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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001841-ME

MONA TUCKER — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 07-CI-00915

STEVE TUCKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND CLAYTON, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Mona Tucker appeals from an order of the Hardin Family Court modifying a parenting timesharing agreement between her

[1] Senior Judge David C. Buckingham 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.

and her ex-husband, Steve Tucker, and designating Steve as their child's primary residential parent.[2] Finding neither error nor abuse of discretion, we affirm.

Mona and Steve were married in October 1999 and had one child, Nate, who was eight years old at the time of the trial court's order. Mona also had two children from a previous relationship, Emily (age 20) and Cody (age 17). Emily and Cody were adopted by Steve during the marriage.

Mona filed for divorce in May 2007. The case moved forward until the fall of 2007, when Mona expressed a desire to move to Indianapolis, Indiana, with the parties' children. Ultimately, she did not move, and the parties attempted to reconcile. The reconciliation was unsuccessful, and the Hardin Family Court issued a divorce decree in January 2008, based in part on a deposition given by Mona in which she stated that she and Steve had been separated for the required statutory period of time.

The decree was later set aside due to the fact that the parties had reconciled for a brief period of time and, therefore, had not been separated for the required period of time. Mona claimed that the deposition had been taken several months earlier before the parties' reconciliation and that it was a simple error that the deposition had not been retaken. As a result of the error, the original decree was set aside. On March 10, 2008, the court entered a new decree.

Mona and Steve had entered into a settlement agreement that was incorporated into the decree of dissolution. In this agreement, they agreed to joint

[2] We will refer to the parties by their first names, not for the purpose of informality or to show disrespect, but as a matter of convenience.

custody of their minor children, with Mona designated as the primary residential parent "whether she is in state or out of state," and with Steve having "visitation," or parenting time, with the children pursuant to the Hardin County Local Rules.

In May 2009, Mona planned to marry Sean Kranz, who, due to a recent job promotion, had moved to Florida. When Mona expressed her desire to move to Florida to be with Kranz, Steve filed a motion to modify his parenting time with Nate to require Nate to spend the majority of his time in Kentucky with him. Thereafter, Mona filed a motion requesting the court to permit her to move to Florida with her children. A hearing was held in July 2009, at which time the court heard testimony from both parties and their witnesses.

On August 6, 2009, the court entered an order granting Steve's motion to modify parenting time and granting him the status of primary residential parent of Nate, thereby effectively denying Mona's request to move to Florida with the child. Mona filed a motion to alter, amend, or vacate the order, which was denied by the trial court. Mona also filed a motion to modify the parenting time, claiming that in light of the trial court's ruling, she was no longer moving to Florida and, therefore, wanted to re-establish her status as Nate's primary residential parent. These motions were also denied by the court, and Mona subsequently filed this appeal.

We begin with a general statement about the applicable standard of review. In reaching a decision, a trial court's 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." Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding supported by substantial evidence is not clearly erroneous. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (citing *Daniel v. Kerby*, 420 S.W.2d 393, 393 (Ky. 1967); *Massachusetts Bonding & Ins. Co. v. Huffman*, 340 S.W.2d 447, 449 (Ky. 1960); and *Yates v. Wilson*, 339 S.W.2d 458, 464 (Ky. 1960)). "Substantial evidence" is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Golightly*, 976 S.W.2d at 414 (citing *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367, 369 (Ky. 1971); and *O'Nan v. Ecklar Moore Express, Inc.*, 339 S.W.2d 466, 468 (Ky. 1960)). When there is conflicting testimony, "we may not substitute our decision for the judgment of the trial court." *R.C.R. v. Com., Cabinet for Human Res.*, 988 S.W.2d 36, 39 (Ky. App. 1998) (citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967)).

Once a trial court has made the required findings of fact, it must then apply the law to those facts. Trial courts are vested with broad discretion in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). We will not disturb the trial court's decision unless we determine it constitutes an abuse of discretion. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair

decision." *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)) (quotation marks omitted). In reviewing the decision of the trial court, the test is not whether we, as an appellate court, would have decided the question in a different way, but whether the trial court's findings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). With these standards in mind, we will examine Mona's claims of error.

Mona's first argument is that the trial court failed to consider the settlement agreement in which, she claims, the parties specifically agreed that she would remain the primary residential parent regardless of whether she was in the state or out of the state. The language that she cites is as follows:

> The parties shall have joint custody of the parties' minor children . . . with the wife being the primary residential custodian, whether she is in state or out of state.

