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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001439-ME

JASON JAMES

APPELLANT

v. APPEAL FROM CARTER FAMILY COURT
HONORABLE JOHN R. COX, JUDGE
ACTION NO. 08-CI-00258

CRYSTAL DAWN JAMES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT AND WINE, JUDGES.

DIXON, JUDGE: Appellant, Jason James, appeals from an order of the Carter Family Court denying his motion to modify timesharing and designate him as the primary residential parent. Finding no error, we affirm.

Jason and Appellee, Crystal Dawn James, were married on June 9, 2001. One child, Caleb, was born during the marriage. In addition, the parties adopted a second child, Hanalena. By a decree of dissolution, the parties were

divorced on August 8, 2008. Pursuant to the separation agreement that was incorporated into the decree, the parties have joint custody of the children, with Crystal being designated as the primary residential parent, and Jason receiving liberal visitation.

Subsequent to the parties' divorce, Crystal remarried and, in May 2009, informed Jason of her intention to move to South Carolina where her husband was working. As a result, on July 8, 2009, Jason filed a motion in the Carter Family Court requesting modification of timesharing to the extent that he be named the children's primary residential parent. Crystal filed a response seeking a modification of the timesharing schedule that would permit her to relocate the children to South Carolina. Following an evidentiary hearing, the family court entered an order on July 30, 2009, granting Crystal's motion to relocate, and denying Jason's request to be named primary residential parent. Although the court stated that "[t]imesharing would be modified and expanded taking into consideration the distance between the parents . . ." no specific schedule was included within the order. Jason thereafter appealed to this Court.

Jason first argues that the family court erred by failing to apply the "best interest" standard set forth in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), and rather, erroneously, utilized the "endangerment standard" set forth in Kentucky Revised Statutes (KRS) 403.340(2). Further, Jason contends that he presented sufficient evidence during the hearing to establish that it was in the children's best interest to remain in Carter County.

Kentucky Rules of Civil Procedure (CR) 52.01 states in relevant part, “Findings 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.” Furthermore, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). These directives are clearly applicable to child custody cases. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).

Recently, our Supreme Court in *Pennington v. Marcum* provided an excellent discussion on whether a residential custodian’s relocation with a minor child changes the inherent nature of the joint custody arrangement or merely affects the timesharing/visitation rights of the other parent. The Court explained that when a final custody decree has been entered, as in this case, and a relocation motion arises, any post-decree determination made by the court is a modification, either of custody or timesharing/visitation. If a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so. 266 S.W.3d at 765. Further, the Court commented,

[A] parent opposed to relocation, but not seeking a change in joint custody, does not need to make a motion for a change of custody, but rather a motion for

modification of timesharing. . . . While there is no statute that specifically addresses modification of timesharing in a joint custody setting, it is reasonable to infer that modifying it does not alter the nature of joint custody. Also, since the nature of the custody does not change, the trial court is not bound by the statutory requirements that must be met for a change of custody, but can modify timesharing based on the best interests of the child as is done in modifying visitation.

. . .

If a parent opposing relocation files a motion to modify custody within two years of the date of the custody decree, then the moving party must establish that the move or other reason seriously endangers the child or that the child has been abandoned to a de facto custodian in order to modify custody. If the standard is met, and custody is changed, then that parent as sole custodian could prevent relocation of the child. But, if the only interest of the opposing party is to object to relocating the child, but not to alter joint decision-making, then he is seeking to have the existing visitation/timesharing arrangement changed, and need only establish that it is in the child's best interests not to relocate, which would thereby change the existing visitation/timesharing situation. . . . [W]hen only visitation/timesharing modification is sought, the specific language of KRS 403.320(3) controls, which allows modification of visitation/timesharing “whenever modification would serve the best interests of the child,” and specifically directs that a court “shall not restrict a parent's visitation rights” unless allowing visitation would seriously endanger the child.

Id. at 768-769.

In arguing that the family court applied the wrong standard, Jason seizes on the court’s language that Jason “failed to show that relocation to South Carolina would be harmful to the children, other than the expected stress of a new

school and making friends.” However, we cannot conclude the trial court’s isolated use of the word “harmful” demonstrates that it applied the wrong standard. Indeed, the endangerment standard as set forth in KRS 403.340(2) requires a finding that the “child's present environment may endanger seriously his physical, mental, moral, or emotional health.” Furthermore, it is clear from a reading of the family court’s opinion as a whole, as well as its specific reference to the *Pennington* decision, that it applied the best interest standard.

We likewise find no merit in Jason’s claim that the trial court erred by permitting Crystal to relocate to South Carolina with the children. Jason’s brief focuses on providing explanations and justifications for why it is in the children’s best interest to remain in Carter County and for him to be designated as the primary residential parent. As he did in the trial court, Jason points out that the children have no extended family in South Carolina, and will have the stress of attending a new school and making new friends. Further, and although the trial court specifically found to the contrary, Jason alleges that Crystal has lived in numerous places over the last few years and that the children have had poor school attendance while in her care.

As the family court noted in its opinion, “relocation by a parent with residential custody is a fact of life and a by-product of divorce.” Nevertheless, the family court herein was in the best position to evaluate the evidence and testimony and decide what was in the children’s best interest. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d at 444. The court, after speaking with the children in chambers, found

them to be “happy and well-adjusted.” Further, other than the presence of extended family in Carter County, the court determined that Jason’s other grounds for prohibiting relocation of the children could not be substantiated.

Jason has failed to demonstrate that it would be in the children’s best interest to remove them from the residential custody of Crystal simply to keep them in Carter County. As such, the family court did not abuse its discretion in denying Jason’s motion to be named the children’s primary residential parent.

The order of the Carter County Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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