

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000018-MR

DAVID HARPER

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 02-CI-00325

ANGELA HARPER

APPELLEE

OPINION AND ORDER
VACATING IN PART AND DISMISSING IN PART

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

MOORE, JUDGE: Appellant, David Harper, seeks review of the Oldham Circuit Court's denial of his motion to name him as primary residential custodian of his minor child and to modify child support. The circuit court held a hearing on this motion over three

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

separate days, December 17, 2004, January 27, 2005 and March 7, 2005.² Upon review, we hereby vacate the portion of the circuit court's order pertaining to Mr. Harper's motion to name him as primary residential custodian because the circuit court lacked subject matter jurisdiction over that issue, and we dismiss Mr. Harper's appeal regarding modification of his child support obligation because this Court lacks subject matter jurisdiction over this issue.

I. FACTUAL BACKGROUND

This is an unfortunate matter in which the parties have been in battle for years over nearly every aspect of the life of their minor daughter since the parties began their divorce proceedings in 2002. The child's date of birth is March 23, 1997. Accordingly, for a large portion of her young life, she has only known strife between her parents.

The parties entered into a separation agreement, which was later incorporated into their divorce decree filed on October 1, 2002. Per the parties' agreement, they share joint custody of the minor child.³ The child resides equally with both parents. In a fourteen-day cycle, the child spends seven nights with each parent. Holidays and vacations are divided between the parties. Neither party has ever been designated as the child's primary residential custodian.

² Other motions were also heard by the circuit court during the hearing; however, the court's rulings on those issues are not being challenged.

³ Both parties live in Oldham County, apparently relatively close together.

Mr. Harper has not remarried. Mrs. Harper has now remarried and goes by the name of Mrs. Angela Auberry; she will, therefore, be referenced as “Mrs. Auberry” herein. She has two older sons from a marriage prior to that with Mr. Harper.

On September 28, 2004, Mr. Harper filed a motion with the Oldham Circuit Court. In his motion, Mr. Harper sought “an Order modifying the living arrangements of the parties' minor child....” In the supporting memorandum, however, Mr. Harper stated that he was submitting a “Memorandum in Support of Motion to Modify Custody Arrangements regarding custody of the minor child....” In his request for relief, Mr. Harper requested a court order that “[t]he minor child [] shall reside full time with the Petitioner, David Harper.” Mr. Harper attached his affidavit in support of his motion. In his affidavit, he stated that Mrs. Auberry has failed to care for the child and that her husband is mean to the child. No additional affidavits were attached to his motion. According to his testimony at the December 17, 2004 hearing, Mr. Harper stated the purpose of his motion was not to change the custody determination, but it was his purpose that the minor child would reside with him full time and that she would only see her mother every other weekend and for two weeks in the summer. Thus, he sought to be designated as the child's primary residential custodian.⁴

In same motion, Mr. Harper also sought a modification of child support so that the payment of expenses for the child would be shared equally. The circuit court had

⁴ The term “primary residential custodian” is not defined anywhere in the Kentucky Revised Statutes. *Fenwick v. Fenwick*, 114 S.W.3d 767, 779 (Ky. 2003). Courts have generally granted a parent named as primary residential custodian the discretion to make day-to-day decisions for a minor child, provide for routine care and control, as well as provide the primary residence for the child. *Id.*

entered an order on August 18, 2004, a month earlier, regarding a prior motion by Mr. Harper to modify child support. Mr. Harper did not file a motion to vacate, amend or modify that order; nor did he appeal it.

The circuit court held a hearing on Mr. Harper's September 18th motion over three separate days, December 17, 2004, January 27, 2005 and March 7, 2005.⁵ The circuit court denied his motion to be named as primary residential custodian on November 29, 2005. However, the circuit court did not address Mr. Harper's request to modify child support. Yet, during the initial stages of the hearing, the circuit court indicated that it was not inclined to revisit the child support issues, having just denied, in essence, the same motion by Mr. Harper on August 18, 2004. No new or different grounds were given for modification of child support.

Prior to addressing the present issues before this Court, we note that we are in awe of the history of fighting between the parties over their child and believe that it should be put in some perspective to illuminate how our courts get so clogged by, in this Court's view, unfounded power struggles using children as pawns. The parties have been before the circuit court on many occasions for resolution of numerous disputes, mostly brought by Mr. Harper. These motions have included a request that the circuit court schedule the child's needed tonsillectomy because the parents could not agree on who would perform the surgery; a motion seeking an order that contact between the parties be only for the purposes of discussing circumstances with the child; a motion seeking an

⁵ Mrs. Auberry also had motions pending before the circuit court. However, they are not relevant to the appeal at hand.

order requiring civility between the parties, including Mr. Harper's highly inappropriate name-calling of the stepfather in front of the child; the use of foul language in front of the child by Mrs. Auberry; the use of the child as a messenger between the parties; unfounded allegations by Mr. Harper (based upon findings by the circuit court's prior orders) that the child was in serious danger of harm to her mental, emotional, moral or physical well being; and at least four calls made to the Department of Protective Services regarding Mrs. Auberry's home environment, which were investigated and found to contain unsubstantiated claims.

