FILED
MAR 27 2013
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2012-SC-000420

RECEIVED
MAR 27 2013
CLERK
SUPREME COURT

SHANE THOMAS MASTERS PETITIONER

VS.

ON APPEAL FROM THE MADISON FAMILY COURT
CIVIL ACTION FILE NO. 04-CI-0960
COURT OF APPEALS FILE NO. 2010-CA-1332-ME

DENA SUE GREER MASTERS RESPONDENT

****

BRIEF ON BEHALF OF APPELLEE DENA SUE GREER MASTERS

****

Respectfully submitted,

Crystal L. Osborne
BRITTON OSBORNE JOHNSON PLLC
200 W. Vine Street, Suite 800
Lexington, Kentucky 40507
Telephone: 859-963-2245
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellee's Brief was sent by U.S. mail, postage prepaid, to: Hon. Bruce Petrie, Special Judge, Boyle County Family Court, 321 W. Main Street, Ste 215, Danville, KY 40422; Hon. Rebecca Novak, 253 S. Limestone, Lexington, KY 40508; Linda Spurlock Cates, Madison Circuit Court Clerk, P.O. Box 813, Richmond, KY 40476-0813; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Sheila F. Redmond, Office of Legal Services, 2050 Creative Drive, Ste 160, Lexington, KY 40505; Hon. Matthew R. Walter, P. O. Box 137, Danville, KY 40423-0137 and ten (10) copies of this brief were hand-delivered to Clerk, Supreme Court of Kentucky, 700 Capitol Avenue, Room 209, Frankfort, KY 40601-3415 on this the 27th day of March, 2013.

By: Crystal L. Osborne

STATEMENT CONCERNING ORAL ARGUMENT

The issue on appeal presented in this case involves an application of established law. Appellee does not believe that oral argument will assist the Court in deciding the issue on appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 2

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL DID NOT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE CUSTODY DECREE.

KRS 403.340(2) 2, 3, 7

Petrey v. Cain, 987 S.W.2d 786 (Ky. 1999) 2, 3

Privett v. Clendenin, 52 S.W.3d 530 (Ky. 2001) 2

Karahalios v. Karahalios, 848 S.W.2d 457 (Ky.App 1993) 2

Copas v. Copas, 699 S.W.2d 758 (Ky.App. 1985) 2, 3

THE MOTION TO MODIFY CUSTODY WAS NOT SUPPORTED BY MORE THAN ONE AFFIDAVIT.

KRCP Rule 43.13(1-2) 4

Black's Law Dictionary (9th ed. 2009) 4

THE DATE OF THE ENTRY OF THE DECREE OF DISSOLUTION WAS THE PROPER DATE BY WHICH THE MOTION TO MODIFY CUSTODY WAS TIMED FOR PURPOSES OF DETERMINING IF THE MOTION WAS WITHIN THE TWO YEAR TIME CONSTRAINT.

Lebus v. Lebus, 382 S.W.2d 873 (Ky. 1964) 6

CONCLUSION 7

COUNTERSTATEMENT OF THE CASE

Appellee adopts Appellant's Statement of the Case in its entirety.

ARGUMENT

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE TRIAL DID NOT HAVE SUBJECT MATTER JURISDICTION TO MODIFY THE CUSTODY DECREE.

The Court of Appeals correctly held that the trial court did not have subject matter jurisdiction to modify the custody decree because Appellant filed his motion to modify custody in May 2007 within two years of the August 2005 decree. KRS 403.340(2) requires a party seeking to modify custody within two years of the decree or relevant custody order to submit "affidavits that there is reason to believe that (a) the child's present environment may endanger seriously his physical, mental, moral or emotional health[.]" In Petrey v. Cain, this Court held that at least two affidavits were required to modify custody when the matter was brought within two years of a decree and further that if the provisions set forth in KRS 403.340(2) are not met, the trial court lacks subject matter jurisdiction of entertain a motion to modify custody. Petrey v. Cain, 987 S.W.2d 786, 788 (Ky. 1999). In addition, subject matter jurisdiction cannot be waived and may be raised by the parties at any time, Privett v. Clendenin, 52 S.W.3d 530, 532 (Ky. 2001), to include raising the issue for the first time on appeal Karahalios v. Karahalios, 848 S.W.2d 457, 460 (Ky.App. 1993).

