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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002419-ME

LILLIE MARIE STAMBAUGH — APPELLANT

v.

APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 03-CI-00250

MICHAEL LEE WATTENBERGER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; HENRY,[1] SENIOR JUDGE.

WINE, JUDGE: Appellant, Lillie Marie Stambaugh formerly Wattenberger ("Stambaugh"), seeks review of the Clark Circuit Family Court's decision to grant the Appellee, Michael Lee Wattenberger's ("Wattenberger") motion to modify a time-sharing

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

agreement[2] involving the parties' two minor children. Upon review, we hereby reverse the circuit court's September 11, 2006, order pertaining to Wattenberger's motion to change the parties' time-sharing agreement in effect since December 17, 2003, and remand for additional findings of fact and conclusions of law.

The parties were married on November 7, 1990. Two children, a son Wesley, now 12, and a daughter Tessa, now 7, were born as a result of the union. The parties separated on or about May 4, 2003. The parties entered into a property settlement agreement on November 25, 2003, which included the following provision:

> 4. CHILD CUSTODY:
>
> The Petitioner and Respondent shall have joint custody of the parties' two minor children, . . . with the parties sharing **equal** physical custody of said children. **A time sharing schedule shall be agreed upon and adhered to as much as possible** so as to provide stability for the children.

(Emphasis added).

The agreement was drafted by Wattenberger's counsel. Subsequently, on December 17, 2003, a decree of dissolution was entered, adopting and incorporating by reference the terms of the separation agreement. There was no subsequent written agreement detailing the parties' time-sharing schedule. Nor does it appear from the separation agreement that a written schedule was anticipated. At the time of the divorce,

[2] Although the agreement between the parties, as well as the briefs of counsel, utilized the term "time-sharing" when referring to shared parenting time with the children, to remain consistent the Court will use the same term; however, believes "shared parenting time" is more appropriate.

both parties resided in Clark County. Neither the agreement nor the court designated either parent as a primary residential custodian.

In July 2006 Wattenberger moved the court to modify the parties' time-sharing agreement. Wattenberger, by affidavit, cited the relocation move by Stambaugh and the children to a one-bedroom apartment in the neighboring county of Madison. He claimed the children were now subjected to a 45 minute commute to school and were required to share a single bedroom. Wattenberger also claimed the apartment was within 100 feet of a residence occupied by a registered sex offender. He also claimed the children had been repeatedly tardy to school, were not properly supervised when in Stambaugh's custody and that she had posted the children's photos on the website MySpace.com. He did not allege the move resulted in any less parental time with his children or addition commuting expenses incurred by him.

A hearing was scheduled for July 18, 2006. Because Stambaugh's counsel moved to withdraw, the trial judge agreed to reschedule the matter. Although the trial court specifically stated that he would not discuss any pending issues, he asked Wattenberger's counsel if there were any matters which needed to be addressed before the next hearing date. Wattenberger's counsel then outlined the accusations in the affidavit as well as the proposed modification to the time-sharing schedule. Wattenberger requested that the children live with him during the school year from Monday until Friday afternoon and then every other weekend. Stambaugh would then be allowed visitation on Tuesday and Thursday evenings until 7 p.m. and every other weekend beginning Friday

until either Sunday evening or Monday morning when she would drive them to school. Counsel further suggested there may be grounds to change custody to allow Wattenberger sole custody or change the current amount of child support he had agreed to and been ordered to pay.

The trial court then ordered the parties to mediate the issue of the time-sharing schedule and denied any change to the current schedule. Subsequently, Stambaugh retained new counsel and filed a response to the motion. Included with the response was her own affidavit including documentation that her apartment was only 20 minutes from the school, that the registered sex offender lived at a different address and that both children were not only excelling in school but both children received "Certificates for Perfect Attendance."

At a subsequent hearing on August 29, 2006, both parties testified consistent with the averments in their affidavits. Stambaugh's counsel objected to the hearing claiming that Wattenberger was actually moving for a change of custody and that the statutory mandates of KRS 403.340 had not been met. When he renewed the objection at the conclusion of the proof, the trial court overruled his objection and stated that he would treat the motion as styled as an effort to revise the time-sharing schedule.

The trial judge orally opined that it was a close call and that he felt there was a lot of nit picking. While he understood Wattenberger's concern about a sex offender living near the children, he was also confused as to the location of the residence of the sex offender. While he found it less than ideal that the children had been moved to

another county, he did not find the move detrimental to their well-being. He recognized that Stambaugh would deal with the school tardiness problem and criticized her for not directly communicating with Wattenberger about important issues such as the planned relocation of her residence. The trial judge promised to give it some thought and recessed the hearing.

Thereafter, the court entered a handwritten order on August 29, granting Wattenberger's motion. In his order the court held:

> Heard. Pet's proof shows adjustment to customary time-sharing schedule during school year would be in children's best interest. During school, children to spend school nights at Father's house. Mother's timesharing Mon, Tue, Thurs after school - 7:00 pm. Alt Wknds Fri after school - Sun 7:00 pm. Parties to revert to previous 50-50 schedule when school not in session.