Moreover, Mr. Harper has changed the child's school without the prior consent of Mrs. Auberry. Mr. Harper has sent a hand-written note to school officials, communicated through the child's school log which the child had access to, discussing the lack of supervision at her mother's house, the "fact" that her mother has exposed the child to sex, and the violence at her mother's house. Based upon the record in this matter, we query whether the wisdom of Solomon could even resolve the issues between these parties, and as is the usual case, it is the child who suffers. We note that the circuit court has shown the patience of Job in dealing with the antics of the parties, in particular Mr. Harper. Indeed, in an order dated October 29, 2003, the circuit court found "[t]hat the parties have a difficult time communicating goes without saying." The circuit court also

admonish[ed] both parents to refrain from the use of bad language around the child and derogatory statements about the significant others or current spouses of either parties. The court considers that such behavior is harmful to the child's well being, and encourages misbehavior and defiance on the part of the child toward both parties.

Id.

In the same order the circuit court commented that “this child is in the middle of a tremendous conflict with her parents.” Also, in the October 29, 2003 order the circuit court ordered that in reference to Mr. Harper's unilaterally switching the child's school, a parenting coordinator be appointed.

In this Court's opinion, the record verifies that the parties have traded the best interests of their child for several years now for an on-going power struggle using the court system; we note that Mr. Harper has particularly done so. Fortunately, the circuit court has shown great wisdom in ordering counseling for the child.

Regarding child support, Mr. Harper pays to Mrs. Auberry, for the support of the child, \$100.00 per week; he provides health insurance coverage; and he pays for all expenses of the child, including day care. Unhappy about this arrangement, Mr. Harper has filed numerous motions for modification of child support. With only minor adjustments, these motions have been denied by the circuit court. And, as noted earlier, prior to his September 28, 2004 motion, the circuit court denied by written order a prior motion for modification on August 18, 2004.

Returning now to the September 28th motion, after a detailed hearing held over several dates, the circuit court, by written order, denied Mr. Harper's motion to be named as the primary residential custodian. In the order, the circuit court did not address the modification of child support issue. Upon review of the evidence of the record, we would like to agree with the circuit court's detailed findings; however, as will be

explained *infra*, the circuit court lacked subject matter jurisdiction to hear Mr. Harper's motion to be named as primary residential custodian. Therefore, we regret that we must vacate that portion of the circuit court's order. Our regret in vacating is particularly weighty in light of the time the circuit court spent on this matter and because a review of the hearing supports the court's findings. We mourn for the child in this matter and at best hope that our vacating the order will not result in a rehashing of the prior hearing. It is time for the parties to focus jointly on working together for the best interests of their child.

As to Mr. Harper's appeal regarding child support, we find his appeal untimely. Thus, we dismiss that portion of his appeal for lack of this Court's subject matter jurisdiction.

II. ANALYSIS

A. The Oldham Circuit Court lacked subject matter jurisdiction to hear Mr. Harper's motion to be named as primary residential custodian.

A Decree of Dissolution was entered in this matter on October 1, 2002, which incorporated the parties' separation agreement. The parties' agreement included provisions regarding shared legal custody and shared physical custody over their minor child. Neither party has ever been named as primary residential custodian of the minor child.

In less than two years after the entry of the divorce decree, Mr. Harper filed a motion on September 28, 2004, seeking “an order modifying the living arrangements of the parties' minor child....” However, in the supporting memorandum, he states that it is

in support of his “Motion to Modify Custody Arrangements regarding custody of the child....” And, in his request for relief, he seeks that the minor child reside full time with him. Finally, in his Prehearing Statement before this Court, he states that “Appellant filed for change in custody.”

Regardless of how Mr. Harper's styles his motion, whether it be a change in custody or primary residential custodian designation, the outcome is the same: the circuit court lacked subject matter jurisdiction to hear the motion.

The genesis for this determination is found in *Crossfield v. Crossfield*, 155 S.W.3d 743, 746 (Ky. App. 2005), where this Court held that a change in the primary residential custodian amounts to a modification of a joint custody arrangement.⁶ And, subsequently, in *Brockman v. Craig*, 205 S.W.3d 244, 248-49 (Ky. App. 2006), our Court decided that the holding in *Crossfield* is no different where a primary residential custodian has never been named. Indeed, the facts in *Brockman* are relatively indistinguishable from the salient facts in the case at hand.

