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**DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
AUGUST 15, 2007
(FILE NO. 2007-SC-0348-DE)**

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001559-ME

DEBRA RANKIN

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-CI-00984

BRAD COFFMAN

APPELLEE

OPINION REVERSING AND REMANDING

** ** * ** * ** *

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

NICKELL, JUDGE: Debra Rankin has appealed the Hardin Family Court's May 30, 2006, order modifying custody of her two children, and its July 9, 2006, order denying her motion to alter, amend, or vacate its prior order. For the following reasons, we reverse.

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 Kentucky Revised Statutes (KRS) 21.580.

Debra Rankin and Brad Coffman were divorced by a decree of the Barren Circuit Court on January 8, 2001. Within the divorce action, the parties were awarded joint custody of their two minor children, with Debra being the primary residential custodian and Brad being granted standard visitation according to the Barren Circuit Court's local rules. Both parties and their children continued to reside in Hardin County.² There was never an issue regarding visitation, and the parties routinely modified the standard schedule in an effort to ensure that both saw the children as much as possible. Both parties subsequently remarried, and continued to work together amicably with respect to all matters concerning the children.

Debra divorced her second husband in 2003, and shortly thereafter she became engaged to be married to Dr. Tom Rankin, with plans to relocate from Hardin County. Brad became troubled by information he obtained from an investigation of Dr. Rankin, particularly regarding Dr. Rankin's past history of oral narcotics addiction, depression, and suicidal tendencies. Brad concluded that Debra was unstable due to her numerous failed relationships, and that Dr. Rankin's troubled past would only exacerbate her instability.

On May 20, 2004, Brad filed a petition for child custody in the Hardin Family Court, as all parties involved were current residents of that jurisdiction. While styled as though this was a motion for initial determination of custody, the petition was

² As used herein, all references to geographic locations or political subdivisions are located within the confines of the Commonwealth unless otherwise expressly stated.

actually a request for modification of the prior Barren Circuit Court's custody order.³ Brad failed to file a separate affidavit along with his moving papers as technically required by Kentucky Revised Statutes (KRS) 403.350, but the petition was verified and Brad's signature was witnessed by a Notary Public. Brad's motion alleged that Debra had become unstable since the divorce, that the children now attended school in a district not associated with their actual place of residence, and that Debra's forthcoming marriage to Dr. Rankin would be detrimental to the children.

On June 23, 2004, Debra filed her verified response in which she denied the substantive allegations contained in Brad's motion. An affidavit was attached to the response addressing some of the issues Brad raised, and raising different concerns with respect to the relationship between the children, Brad, and the paternal grandmother. Concurrently with the filing of the above verified response, Debra filed a motion for leave to relocate with the children to Jefferson County. Debra attached an affidavit to her motion stating that the request was based upon her impending marriage to Dr. Rankin, who was then a resident of that county, that her employment was located in Jefferson County, that she would fully cooperate with Brad to accommodate his visitation with the children, and setting forth the facts and circumstances leading up to the filing of the motion, including discussions she allegedly had with Brad regarding the proposed move. Brad filed no written response to Debra's motion.

³ The issue of venue was not raised in the trial court nor on appeal, but a review of the record reveals concurrent jurisdiction was vested in Barren Circuit Court and Hardin Family Court for purposes of custody determinations and modifications.

On July 31, 2004, a hearing was held on Debra's motion. Brad objected to the proposed move. Both parties testified and were cross-examined by counsel. Upon consideration of the testimony given and arguments presented by the parties' counsel, the family court granted Debra's motion.⁴ Shortly thereafter, Debra and Dr. Rankin were married and relocated with the children to Jefferson County.

Subsequent to the move, Brad continued to exercise his visitation with the children, and Debra continued to allow him more time than was required by the prior court orders. She testified that this was done in an effort to maintain as strong of a bond as possible between the children and their father and paternal grandmother. The children attended and became active in their schools in Jefferson County and participated in some extracurricular activities which they had previously enjoyed in Hardin County. The children had near perfect attendance and seemed to be doing quite well with their studies, as evidenced by information presented by a school representative at trial.