Appellant argues that the "two affidavit" requirement of KRS 403.340 should not be a prerequisite to a court acquiring subject matter jurisdiction over a motion to modify custody. Appellant's argument is unintelligible because KRS 403.340 specifically requires the presence of "affidavits" when party moves to modify custody within two years of the previous custody order or decree. The statute requires "affidavits", not an affidavit, because as explained in Copas v. Copas, 699 S.W.2d 758, 759 (Ky.App.

1985), "if the statute required only one affidavit the trial courts would be continually harassed by the loser in the prior custody battle with a demand for modification." The Copas Court set forth this is a specific and highly rational basis for requiring more than one affidavit when attempting to modify custody sooner than two years after a prior custody decree is entered. KRS 403.340 is the law of this Commonwealth for modifying a custody decree and Appellant's argument that if this requirement is not met that this failure to satisfy the statute should not be used to deny subject matter jurisdiction is misplaced.

The Decree of Dissolution of Marriage was filed on August 12, 2005 (ROA 139-142). Appellant's motion to modify custody was filed on May 31, 2007 (ROA 565-585) – within the two year time period set forth in KRS 403.340. He attached only one affidavit – his own - to his motion (ROA 565-585 and 1173-1186). Appellant's motion to modify custody was supported by only one affidavit, therefore, per KRS 403.340 and supporting case law cited herein, it is deficient. Because the motion is deficient, the trial court lacked jurisdiction to entertain the motion and modify custody (Petrey v. Cain, 987 S.W.2d 786, 788 (Ky. 1999)). And, even though the issue of subject matter jurisdiction was never challenged at the trial court level, subject matter jurisdiction cannot be waived and the Court of Appeals was correct in vacating the trial court's erroneous order.

THE MOTION TO MODIFY CUSTODY WAS NOT SUPPORTED BY MORE THAN ONE AFFIDAVIT.

Appellant's claim that his motion to modify custody was supported by more than one affidavit it false. Appellant's motion to modify custody filed on May 31, 2007 was

supported by his affidavit (ROA 577-585) and several letters or statements, some of which were notarized (1173-1186).

KRCP Rule 43.13(1) defines an affidavit as "a written statement or declaration sworn to or affirmed before an officer authorized to take depositions by Rule 28." Rule 43.13(2) states that "[e]very affidavit shall be subscribed by the affiant; and the certificate of the officer or person before whom it is made shall be written separately, following the signature of the affiant, and shall be proof of the time and manner of the affidavit being made." Black's Law Dictionary (9th ed. 2009) defines an affidavit as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths."

Appellant attached five letters/statements to his motion to modify. Two of the letters, specifically the letter written by Jessica Masters and the letter written by Jon Lucas are not notarized nor do they contain the language that they were sworn to before an officer authorized to administer oaths, thus they are not affidavits according to the definition herein. They are simply letters which state they are made "under oath". The other three letters/statements filed in support of the May 31, 2007 motion to modify state the following at the beginning: "I (name) under oath write this affidavit". (ROA 1173-1186) The problem with these three remaining affidavits is that they do not appear to have been sworn to or made under oath before the notary because the font for the notary is the same on each letter and the notary font does not match the font on the letters. A review of the letters and the notary statement appears to show that the notary statement was placed on the letters after they were written and signed. Moreover, the notary statement on the letter signed by Tanya L. Payne on behalf of

Shane Masters (Ms. Payne wrote a letter for both Shane Masters and his wife, Amy Kinder) has a line struck through the date so there is a certainly cause to suspect that the notary signature part of the letter was simply cut and pasted and added after the letter was signed and received by the notary. As such, the statements were not sworn to before a proper authority and are, thus, nothing more than letters, not affidavits.