A nearly identical typed order, *sans* abbreviations, was entered on September 11, 2006.

Subsequently, Stambaugh timely moved, pursuant to CR 52.02 and 59.01, that the court alter, amend and/or vacate the order of August 29, 2006. In the alternative, Stambaugh requested the court make findings of fact and conclusions of law pursuant to CR 52.02.

A hearing was held on October 17, 2006. The court denied Stambaugh's motions, citing her poor judgment and the decision to move as one made in poor taste and that it was "her fault" the visitation had been changed. Interestingly, the court also stated that she had a right to move and that the separation agreement drafted by Wattenberger's counsel, and approved by the court, was vague. In denying the motion for specific

findings of fact and conclusions of law, the court, in its written order, stated those were already on the record.

At issue is whether the trial court erred by applying the mandates of KRS 403.320, the visitation modification statute, as opposed to the mandatory requirements for modifying custody under KRS 403.340 and the companion statute, KRS 403.350, when the time-sharing schedule was modified.

In reviewing a child custody determination, this Court reviews the trial court's factual findings for clear error. *Reichle v. Reichle*, 719 S.W.2d 849, 852 (Ky.App. 1986). The 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). "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Id.* "Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id.* As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky.App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." "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*, 74 S.W.3d at 782-83. Broad discretion is vested in trial courts in matters concerning custody and visitation. *See Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000); *Futrell v. Futrell*, 346 S.W.2d

39 (Ky. 1961). "A reversal may not be predicated on mere doubt as to the correctness of the decision." *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

From the explicit language of the trial court's order, it is clear that the court followed the dictates of KRS 403.320(3) which provides:

> The court may modify an order granting or denying visitation rights whenever modification would serve the **best interests of the child**; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

(Emphasis added).

Prior to the order of August 29, 2006, Stambaugh enjoyed overnight visitation on every Monday and Tuesday as well as every other weekend. The children spend every Wednesday and Thursday with Wattenberger as well as every other weekend when not with Stambaugh. Thus, there was a clear 50-50 arrangement as approved by the court and mandated by the separation agreement. However, once the court changed the visitation schedule during the school year requiring the children to spend Monday through Thursday with their father as well as every other weekend, with Stambaugh enjoying only approximately three hours' visitation every Monday, Tuesday and Thursday in addition to overnight stays every other weekend, the visitation schedule changed "dramatically" as acknowledged by the trial court.

The separation agreement awarded the parties joint custody with each parent to enjoy "equal physical custody" with the children. Usually, joint custody

"contemplates shared decision-making rather than delineating exactly equal physical time with each parent." *Fenwick v. Fenwick*, 114 S.W.3d 767, 777 (Ky. 2003). The custody should be shared in such a "way that assures the child frequent and substantial contact with each parent under the circumstances." *Id.* at 778. In the case *sub judice,* in an attempt to ensure both parents equal access to their children, the court and parties agreed to a "split custody" arrangement.

Previously, the court would not look with favor upon split custody of small children. *Conlan v. Conlan,* 293 S.W.2d 710 (Ky. 1956); *Garner v. Garner*, 282 S.W.2d 850 (Ky. 1955).

Now however, since 1980, both the legislature and the courts have recognized the value of joint custody as well as maximizing the amount of time a parent is able to spend with their child. *Burchell v. Burchell*, 684 S.W.2d 296 (Ky.App. 1984). In determining whether joint custody should be awarded, courts must consider the statutory factors concerning the award of custody generally, to account for a child's unique circumstances, and thereafter the trial court should look beyond the present and assess the likelihood of future cooperation between the parents, and to achieve such cooperation, the trial court may assist the parties by means of its contempt power and its power to modify custody in the event of a bad faith refusal of cooperation. *Squires v. Squires*, 854 S.W.2d 765 (Ky. 1993). Even when joint custody is awarded, the court may designate where the child shall usually reside and may make such other orders as are necessary to properly effectuate joint custody.

When awarding joint custody, a primary residential custodian is usually designated. *Fenwick*, 114 S.W.3d at 778-79. The primary residential custodian exercises the discretion to make day-to-day decisions for the minor child, provide for routine care and control, as well as provide the primary residence for the child. Contrary to Stambaugh's argument, a primary custodian is not presumed, nor does Kentucky recognize, a *de facto* primary custodian as such. Where a primary residential custodian is named, "a change in the primary residential custodian amounts to a modification of the joint custody." *Crossfield v. Crossfield*, 155 S.W.3d 743, 746 (Ky.App. 2005).

Recently, in *Brockman v. Craig*, 205 S.W.3d 244, 248 (Ky.App. 2006),[3] this Court held:

> The status of primary residential custodian must be designated by the court or by agreement of the parties, or it has no basis in fact in a custody arrangement. As stated by the Supreme Court in *Fenwick,* it does not arise by statute, but is created by the court or the parties to confer particular responsibilities on one of the parents.

