

RENDERED: JUNE 15, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002411-MR

BENETTA JO BOARD

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 02-CI-00272

JOSHUA DARRIN BOARD

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE

PAISLEY, SENIOR JUDGE: Appellant, Benetta Jo Board appeals the denial of her motion pursuant to KRS 403.340(2) seeking modification of child custody. She argues that the trial court failed to properly grant a full evidentiary hearing and that her former husband has abdicated his right to custody resulting in a risk of serious endangerment to the child. After our own review of the record, we find no error and affirm.

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

During the pendency of the divorce proceedings, the parties were awarded joint temporary custody of the single minor child of the marriage. The husband was designated as the primary custodial parent and the wife was granted appropriate visitation. The domestic relations commissioner conducted a hearing and recommended to the court that the husband continue as the primary custodial parent. Several weeks after that order was entered, the husband sought child support payments.

The wife hired a private investigator to monitor the comings and goings of the child at the home of the paternal grandparents. It is clear that the child sometimes stayed with the grandparents before being taken to school. Almost three months after this surveillance and a week before the hearing on child support was scheduled, the wife filed a motion pursuant to KRS 403.340 asking that she be awarded temporary and permanent custody claiming the custodial parent had abandoned the child. She also sought relief from the order directing her to pay child support and in turn sought child support from the father should she be granted custody. The trial court directed the domestic relations commissioner to take evidence on the issue of abandonment. The trial court adopted and confirmed the resulting commissioner's report and ordered that the husband was to be the primary custodial parent.

In order to seek a change of custody under the circumstances surrounding this divorce, affidavits must be presented with the motion that provide a reason to believe the child's environment presents a danger to his physical, mental, moral or emotional health or that the child has been placed with a *de facto* custodian. KRS 403.340(2).

Because the motion for modification was filed within two years of the entry of the custody decree, at least two affidavits are required. *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999).

The record contains an affidavit from appellant and another from her mother. Appellant's mother's affidavit states her belief that the child was suffering from “a serious endangerment to her mental and emotional health.” The mother's affidavit states that the custodial father has “largely abdicated [his] parental responsibilities to his parents.” She states in the affidavit that such an abdication is “a serious endangerment to [the child's] mental and emotional health.” Based on the information in the affidavits, the trial court summarily denied the motion.

Where a trial judge has essentially tried the case on depositions or sworn affidavits, we should not undertake a *de novo* determination of the facts. *Reichle v. Reichle*, 719 S.W.2d 442 (1986). Our standard of review is limited to a determination of whether there was an abuse of discretion. *Bennett v. Horton*, 592 S.W.2d 460 (1979). In this case, the trial court acted appropriately. The affidavits are conclusory and present no reasons other than the affiant's self serving opinions. *See Gladish v. Gladish*, 741 S.W.2d 658, 661 (Ky. App. 1987). The trial court noted the almost three month delay from the time the investigation observed the child with the grandparents. We agree that it appears the payment of child support and not any serious endangerment was the driving force behind the motion or it would have been made in a more timely manner. Facts set forth in an affidavit must establish “adequate cause” before a hearing is required. *West v.*

West, 664 S.W.2d 948 (Ky. App. 1984). There was no abuse of discretion in denying the motion without a hearing. The order of the Breckinridge Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Greta L. Noe
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Phillip G. Abshier
Owensboro, Kentucky