THE DATE OF THE ENTRY OF THE DECREE OF DISSOLUTION WAS THE PROPER DATE BY WHICH THE MOTION TO MODIFY CUSTODY WAS TIMED FOR PURPOSES OF DETERMINING IF THE MOTION WAS WITHIN THE TWO YEAR TIME CONSTRAINT.

Appellant argues that the subsequent entry of a divorce decree should not "reset the clock" on a prior custody order. Appellant's argument is incorrect.

The trial court entered an order on April 18, 2005 whereby it set forth decisions on matters such as temporary child support, temporary maintenance and reimbursement for marital debts (ROA 76). The trial court also granted the parties joint custody and designated Respondent (now Appellee) the primary residential parent (ROA 77). The trial court further opined that the parties had agreed to abide by the terms of the Agreed Parenting Scheduling Order "until further Orders of this Court" (ROA 77). In the Decree of Dissolution dated August 12, 2005, the following prior orders were incorporated by reference: Agreed Parenting Schedule dated September 7, 2004, the Order dated April 18, 2005, the Mediation Agreement dated June 2, 2005, a Visitation Agreement dated August 9, 2005 and a Summer Visitation Agreement dated August 9, 2005. (ROA 76-80) Between April 18, 2005 and August 12, 2005, the parties entered into three subsequent, additional visitation agreements (ROA 77-78). It is clear that the issue of permanent visitation and custody was not yet set in stone in the April

18, 2005 order. The permanency and finality of the custody and visitation order and agreements was made when these orders and agreements were incorporated by reference into the Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage entered of record on August 12, 2005. It is undisputed that up until the time the trial court entered findings of fact and conclusions of law and the decree dissolving the marriage that the parties could have decided on a different custody arrangement such as sole custody or agreed that the father could be named as the primary residential parent or changed, modified or expanded visitation – which they did on three occasions. If the parties had agreed that between April 18, 2005 when the trial entered its order and August 12, 2005 when the trial court entered the decree that father would be the primary residential parent and have sole custody, this subsequent, new agreement would have been incorporated by reference into the August decree and that portion of the April 18, 2005 order that set forth custody and named mother as the primary residential parent would have been set aside. Therefore, Appellant's effort to convince this Court that the incorporation of the April 18, 2005 order granting the parties joint custody is not dispositive and does not change the date by which the custody arrangement should be timed is disingenuous.

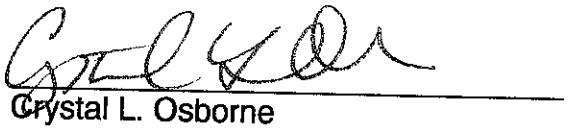
Moreover, these agreements and prior orders are considered interlocutory and cannot be appealed from until the decree of dissolution is entered. Lebus v. Lebus, 382 S.W.2d 873, 874 (Ky. 1964). As such, they must be incorporated by reference into the decree so that they are final and appealable. Once these orders and agreements were incorporated by reference into the decree of dissolution, the clock began ticking for purposes of an appeal. If either father or mother had wanted to appeal the trial court's

decision regarding custody at the time the decree was entered, the party would have appealed from the August 12, 2005 decree, not the April 18, 2005 order. Otherwise, an appeal in August 2005 would not be timely since the 30 days for filing a timely appeal would have long passed from April 2005.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be upheld. Appellant's motion to modify custody was not supported by two affidavits as required by KRS 403.340(2). As such, the trial did not have subject matter jurisdiction to entertain the motion to modify custody. Lastly, the proper timing of the order setting forth custody of the minor child was the decree incorporating by reference the five prior custody and visitation orders and agreements which was entered of record on August 12, 2005.

Respectfully submitted,



Crystal L. Osborne
BRITTON OSBORNE JOHNSON PLLC
200 W. Vine Street, Suite 800
Lexington, Kentucky 40507
ATTORNEY FOR APPELLEE