra's voluntary underemployment.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Leah Hawkins Mt. Sterling, Kentucky	M. Alex Rowady Winchester, Kentucky