In *Brockman*, the mother decided to relocate to another state and sought to move the parties' minor child with her. The motion was made within two years of the original custody order, unlike the order in this action which was made over three years after the original custody order was entered. The *Brockman* trial court had previously awarded the parties joint custody although neither had been named primary residential custodian. The child's time was divided equally between his parents. However, if the

[3] *Brockman v. Craig* was not final until after the trial court decided the issues below.

move was approved, the father's parenting time would have been reduced, so he objected to the relocation. The commissioner in *Brockman* stated that in order to relocate and alter the joint custody agreement, the mother would be required to meet the burden of proving the requirements of the statute on modification of custody. The commissioner found that her motion not only affected parenting schedules, but proposed to change the child's school and substantially reduce the amount of time the father spent with the child. Thus, it must be treated as a motion to modify custody.

The commissioner then applied KRS 403.340 and considered the mother's affidavits in support of the motion. He found that she had not met the standard of showing serious endangerment to the child. Instead, her allegations amounted to arguments that the move was in the best interest of the child. The commissioner thus concluded there was no basis for a hearing on the motion and recommended that the motion for modification be denied. That same day, the circuit court ordered that the motion for modification of custody did not meet the requirements for the court to hold a hearing under KRS 403.340 and denied the motion.

As in *Brockman*, the parties in the case *sub judice* did not designate a primary residential custodian. However, the separation agreement did mandate the parties share equal physical time with the children. Under the current order, the Wattenberger children now spend the majority of the year, while in school, with Wattenberger. As such, the visitation change proposed by Wattenberger, and ordered by the trial court, has upset the balance of time spent with the parents and would in effect be a change in

custody and therefore subject to the statutory provisions of KRS 403.340 which states in part:

> (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[.] . . .

KRS 403.270(2) provides:

> (2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all individuals involved;
>
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
>
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
>
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
>
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The companion statute, KRS 403.350, states in pertinent part:

> A party seeking . . . modification of a custody decree shall submit together with his moving papers an affidavit setting forth facts supporting the requested . . . 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.

Stambaugh also requested the trial court make specific findings of fact. When either party at divorce requests specific findings regarding visitation, the trial court must make a *de novo* determination of what amount of visitation is appropriate, and enter a visitation order accordingly; the terms of a standard visitation schedule may be considered among all other options, but the trial court should not make any presumption in favor of a standard visitation schedule. *Drury v. Drury*, 32 S.W.3d 521 (Ky.App. 2000).

Although the trial court stated in the order of October 17, 2006, that its findings of fact and conclusions of law were stated on the record during the hearing of August 29, 2006, Wattenberger does not cite to the record those findings, nor can we find them. To the contrary, both during the hearing on August 29, 2006, and October 17, 2006, the trial court only refers to the decision of Stambaugh to relocate to an adjoining county as a reason to change the visitation schedule. Nothing in the record demonstrated how this move affected the equal physical custody requirement of the separation agreement. Neither Wattenberger's affidavit nor his testimony on August 29, 2006, alleges that he was either denied visitation or that he was required to expend any additional time or energy to exercise his right to visitation as a result of the Stambaugh's decision to relocate. During his testimony on August 29, 2006, Wattenberger testified he

sought to change time-sharing so their son could enjoy more time with extracurricular activities after school. Although Wattenberger conceded his children were doing well academically, he complained on one occasion his son suited up late for a football game and thus was not allowed to play. Thus, any discussion by the court as to the visitation arrangement being disrupted because of the relocation to an adjoining county has no basis in the evidence before the court. Finally, contrary to any discussions on October 17, 2006, there was no requirement of a written visitation schedule.

In his oral comments on August 29, 2006, the trial judge indicated difficulty in finding any reason to change the custodial arrangements between the parties. He even opined that the move to another county was not detrimental to the well-being of the children and that the tardiness problem had been addressed. It was only during the subsequent hearing on October 17 when Stambaugh's motions to vacate the previous ruling, or in the alternative enter findings of fact and conclusions of law, that the court expressed concerns about Stambaugh's decision-making process. Even then, those concerns were related to her failure to communicate with Wattenberger. (Of course, Wattenberger's decision to allow his significant other to communicate with Stambaugh in his stead, probably does not reflect the best decision-making process either.)

Wattenberger attempted to avoid the more rigorous standards of KRS 403.340 by styling his motion as one for a modification of visitation. In reality, the decision to change the visitation schedule created an imbalance in the equal time-sharing and thus a change in the custody of the children. Thus, the court improperly applied the

standards under KRS 403.320, as opposed to KRS 403.340 and 403.350. Further, the "findings" of the court were clearly erroneous and not supported by the evidence before the trial court. Because the trial court found each issue raised by Wattenberger in his affidavit had been satisfactorily addressed, there was no reason to change the visitation schedule much less custody arrangements as threatened by Wattenberger during the hearings on July 18 and August 29, 2006.

For the foregoing reasons, the order of the Clark Circuit Court changing the visitation schedule is reversed and this matter is remanded for an order reinstating the original visitation order affording equal physical custody time between the parties.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Heidi Engel
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