Brad's motion for modification of custody remained pending until a trial on the matter was held on February 23, 2006. While several discovery depositions were taken in the interim time period, no explanation was advanced for the lengthy delay experienced by the parties in obtaining a trial date for this portion of the case. However, a review of the record indicates that both parties requested continuances at differing times throughout the nearly two-year period of delay.

⁴ Although the issue is not properly before us on this appeal, we note that the family court's ruling on this matter could easily have been construed as an implicit denial of Brad's motion for change of custody. However, the trial court chose to allow Brad to continue to pursue the modification.

At trial, testimony was taken from the parties, the children,⁵ 11 witnesses, and the depositions of two additional witnesses who were unavailable on the date of trial were admitted into evidence. Much of the testimony centered upon the history of Dr. Rankin, including his mental and emotional stability and issues relating to his career. There was testimony that each of the parties were good parents to their children. No testimony was elicited as to the past or current psychological status of the children, and no experts were requested to perform evaluations. In fact, little of the testimony involved the children in more than a cursory manner.

After the lengthy trial, the family court took the matter under advisement and issued its written findings of fact, conclusions of law, decree and order on May 21, 2006. That order set forth, in great detail, the facts and law the family court utilized in making its decision. The family court ultimately granted Brad's motion for modification making him primary residential custodian of both children, granted Debra visitation in accordance with the local rules, recalculated the child support obligations of the parties, and dealt with the issue of health care expenses and insurance for the children. Debra promptly filed a motion to alter, amend, or vacate the May 21, 2006, order. A hearing was held on June 27, 2006, and the family court entered an order denying the requested relief on July 9, 2006. This appeal followed.

Debra assigns error to the family court on three separate matters. First, Debra argues that the family court abused its discretion in evaluating the evidence before

⁵ We note that the children were interviewed separately by the family court in camera and outside the presence and hearing of either of the parents or their counsel.

it, and that the ruling was ultimately made in contravention of the weight of the evidence presented. She next argues that the family court committed error by failing to grant her motion to alter, amend, or vacate the prior order. Finally, Debra alleges that Brad failed to comply with the requirements of KRS 403.350, thus depriving the family court of subject matter jurisdiction.

We find Debra's jurisdictional argument to be both persuasive and dispositive. We will therefore focus our discussion on that point, addressing the other issues only as necessary.

Brad argues that Debra failed to preserve the jurisdictional issue for our review and insists we summarily dismiss this part of her argument. However, subject matter jurisdiction cannot be obtained by consent nor can it be waived. The issue can be raised at any time and is reviewable by the appellate courts whenever it is raised.

Kentucky Rules of Civil Procedure (CR) 12.08(3). *See also Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky.App. 2005); *Goff v. Goff*, 172 S.W.3d 352, 358 (Ky. 2005); *Gullett v. Gullett*, 992 S.W.2d 866, 868 (Ky.App. 1999); and *Commonwealth, Department of Highways v. Berryman*, 363 S.W.2d 525, 526 (Ky. 1962). Therefore, it is not only proper, but imperative, that we discuss the jurisdictional issue complained of herein.

KRS 403.350 provides, in pertinent part, as follows:

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. . . . 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.

Brad failed to file a separate affidavit along with his petition. Debra argues that this failure is fatal to his request. While we believe the better practice would be to file a separate document, the verified petition herein technically meets the requirements of being an “affidavit.”

CR 43.13(1) defines an affidavit as “a written statement or declaration sworn to or affirmed before an officer authorized to take depositions by [these rules].” Subsection 2 of this rule sets forth further requirements for subscriptions and certifications for affidavits. Here, there is no argument that Brad's verified complaint was a written statement or declaration, signed by Brad, and sworn to before a Notary Public⁶ who was authorized by CR 28.01 to take depositions and who inscribed the date and location of such affirmation. Thus, while not holding that a verified complaint will always meet the legal requirements of being an affidavit, we find in this case that Brad's verified complaint technically fulfilled the requirements of CR 43.13.

