

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001932-ME

BRIAN HENDRIX

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE ROB DAN MATTINGLY JR., JUDGE
ACTION NO. 09-CI-00312

ELIZABETH HENDRIX

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MOORE, DIXON AND THOMPSON, JUDGES.

MOORE, JUDGE: Brian Hendrix appeals from the findings of fact, conclusions of law and judgment of the Calloway Circuit Court, which denied his motion to modify timesharing of the parties' minor child. After careful review of the record, we affirm.

The marriage of Brian and Elizabeth Hendrix was dissolved on January 12, 2005. They have one child, L.H., who was born on July 15, 2003. Under the terms of their Child Custody and Property Settlement Agreement, Brian and Beth assumed joint custody of L.H. and agreed that she would reside primarily with Beth. Brian was provided visitation in accordance with the local judicial circuit guidelines, with some modification to include extra overnight visits.

On April 27, 2010, Brian made a motion for change of primary custody/ timesharing periods, seeking to be appointed the primary residential parent. After a hearing, the trial court entered findings of fact, conclusions of law and judgment finding that a modification of the timesharing arrangement would not be in L.H.'s best interest. Brian filed a motion to alter, amend or vacate the order to allow him to produce additional evidence about Beth's paramour, Charles White. The trial court held another hearing in order to supplement the record with testimony from White and then entered an order confirming its prior judgment. This appeal followed.

In *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), the Kentucky Supreme Court ruled that a motion to modify visitation/timesharing arrangements is governed by Kentucky Revised Statutes (KRS) 403.320(3), which states:

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.

Brian argues that the trial court's finding that it would not serve L.H.'s best interests to designate him as the primary residential parent was clearly erroneous. Essentially, he contends that the weight of the evidence presented at the hearings was in his favor. Our standard of review requires that we give deference to the findings of the trial court. 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. "[F]indings of fact are clearly erroneous only if they are manifestly against the weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). "[A]ny decisions based upon said facts are reviewed under an abuse of discretion standard." *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)).

Brian argues that the evidence elicited at the hearings proves that Beth has psychological and financial problems which create an unstable living situation for L.H. This evidence can be grouped into four areas which we will summarize briefly: (1) Beth's relationship with her five other children, each of whom has a

different biological father. The primary physical custody of Beth's eldest child was changed to his father about seven years ago after Beth spanked the child, bruising him. Beth's second child, who resides with Beth and who has no contact with his biological father, has been fighting with other children at school and was removed from the school bus because he exposed his genitals. (2) Beth's mental and emotional health: Beth has been suffering from severe depression following the death in infancy of a child who was born after her divorce from Brian. She is unable to work outside the home, and her primary source of income is social security disability payments. A large portion of her disability benefits go towards the payment of the rent on her home, although she testified that she has now purchased a home. She has moved frequently since the dissolution of her marriage to Brian. (3) Beth's relationship with her paramour, Charles White: Beth has been living with White for several years. He has a criminal record, has been incarcerated and is currently on probation. (4) L.H.'s performance at school: Brian was encouraged by L.H.'s first grade teacher to seek custody of the child. There was evidence that L.H. often seems tired at school, has frequent absences and wears "hand-me-down" clothing, which does not fit her well. She may also be exposed to secondhand smoke in Beth's home because Beth and Charles smoke.

By contrast, Brian emphasizes that he has stable employment, has lived with his girlfriend for five years in a three-bedroom house, has an affectionate relationship with L.H. and would encourage her to participate in extracurricular activities. He disputes Beth's contention that the only reason he is

seeking primary residential custody is because he does not want to pay increased child support. The trial court found that Brian's child support was increased on October 2009 from \$280 per month to \$466.56.

Although the trial court noted that L.H.'s teacher supported Brian's decision to seek primary residential custody, the court also relied on the teacher's testimony that L.H. was always clean and that both Brian and Beth were interested in her school performance. The trial court also noted that Patty Williams, a social worker who assisted Beth during the illness and death of her infant son, found Beth to be a devoted mother and voiced no concern regarding her care for her children.

The trial court concluded that L.H. is a healthy, intelligent, socially well-adjusted child who is succeeding at school and has a good relationship with both parents. The trial court conceded that Brian may be in a better position to provide financially for his daughter, but that there had been no testimony to indicate that she was without basic necessities in her mother's primary care.

Brian cites three unpublished opinions of this Court which he contends mandate reversal of the trial court's decision.¹ *See Snyder v. Snyder*, 2006 WL 1195927 (Ky. App. 2006) (2005-CA-002074-ME); *Jones v. Jones*, 2007 WL 3122280 (Ky. App. 2007) (2007-CA-000786-ME); *Hensley v. Hensley*, 2011 WL 96157 (Ky. App. 2011) (2010-CA-000174-ME). Although there are some similarities between these unpublished cases and the present case, each is factually unique and must be considered on its own merits. Furthermore, the Court in each

¹ Brian's reliance on these cases does not comport with the requirements of Kentucky Rules of Civil Procedure (CR) 76.28(4)(c).

of those opinions affirmed custody modification orders. Because Brian is asking us to reverse a 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). The trial court fully acknowledged the nature and extent of Beth’s problems but concluded that a change in timesharing was not in L.H.’s best interests. Based upon our review we cannot say the trial court’s findings are clearly erroneous.

The order of the Calloway Circuit Court is affirmed.

ALL CONCUR.

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