The significance of *Crossfield*, and subsequently *Brockman*, is that the movant seeking to be named as primary residential custodian must meet the requirements for modification of custody pursuant to Kentucky Revised Statutes (KRS) Chapter 403. “The basis for the ruling in *Crossfield* was not the amount of time spent, but what the effect would be of changing the assignment of primary residential custodian status.” *Brockman*, 205 S.W.2d at 249 (citing *Crossfield*, 155 S.W.2d at 746). Consequently, the

⁶ In *Crossfield*, a primary residential custodian was named in the parties' agreement.

statutory provisions regarding modifying custody in KRS Chapter 403 apply and must be met by the movant.

As in *Brockman*, with no primary residential custodian having been designated, Mr. Harper was required to obtain a modification of custody to become the minor child's primary residential custodian. *Id.* Because Mr. Harper's motion was filed less than two years since the divorce decree was entered, which incorporated the custody agreement by the parties, he was obligated to comply with the provisions under KRS 403.340(2)(a). This statutory provision provides that

- (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[.]

Accordingly, we are compelled, pursuant to *Crossfield*, to treat Mr. Harper's motion as a motion for a modification in custody made within two years after the parties' decree; thus, KRS 403.340(2)(a) applies. Where the requirements of KRS 403.340(2) are not satisfied, the circuit court lacks subject matter jurisdiction to consider the motion. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999); *Crossfield*, 155 S.W.3d at 746. Defects in subject matter jurisdiction cannot be waived and can be reviewed, even *sua sponte*, at any stage in litigation, including while on appeal. *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001).

The Kentucky Supreme Court has interpreted KRS 403.340(2), along with its companion, KRS 403.350,⁷ as requiring a party to file at least two affidavits to support

⁷ This statutory provision provides that

any motion for modification that is made within two years of the prior custody order.⁸ *Petrey*, 987 S.W.2d at 788. “If the applicable requirement is not met, the circuit court is without authority to entertain the motion.” *Robinson v. Robinson*, 211 S.W.3d 63, 69 (Ky. App. 2006) (quoting *Petrey*, 987 S.W.2d at 788). “The filing of affidavits, therefore, is a jurisdictional requirement.” *Robinson*, 211 S.W.3d at 69 (citing *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006)).

As the record in this case demonstrates, Mr. Harper's motion was supported only by his own self-serving affidavit, without a second affidavit. Consequently, he failed to meet the requirements under KRS 403.340(2), divesting the circuit court of subject matter jurisdiction to consider his motion. Accordingly, the portion of the circuit court's November 29, 2005 order regarding Mr. Harper's motion, whether it be styled to modify custody or declare him as primary residential custodian, is hereby vacated and set aside. Because the circuit court was presiding over numerous other motions by the parties, the remainder of the order remains in effect.

a party seeking a temporary custody order or modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. If a court determines that a child is in the custody of a de facto custodian, the court shall make the de facto custodian a party to the proceeding. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

⁸ KRS 403.340(2) requires a motion to modify within two years be accompanied by *affidavits*. Clearly, more than one affidavit is required.

2. Mr. Harper's motion seeking modification of child support is dismissed as untimely.

In Mr. Harper's Notice of Appeal, filed on December 22, 2005, he states he is appealing from the “Judgments entered by the Oldham Circuit Court, on November 30 and December 6, 2005.”⁹ And, in his Prehearing Statement, he states that one issue he is raising on appeal is a “child support issue”; he gives no further indication regarding the child support matter he appeals.

Throughout the history of this case, Mr. Harper has filed several motions to reduce his child support obligations. The circuit court has reviewed these motions and filed orders regarding child support on the following dates: June 9, 2003; July 8, 2003; August 24, 2004; and November 16, 2004. Throughout these various orders only slight changes have been made to Mr. Harper's child support obligation. One change was that in the circuit court's November 16, 2004 order, it limited Mr. Harper's responsibility to 68% of the costs for the minor child to attend counseling. Otherwise, Mr. Harper's obligations have remained virtually the same, despite his frequent attempts to modify child support. Mr. Harper is obligated to pay \$100 per week, pay the child's expenses, and provide health care insurance for the minor. As stated above, the parties share the child's counseling expenses.

⁹ The December 6, 2005 order was also a product of the three-day hearing. However, it dealt with modification of the shared custody arrangements to accommodate the parties' schedules, not whether one party would be named as the primary residential custodian. It also dealt with overdue payments the parties owed to each other, which is not relevant to the appeal at hand.

Despite the prior, and frequent, motions for modification, Mr. Harper included in his September 28, 2004 motion a request for modification of child support even if the primary residence remained unchanged, without citing any new grounds for modification. The circuit court did not address this request in either of the orders from which Mr. Harper appeals.