Having found that Brad technically complied with the statutory requirement of filing an “affidavit,” we next turn to the remaining portion of KRS 403.350 which

⁶ We note that the notary certificate states that the document was “subscribed, sworn to and acknowledged” by Brad. With no evidence to the contrary, we will take this assertion as true. We further note that a mere acknowledgment before a Notary Public is not an oath and would not meet the requirements of being an affidavit. *See Meigs v. Black*, 960 P.2d 770, 772 (Kan.App. 1998).

requires the family court to determine whether “adequate cause” exists to consider the requested modification, based solely upon the facts contained in the affidavits and counter-affidavits, if any. In the event of a failure to show adequate cause, the family court is required to summarily deny the motion. *Petrey v. Cain*, 987 S.W.2d 786, 788 (Ky. 1999). See also *Quisenberry v. Quisenberry*, 785 S.W.2d 485 (Ky. 1990); *Betzer v. Betzer*, 749 S.W.2d 694 (Ky.App. 1988); and *West v. West*, 664 S.W.2d 948 (Ky.App. 1984). In *West*, this Court stated:

Adequate cause, in this context, requires more than prima facie allegations which might permit inferences sufficient to establish grounds for a change in custody. . . . [T]he movant must present facts in his affidavit that compel the court's attention. He cannot simply assert the statutory requirements for modification [of the original custody determination].

Id. at 949.

Debra initially argues that the family court erred by not making a specific finding of “adequate cause” on the record, and that such failure alone is sufficient to warrant reversal. We disagree. While the statute specifically requires the courts to make this threshold finding, we find nothing therein to support Debra's contention that such a finding must be specifically placed in the record. The trial court's scheduling of a hearing on the matter is sufficient to reveal that such a determination has been made. Otherwise, an order denying relief on the basis of a failure to show adequate cause would be required. The error complained of is without merit.

We then must determine if the family court was correct in its finding that adequate cause existed based solely upon the face of the parties' pleadings. Our review of

this issue, as elucidated in *West, supra*, is limited to a determination of whether the trial court clearly abused its discretion when making its ruling. We find it did.

A review of Brad's petition reveals allegations that Debra's lifestyle was unstable due to her remarriage, divorce, and interim dating habits; that the children were attending school in a system associated with his address rather than Debra's; that Debra intended to marry an older man “who had severe problems in his own life”; and that he believed it would be in the children's best interest to have the custody modified. There were no further substantive allegations contained in the petition, nor was there any mention of a risk of serious endangerment to the children's physical, emotional, mental and moral health based upon their present environment. *Betzer*, 749 S.W.2d at 694.

We find that the vague and conclusory allegations contained in Brad's petition do not rise to the level required by KRS 403.350 to justify a finding of adequate cause. *Gladish v. Gladish*, 741 S.W.2d 658 (Ky.App. 1987). Without a sufficient factual basis to support a finding of adequate cause, the family court abused its discretion by setting the matter for a hearing rather than denying Brad's motion outright, as the court had nothing further to consider. *Robbins v. King*, 519 S.W.2d 839 (Ky. 1975). Thus, the family court's May 21, 2006, order making Brad the children's primary residential custodian was invalid. Accordingly, we must reverse and remand this matter with instructions for the family court to return residential primary custody of the minor children to Debra, and to conduct such further proceedings as are necessary to recalculate

child support obligations, health insurance issues, and any other matters affected by the earlier ruling.