However, the settlement agreement also contains the following provisions:

> The agreed visitation schedule is based on the current residences of the parties. Prior to relocation of either party to another county or state, which would require modification of the present agreement, the party intending to relocate shall tender an Agreed Order modifying visitation or said party shall petition the Court for mediation or a Commissioner's hearing to modify visitation. A possessory parent shall not relocate the child/children prior to modification. The parties agree that the Hardin Circuit Court shall continue to have jurisdiction of the matter of visitation until said modification is approved by the Court.

Therefore, Mona and Steve specifically agreed that a possessory parent, in this case Mona, must seek permission from the court, and the settlement agreement must be modified, before that parent may relocate with the child.

Even if the agreement did not contain this language, nothing in the settlement agreement could be interpreted as requiring the trial court to reach a particular result if the trial court did not feel the result was in the best interests of the child. Issues regarding support, custody, and visitation are always modifiable. KRS 403.180(6). The trial court correctly addressed this issue in its order denying Mona's motion to alter, amend, or vacate the court's order, and there was no error.

Mona's second argument is that under *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), the trial court applied the incorrect standard and should have treated Steve's motion as a motion for modification of custody rather than a motion for modification of parenting time.[3] The Kentucky Supreme Court addressed the issue of relocation in *Pennington* and recognized that when a parent in a joint custody arrangement seeks to become the primary residential parent, he or she is actually only requesting to modify the existing timesharing agreement. *Id.* at 769-70. Consequently, the question for a court to address is whether the proposed modification would be in the best interests of the child under KRS 403.320. *Id.* It is when a party seeks a change of actual legal custody, such as from joint custody to sole custody, that the standards set forth for a change of custody situation are applicable. *Id.*

[3] If Steve's motion was construed to be a motion to modify custody, then supporting affidavits would have been required to be filed. KRS 403.340(2).

Here, no motion was made by either party to modify custody. Steve initiated this proceeding by moving the trial court to modify the visitation/timesharing agreement "to where [Nate] . . . will spend the majority of his time in Kentucky with [Steve]," and Mona simply moved the court for permission to move to Florida. No mention was made in either of the motions of a change in the legal custody arrangement. The Court in *Pennington* specifically held that the "best interests of the child" standard is applicable in this situation, as visitation/timesharing, not custody, was the issue before the trial court. *Id*. at 770. Therefore, the trial court applied the correct standard, and there was no error in this regard.

Mona's third argument is that the relocation would not have required a modification of parenting time from the Hardin County Local Rules, so consequently no motion to relocate need have been made by her, as Steve still could have exercised visitation pursuant to Hardin County's Local Rules. In essence, Mona is arguing that had she chosen to, she had the right to bypass the court system and take Nate to Florida because Steve still would have been able to exercise visitation pursuant to the Hardin County Local Rules relating to parties not living in adjoining counties. However, not only did Mona fail to argue this to the trial court, but this argument continues to ignore the fact that the parties' agreement specifically states that relocation by either party would require a modification of the agreement by the court. There was no error in this regard.

Mona's final argument is that the trial court's decision to modify the timesharing agreement and refusal to allow her to relocate to Florida with Nate was an abuse of discretion because it was not in Nate's best interest to remain in Kentucky with Steve. Mona makes numerous claims in support of her argument that the court's ruling was an abuse of discretion, most of them going to the trial court's assessment of the credibility of the witnesses and the alternate ways in which the court should have weighed the evidence.

Kentucky law has uniformly applied the principle that, "[i]t is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) (citing *Gen. Tire & Rubber Co. v. Rule*, 479 S.W.2d 629 (Ky. 1972)). Moreover, as previously discussed, an "[a]buse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey*, 74 S.W.3d at 783.

In this case, we find no abuse of discretion by the trial court. The court reviewed the evidence in light of the correct legal standard, placing significant weight on the child's adjustment within the community and the route that would cause the least disruption in the child's life, and concluded that a move to Florida would not be in Nate's best interests. As stated by the Kentucky Supreme Court, "[w]hile some of the evidence conflicted with the trial court's conclusions, and a different trial court or a reviewing appellate court might

disagree with the trial court, the standard on appellate review requires a great deal of deference both to its findings of fact and discretionary decisions." *Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008).

The order of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Roger T. Rigney
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