A review of the hearing held on December 17, 2004, illustrates the reason for this omission in the circuit court's written order.¹⁰ Our review evidences that it is

¹⁰ Court:

Frankly, Julie, the real issue I'm concerned with is if the residence of the child changes, because it has not been, it seems to me, six months since I re-did the child support and at that time he had the child half the time.

Ms. Curry:

You entered an order on August 18 and affirmed his obligation to pay \$100.00 a week and that was after an extensive hearing.

Ms. House:

Your honor, I understand that, but the issue is he has the child half the time. The order considers him to be a non possessory parent, a non-custodial parent. *There is no consideration given in any of the orders for the fact that he has the child at least half the time.* The case law is clear that if he has the child half the time he is at least entitled to a reduction of the normal support based upon either one of two formulas. One being, that her support is figured, his support is figured and you take the difference between the two and that's what he pays. The other one being the percentage of time he has the overnights and subtract that from his obligation.

Ms. Curry:

Your honor, the visitation arrangement, as you already indicated, was the very same when we had these hearings in April and May of this year as they are now. The visitation arrangement has not changed. Those arguments could have been made when we were here in April and May. We could have had a motion to modify, vacate or amend your order if those were the arguments. We are now here, at a considerable expense to my client, once again arguing the same thing we've argued two times now. We don't have a motion to modify child support, we have a motion to change the residence. Obviously, if the residence is changed, we may be re-looking [at] child support, but I really have a problem

beyond question that Mr. Harper sought the circuit court's review of its prior order of August 18, 2004, for which a two-day hearing had been held in April and May of 2004. The circuit court stated at the beginning of the December 17th hearing that it was not inclined to revisit the issue of child support again, after having reviewed it only a few months earlier. Mr. Harper's counsel argued the circuit court had erred in its prior order for failing to take into consideration that Mr. Harper had the minor child one-half of the time. The circuit court indicated that it was unlikely to change its mind but stated that the proof will be whatever the proof will be; however, the court was not inclined to

with starting new on this issue when all of these facts are the same as they were when we were here in April and May. If he wants to move on a basis of a reduction of income, which is what he did in April and May, and the court did not modify the child support and the 15% rule kicks in. I just don't know how many times we're going to go through this two-day hearing on him moving to modify child support because you keep affirming the orders.

Court:

I think the proof will be whatever the proof is on that. I don't think it's going to take any extra time. Julie, *I am advising you that I'm not inclined to re-visit it because I do agree if you all felt it was wrong before you probably should have made a motion to have me reconsider the order or something.*

Ms. House:

Your honor, that proof was submitted in the hearings. It's just never been ruled that way.

Court:

Then I didn't do it.

Ms. House:

I understand.

Court:

Why would I do it now if I didn't do it then?

Ms. House:

Because the law says he's entitled to a reduction from the normal support because he has the child at least half the time.

Court:

Well, you can make your arguments. I just don't know if I'm going to change it.

(HR of December 17, 2004; 1:34:44-1:37:24)(emphasis added).

revisit the issue. Mr. Harper's counsel then stated that “[b]ut that proof was put on in May and the court didn't consider it.” Despite this allegation, Mr. Harper did not file a motion for the court to modify or reconsider its August 18th order. Moreover, Mr. Harper failed to appeal that order. The hearing video clearly evidences that Mr. Harper disagreed with the court's earlier order regarding child support and instead of appealing, it sought review of it again by way of his September 28, 2004 motion.

Our conclusion is further evidenced by the fact that no proof was put on during the three-day hearing at issue regarding Mr. Harper's income, Mrs. Auberry's income, or any reason to deviate from the court's earlier order beyond the fact that the child resides with Mr. Harper one half of the time. This was the same situation that existed when the circuit court entered its August 18th order and the same reason for which Mr. Harper had previously moved for a modification. Thus, we have nothing on appeal to review that is within our subject matter jurisdiction.

Indeed, Mr. Harper's brief before this Court does not attack the circuit court's orders from which he appeals, namely the November 29, 2005 order or the December 5, 2006 order. Indeed, the circuit court did not even address Mr. Harper's child support modification request, and he failed to ask the circuit court for a ruling on this. Mr. Harper's current attack on the court's child support orders are based on the earlier child support orders of the circuit court. Clearly, he failed to timely file notices of appeal from these orders. This Court cannot review these orders, as we lack jurisdiction to entertain them; our Court's jurisdiction is limited to those issues that are timely

appealed. Accordingly, Mr. Harper's appeal regarding child support is dismissed as untimely.

For the reasons as stated, the portions of the Oldham Circuit Court's order dated November 19, 2005, regarding Mr. Harper's motion to be named as primary residential custodian are hereby vacated and set aside. Regarding Mr. Harper's appeal pertaining to child support, his appeal on this issue is hereby dismissed for lack of this Court's subject matter jurisdiction.

ALL CONCUR.

ENTERED: August 17, 2007

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

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