Moreover, on the merits, it appears that the family court's determination to modify custody was not based upon substantial evidence, but rather upon conjecture and speculation. While we are bound to give deference to the family court's findings of fact and its ability to judge the credibility of witnesses, *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003); CR 52.01, we are persuaded that, based upon the evidence received, we would have been required to hold that the findings of the family court were clearly erroneous and constituted an abuse of discretion. Our review of the record reveals that there was insufficient evidence presented to show that the children's environment endangered seriously their physical, mental, moral, or emotional health, or that the harm caused by modification would be outweighed by the advantages of such a change. Furthermore, the evidence was insufficient to show that the change in custody was in the best interest of the children under the guidelines set forth in KRS 403.340 and KRS 403.270(2). The mere fact that Dr. Rankin had suffered mental health problems in his past, alone, and without a showing of current issues affecting the children's well-being, would not necessarily provide a sufficient basis upon which to disturb custodial rights. The family court also apparently ignored the wishes of the children in its decision in that it made no mention of their desires in its decision. These factors indicate that the family court's order was clearly erroneous and constituted an abuse of discretion.

For the foregoing reasons, the judgment of the Hardin Family Court is reversed and remanded with directions that primary residential custody of the parties' children be returned to their mother, Debra Rankin, and for further proceedings consistent with this Opinion.

PAISLEY, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. The primary reason given by the majority for reversing the judgment entered by the family court is that Brad's verified petition, filed pursuant to KRS 403.350, fails to set forth adequate cause sufficient to warrant the family court's review. I do not believe our Court can resolve the appeal for this reason since it was not properly preserved below for our review.

I agree with the majority that the verified petition filed by Brad with the family court constituted an affidavit under KRS 403.350 sufficient to confer subject matter jurisdiction to consider the petition for custody modification. Having acquired subject matter jurisdiction, the family court was then duty bound under KRS 403.350 to deny the petition if the affidavit(s) failed to show adequate cause for a hearing on the petition. This is a substantive issue, rather than jurisdictional, that looks to the merits of the claims as to whether they are statutorily adequate to warrant a hearing. The family court proceeded to schedule a hearing that the majority correctly finds to be a determination by the family court that the petition presented adequate cause to schedule a

hearing. The majority then concludes that the allegations in the petition do not justify a finding of adequate cause and that the family court abused its discretion in making such a determination. However, at no time from the date of filing of this petition on May 20, 2004, through the evidentiary hearing conducted by the court on February 23, 2006, did Debra object to this “finding” of adequate cause by the family court. In fact, during the almost two years that this case proceeded, Debra engaged in discovery and produced witnesses at an evidentiary hearing on the merits of the petition. It is well-established that our Court will not review nor decide issues not raised in the lower court. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225 (Ky. 1989); *Gladish v. Gladish*, 741 S.W.2d 658 (Ky.App. 1987). While I agree that the substantive allegations in the verified petition to justify adequate cause for a hearing are meager at best, Debra's failure to object below precludes our review on this issue.

After concluding that the family court should not have conducted a hearing on the merits for lack of adequate cause, the majority gratuitously and summarily addresses the merits of the appeal, concluding that “it appears that the family court's determination to modify custody was not based upon substantial evidence, but rather upon conjecture and speculation.” I submit that “appearance” is not a sufficient legal basis for this Court to substitute its judgment for that of the family court under the circumstances of this case.

Our review of the merits in a child custody case is succinctly set out by Judge Johnson in *B.C. v. B.T.*, 182 S.W.3d 213 (Ky.App. 2005) as follows:

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. Abuse of discretion implies that the family court's decision is unreasonable or unfair. Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

Id. at 219-20 (citations omitted).

As noted previously, this case was actively practiced before the family court for almost two years. The record reflects that there were six discovery depositions taken in this case. The family court conducted an evidentiary hearing where it heard the testimony of eleven witnesses in addition to the parties to this action. The parties' minor children were also interviewed in camera. Two of the six discovery depositions were considered by the family court as evidence. The family court entered exhaustive findings of fact and conclusions of law that totaled almost seventeen pages. Based upon the totality of the evidence considered by the family court, I cannot conclude that the family court's findings were clearly erroneous or that the family court abused its discretion in awarding custody to Brad. There being no dispute as to the application of the correct law in this case, I would affirm the family court's order granting custody of the children to Brad.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Barry Birdwhistell
Elizabethtown, Kentucky

William L. Hoge, III
Louisville, Kentucky