

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001527-ME

JOHN M. GROVES

APPELLANT

v. APPEAL FROM BATH CIRCUIT COURT  
HONORABLE WILLIAM E. LANE, JUDGE  
ACTION NO. 04-CI-00203

AUTUMN GROVES

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: John M. Groves brings this appeal from August 13, 2009, and August 18, 2009, orders of the Bath Circuit Court modifying the custody arrangement between John and Autumn Groves. We affirm.

John and Autumn Groves were married June 10, 2000. One child was born of the parties' marriage. On November 3, 2004, John filed a petition for

dissolution of marriage. The parties subsequently entered into a property settlement agreement. Relevant to this appeal, the agreement provided that John and Autumn were to share joint custody of the minor child with an “equal timesharing arrangement.” Neither party was designated as the primary residential custodial parent. The parties’ property settlement agreement was subsequently incorporated into the Decree of Dissolution of Marriage entered on February 14, 2005.

On May 18, 2009, Autumn filed a motion seeking an award of sole custody of the parties’ minor child. As the basis for her motion, Autumn alleged that there existed “a risk of harm” to the child living with John. Specifically, Autumn alleged that the child suffered physical abuse while in John’s custody and specifically asserted that John’s current wife, Corina, had struck the child. Two days after Autumn’s motion was filed, John filed a motion seeking to be designated the primary residential parent. Therein, John alleged that Autumn suffered from a serious substance abuse problem. John also filed a response to Autumn’s motion for sole custody and attached a report prepared by the Cabinet for Health and Family Services (Cabinet). In the report, the Cabinet determined that it could not substantiate the child abuse by Corina.

The matter was referred to the Domestic Relations Commissioner. Kentucky Rules of Civil Procedure (CR) 53.03. Following a hearing, the master commissioner tendered a recommended order designating Autumn as the child’s primary residential custodian and awarding John standard visitation. The

commissioner effectively proposed modification of the previous joint custody award to an award of shared custody. *See Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).<sup>1</sup> The commissioner further directed that the child be professionally evaluated for behavior problems and that both parties attend counseling to facilitate the new timesharing arrangement.

John filed objections to the recommended order. By order entered August 13, 2009, the circuit court denied the objections and adopted the recommended order. John subsequently filed a motion pursuant to CR 59 to vacate the court's August 13, 2009, order and for a new hearing. He also requested additional findings of fact pursuant to CR 52. By order entered August 18, 2009, the circuit court made an additional finding of fact "that the parties['] timesharing/visitation was modified based on the requirements of KRS 403.320(3)" but did not otherwise amend the August 13, 2009, order. This appeal follows.

John contends that the circuit court erred by modifying custody to designate Autumn as the primary residential parent. John specifically asserts that the circuit court failed to consider the factors set forth in Kentucky Revised Statutes (KRS) 403.340 (modification of custody decree) and KRS 403.270(2)

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<sup>1</sup> In *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008), the Supreme Court held that shared custody was a "subset of joint custody that combines the concept of joint custody with some of the patterns of sole custody." The Court explained that in shared custody one parent is typically named primary residential parent and timesharing usually "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." *Id.* at 764-765.

(best interests factors). John also asserts that the court failed to make adequate findings of fact pursuant to CR 52.01.

Our review of a circuit court's custody award is limited to whether the court's findings of fact are clearly erroneous or whether the court abused its discretion in making these findings. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974); *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008). A finding of fact is clearly erroneous if not supported by substantial evidence of a probative value. *See Hunter v. Hunter*, 127 S.W.3d 656 (Ky. App. 2003).

In this case, modification of custody took place over two years after entry of the original decree; thus, the relevant inquiry is "the best interests of the child" either under KRS 403.270 or KRS 403.340(3). *Pennington*, 266 S.W.3d at 767. Our review shall proceed accordingly.

At the hearing before the Domestic Relations Commissioner, John's mother, Fran Groves, testified that she frequently took care of the child throughout his life and was concerned about John's disciplining of the child. She stated that John would "ground" the child for several days and the child was not allowed to leave his bed. Fran recounted that these groundings would occur routinely and that the child was close to a breaking point because of John's discipline regime. During John's testimony, he admitted to grounding the child for days at a time to his bed and only allowing the child to leave his bed for limited reasons; i.e., bathroom trips, lunch, or dinner. John also admitted that his wife, Corina, struck the child with a "switch" causing a significant red welt with bruising along the

greater part of the child's leg. The record contains photographs memorializing the child's injury. And, Corina conceded that she did hit the child with a switch.

In its oral findings, the court expressed concern over John's disciplining of the child and, in particular, grounding the child for "days in his bed." It found that the current arrangement with the child "was not working." And, the court specifically found that it was in the best interest of the child to modify custody by designating Autumn as the primary residential custodian and by awarding John standard visitation.

Upon the whole, we are of the opinion that the circuit court's findings of fact as to the child's best interest were not clearly erroneous or an abuse of discretion. We also believe the circuit court adequately considered the relevant factors outlined in KRS 403.340 and KRS 403.270. In fact, the evidence was more than ample to support the circuit court's decision to award the parties' shared custody. In particular, the evidence detailing John's disciplinary regime was most disconcerting, as well as the injury suffered by the child after being hit by John's wife, Corina.

In sum, we hold that the circuit court properly modified the custodial arrangement by awarding shared custody with Autumn being designated the primary residential custodian.

For the foregoing reasons, the orders of the Bath Circuit Court are affirmed.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE

OPINION.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I reluctantly concur with the majority. It is my opinion that the evidence in this action justified the decision by the trial court. However, I agree with the dissent in that the trial court should have made findings of fact pursuant to the properly filed motion. Because the evidence is overwhelming in support of the trial court's decision, I reluctantly concur because this is an advanced appeal where the stability of the child trumps the failure to follow proper procedures by the trial court.

Once again let me state, oral findings do not substitute for written findings upon a properly filed motion and although this record contains numerous oral findings, it contains inadequate written findings. I concur because I find the error harmless.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent from the majority's opinion in this case. I would remand for additional findings of fact. In my opinion, when John properly moved for additional factual findings pursuant to CR 52.02, the circuit court's response in its order that "[t]he Court makes the additional finding that the parties' timesharing/visitation was modified based on the requirements of KRS 403.320(3)" is insufficient as factual findings such that this Court can make an adequate review of the basis of the trial court's decision.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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