RENDERED: FEBRUARY 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000691-ME

BONNIE SUE DAILEY — APPELLANT

v.

APPEAL FROM LINCOLN FAMILY COURT
HONORABLE WALTER F. MAGUIRE, JUDGE
ACTION NO. 01-CI-00078

DANNY DAILEY, JR. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

DIXON, JUDGE: Appellant, Bonnie Sue Dailey, appeals from an order of the Lincoln Family Court modifying timesharing between the parties who share joint custody of their minor son and designating Appellee, Danny Dailey, Jr., as the primary residential parent. Finding no error, we affirm.

Danny and Bonnie Sue married on August 30, 1997, and are the parents of one minor child, a son born on November 4, 1996. The parties

separated in January 2002, and were divorced by a decree of dissolution of marriage entered by the Lincoln Family Court on March 22, 2002. They were awarded joint custody of their son with Bonnie Sue designated as the primary residential parent.

On February 17, 2009, Danny filed a motion to modify custody along with a supporting affidavit alleging a concern for the care of the child. Danny stated that Bonnie Sue had failed to provide appropriate dental care, resulting in Danny's taking their son for major dental work. Danny also claimed that Bonnie Sue was not addressing several educational problems.

Thereafter, on July 11, 2009, Danny filed a motion to modify timesharing, citing *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), as an alternative to a custody modification. At a hearing on February 11, 2010, the family court noted that it did not believe a change in custody was warranted and the only issue before the court was whether to modify timesharing. After hearing testimony from the parties, as well as their then thirteen-year-old son, the family court ruled that it was in the child's best interest to modify timesharing and designate Danny as the residential parent. Bonnie Sue thereafter appealed to this Court as a matter of right.

Bonnie Sue argues that the family court erred in applying *Pennington v. Marcum*, because it involved a primary residential parent seeking to relocate with the minor child. Bonnie Sue points out that Danny's request to become the primary residential custodian was based not on reasons of relocation, but on

objections to Bonnie Sue's parenting. Bonnie Sue contends that she has been the primary residential parent since 2002, and the trial court failed to find sufficient grounds to disturb the status quo.

In *Pennington v. Marcum*, our Supreme Court held that a primary residential parent with joint custody seeking to relocate with the children may either make a motion to modify parenting time or a motion to modify custody. 266 S.W.3d at 769-770. If the relocating parent simply asks the court to change the parenting schedule, and not to alter the joint custody agreement, the trial court must apply the standard set forth in KRS 403.320, which provides that "[t]he 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."

Although the facts herein are reversed, in that Danny as the nonresidential parent moved the court to modify timesharing and designate him as the residential parent, the principles of *Pennington* nonetheless are applicable. "Every case will present its own unique facts, and the . . . modification of visitation/timesharing must be decided in the sound discretion of the trial court." *Pennington*, 266 S.W.3d at 769. In fact, in *Humphrey v. Humphrey*, 326 S.W.3d 460 (Ky. App. 2010), a panel of this Court considered circumstances analogous to the instant case and concluded:

> In *Pennington*, our Kentucky Supreme Court held that a motion seeking to change the primary

> residential parent was in reality a motion to modify visitation/timesharing and not a motion to modify custody. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky.2008). We cannot agree with Sarah that the holding in Pennington was intended to be limited only to cases involving relocation and, in fact, this Court has already found otherwise on several occasions. (Footnote omitted).
>
> While a relocation was the particular context in which *Pennington* was decided, we believe that the intent of our Supreme Court was to establish a distinction between a modification of custody (either from joint custody to sole or split custody, or vice-versa), and a modification of timesharing. A modification of timesharing maintains the basic custodial framework agreed upon by the parties but changes the amount of time that each parent spends with the child within that framework. . . . *Pennington* is clear that this is not a modification of custody, but of timesharing, and we decline to find otherwise herein.
>
> *Pennington* is clear that motions to modify visitation/timesharing are brought under KRS [Kentucky Revised Statutes] 403.320(3), which permits modification when it "would serve the best interests of the child."

Humprey, 326 S.W.3d at 463-464.

Since Danny was seeking a modification in the visitation schedule, not the joint custody arrangement, the family court was required to evaluate the child's best interest in light of the testimony presented during the hearing. In doing so, the family court observed:

> [T]he Court finds that while both parties are good, loving parents the father has greatly assisted the child improve his grades, takes it upon himself to address the child's dental issues and involve the child in activities that have improved the child's self esteem. The court also notes

> that the child's desire to live with his father. The Court also finds that the child is integrated into the father's home and the father's home is appropriate for the child. The Court has also considered that the child will have to change school systems as a result of the change in timesharing but believes the child's benefits of having access to his father to help with his homework, participate in extracurricular activities, to ensure the child's dental care is addressed and allow the child to have a male role model in his everyday life outweighs the effect the change in school systems may have especially considering the child will soon be transitioning from middle school to high school regardless of which school system he is in.

The trial court's findings of fact in a domestic relations matter will not be set aside unless they are clearly erroneous. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *See Murphy v. Murphy*, 272 S.W.3d 864 (Ky. App. 2008). As such, the question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005).

Bonnie Sue does not dispute any of the family court's findings. Rather, she essentially believes that proof that she did something wrong was required for the trial court to change the status quo and place the child with Danny. However, that is simply not the standard required under *Pennington*. We conclude that the family court weighed all of the determining factors and properly concluded that it was in the child's best interest to modify the parties' timesharing to designate Danny as the primary residential parent.

The order of the Lincoln Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Cabell D. Francis, II
Stanford, Kentucky

BRIEF FOR APPELLEE:

Justin Genco
Stanford, Kentucky