

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000979-ME

LEA ANN WARREN

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 02-CI-00277

ROBERT JOSEPH WARREN

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

CLAYTON, JUDGE: Lea Ann Warren (Lea Ann) appeals from an order of the Calloway Family Court, of April 23, 2009. She argues that the family court erred in granting Robert Joseph Warren's (Joseph) motion to modify timesharing/visitation when it changed the primary residential parent from Lea Ann to Joseph. Having reviewed the record and the applicable statute, Kentucky

Revised Statutes (KRS) 403.320, we find that the evidence presented at the hearing before the trial court supports its decision. As such, we affirm.

Lea Ann and Joseph were married in 1997; their marriage was dissolved in 2004. By agreement, the parties shared joint custody of their only child, River Joseph Warren (River), who was born on February 21, 1998. Lea Ann was awarded the primary physical care of River.

In April 2009, Joseph filed a motion to modify timesharing/visitation of River. He moved for visitation in accord with the standard visitation of the Calloway Family Court and to be named primary residential parent. Joseph alleges that since the divorce decree was entered in 2004, circumstances have changed significantly for River, and his best interests would be served by modification of the timesharing. A hearing on the motion was held on April 16, 2009, and following the hearing, the court entered an order modifying the previous orders and designating Joseph as the primary residential parent. This appeal follows.

Lea Ann argues that the family court's decision was not supported by substantial evidence and the change in timesharing was not in the best interests of River. Joseph counters that sufficient evidence was provided that a change in the primary residential parent was in the best interests of River. Furthermore, Joseph maintains that an appellate court may only reverse a decision of the trial court upon a finding of palpable error by the court.

In the case at hand, the parties share joint custody, which was not contested. But while there are two categories of custody, sole custody and joint

custody, this simple categorization does not encompass the legal complexity surrounding the issue of who is to be the primary residential parent. This issue has, in essence, become a subset of joint custody. This subset was described in

Pennington v. Marcum, 266 S.W.3d 759, 764-65 (Ky. 2008):

Though it is often stated that there are two categories of custody, sole custody and joint custody, there is in practice a subset of joint custody that combines the concept of joint custody with some of the patterns of sole custody - often called "shared custody." In shared custody, both parents have legal custody that is subject to some limitations delineated by agreement or court order. Unlike full joint custody, time sharing is not necessarily flexible and frequently mirrors a typical sole custody pattern where the child may live with one parent during the week and reside with the other on alternate weekends. The weekend parent does not have "visitation," a sole-custody term which is frequently misused in this context, but rather has "time-sharing," as he or she is also a legal custodian. However, in practice, the terms visitation and timesharing are used interchangeably. Additionally, one parent may be designated the "primary residential parent," a term that is commonly used to denote that the child primarily lives in one parent's home and identifies it as his home versus "Dad's/Mom's house." This concept is frequently misnamed "primary residential custody."

Such is the situation that the family court addressed here – whether the primary residential custodian should be Lea Ann or Joseph.

In *Pennington*, the Court instructed that a parent's motion seeking to change the primary residential parent was not seeking to modify custody but merely to modify visitation/timesharing. *Id.* Moreover, the Court further directed that a motion seeking to change the primary residential parent is properly brought under KRS 403.320. Under KRS 403.320, the Court noted that the parent seeking

to be designated primary residential parent must demonstrate that such a change is in the child's best interest. *Id.*

Here, the record reflects that Lea Ann and Joseph were operating under a shared custody arrangement pursuant to an agreement incorporated into the February 18, 2004, decree of dissolution. Thus, under the precepts of *Pennington*, Joseph's "Motion to Modify Timesharing/Visitation" and be designated "primary residential custodian" must meet the requirement of KRS 403.320. A parent seeking to modify visitation/timesharing under a joint shared custody arrangement must prove that modification is in the best interests of the child under KRS 403.320(3), which says "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]"

In the case at hand, the family court specifically found that "modification is necessary to serve best interests of the child." The family court, as directed by statute, looked to the factors in KRS 403.270 to ascertain the best interests of River. In support thereof, the circuit court outlined a plethora of evidence concerning Lea Ann's behavior, including her inability to cooperate with Joseph, failure to keep him informed of River's school and medical information, and generally aggressive and hostile demeanor to Joseph, which is detrimental to River. The family court provides specific facts supporting these observations. Particularly troubling is the domestic violence altercation that Lea Ann had with a live-in boyfriend and a domestic violence incident between the parties at River's

school. Although both parties behaved inappropriately, the evidence indicated that Lea Ann was the aggressor. While Lea Ann denies these allegations for the most part, she did acknowledge that Joseph is a good father and that Joseph and River have developed a close bond.

Thus, the judge considered the following relevant factors in KRS 403.270(2):

- (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[.]

In the Findings of Facts, Conclusion of Law, and Judgment, the family court outlined the reasons for deciding that Joseph should be the primary residential parent. The family court made this decision after reviewing the wishes of the parents through their testimony and the wishes of the child through the testimony of the child's psychologist. And the family court made this decision after considering the parents' interaction with each other and the minor child, the parental bonds of the parties, domestic violence incidents, and the child's attendance at three separate schools while living with Lea Ann through the

testimony and evidence of record. Hence, the family court relied on substantial evidence in making the determination.

Because each case presents its own unique facts, “change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court.” *Pennington*, 266 S.W.3d at 769. Additionally, it is well-established that “this Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case.” *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

Additionally, regarding Lea Ann’s objection to the current timesharing schedule designed by the family court, we note that the timesharing plan grants her reasonable time with River particularly in light of the geographical distance between the parents. Further, no evidence exists that the court failed to consider the circumstances of both parents and River. Indeed, the schedule was painstakingly detailed by the judge in his order. Moreover, its application in this case is not a manifest abuse of discretion nor is it clearly erroneous.

In conclusion, for the aforementioned reasons, we affirm the decision of the Calloway Family Court.

ALL CONCUR.

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