RENDERED: MARCH 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001066-ME

EDWARD WAYNE RILEY — APPELLANT

v.

APPEAL FROM CARTER FAMILY COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 03-CI-00419

DONNA LEE RILEY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

LAMBERT, JUDGE: Edward Wayne Riley has appealed from the April 8, 2010, order of the Carter Family Court modifying an earlier custody and time-sharing order by granting sole custody of his daughter, Hailey, to his former wife, Donna Lee Riley, and by disallowing his visitation with Hailey. He also appeals from the May 19, 2010, order denying his motion to alter, amend, or vacate that order.

After carefully reviewing the record, including the recordings of the hearings, as well as the parties' arguments, we reverse the portion of the order awarding sole custody of Hailey to Donna, and affirm the portion suspending Edward's visitation with Hailey.

Donna and Edward were married on May 2, 1997, in Carter County, Kentucky. Two children were born of the marriage: Hailey Dawn Riley, born December 22, 1997, and Devin Lathan Riley, born October 4, 2000. Donna and Edward separated on October 9, 2002, and they filed a joint petition for dissolution of marriage on November 5, 2003. At the time they filed the petition, Donna was twenty-two years old and Edward was twenty-six years old. In their petition, Donna and Edward requested that their marriage be dissolved and that the family court incorporate the separation agreement they had entered into and filed along with their petition. In addition to property division, the separation agreement provided that Donna and Edward were to have joint custody of the two children, with Donna having physical possession. In other words, Donna was acting as the primary residential parent. Edward was to have liberal time-sharing, at a minimum in accordance with the Carter County Uniform Visitation Guidelines. Edward also agreed to pay $150.00 per month in child support. On January 16, 2004, the family court entered a decree of dissolution which incorporated the separation agreement. The record also reflects that child support payments were to be paid through the Cabinet for Health and Family Services. We further note that Donna has had two

more children, one during the period of separation and the other subsequent to the divorce.

In 2009, the Commonwealth filed a motion on Donna's behalf to increase Edward's child support obligation to $408.18 per month.

On September 2, 2009, Edward filed a motion to modify the decree of dissolution regarding custody and time-sharing of Hailey and Devin. In the motion, Edward stated that Devin had been in his possession for the past four months and that Donna had not requested his return. He further stated that Donna refused to let him have visitation with Hailey and that he had not had time-sharing with her since May 2009, despite his requests.

In response, Donna stated that she had filed a custodial interference charge against Edward when he failed to return Devin after their July 28, 2009, time-sharing. She further denied that she had ever prevented Edward from exercising his time-sharing with Hailey.

The family court held a hearing on Edward's motion on October 1, 2009. At the hearing, Edward testified that he was unemployed and lived with his parents. His income was derived from unemployment benefits. Regarding the children, Edward stated that his and Donna's previous custody agreement had worked well until recently. He stated that Devin was terrified of Donna's live-in boyfriend, Lowell Jason Gilliam, and Edward introduced certified copies of several domestic violence orders (DVO) that had been entered against Gilliam in the past at the request of Gilliam's father and two previous wives. Edward also introduced

court documents showing that Gilliam's visitation with his own children was ordered to be supervised. Edward then testified to an e-mail from Donna to Devin that contained an inappropriate photograph of a naked woman as well as an inappropriate "quiz" appearing on Hailey's MySpace page, which incorrectly showed that she was eighteen years old rather than eleven.

The second witness to testify was Scott Taber, the father of Donna's fourth child. Taber has sole custody of their five-year-old son and expressed some concern about the man with whom Donna was living. However, he also stated that he knew Donna loved their son.

Finally, Donna testified that she had not kept Hailey from seeing her father, but that Hailey did not want to see him. She discussed ongoing domestic violence issues during her relationship with Edward, although she testified that she never filed a formal complaint with the police. Donna admitted to knowing about Hailey's MySpace page and indicated she had no problem with it because only family members and a few school friends had access to the page. Regarding the e-mail to Devin, she admitted to receiving and responding to Devin's e-mail, but denied that the accompanying picture was hers. Regarding Gilliam, Donna stated that he had never raised his voice to her or his hand against her and that she was not concerned about either the restriction on his visitation with his children or the DVOs entered against him in the past. Donna also testified that Edward said horrible things about her to the children, including calling her a whore.

In addition to the testimony presented on the record, the family court spoke in chambers, separately, with the children about their wishes and concerns. Those discussions are not included in the certified record.

Following the hearing, the family court entered a temporary order on October 2, 2009, stating that Donna's and Edward's animosity toward each other prevented the communication necessary to continue the time-sharing arrangement as it had been. The court then vacated the designation of a "primary physical custodian" and put in place a trial period of time-sharing to give Donna and Edward the opportunity to show their children that they could be civil and treat each other with respect. For the trial period of four to six weeks, the family court ordered equal time-sharing for Devin whereby he would spend alternating seven-day periods with each parent. For Hailey, the court ordered that she continue to reside with Donna and have time-sharing with Edward on Sunday afternoons.

The parties returned to court for a status hearing on November 5, 2009. Donna indicated that Devin was doing well, but Hailey was not. Hailey reported to Donna that Edward had been talking to her about the Wiccan religion. Edward denied that he was trying to convert her, but stated that he was open to learning about and teaching his children about all religions. Following the status hearing, the family court appointed a guardian *ad litem* (GAL) for the children and ordered the GAL to interview the children and file a written report with the court.

The GAL filed a report on February 4, 2010, detailing her discussions with the children and recommendations. Based upon her separate discussions with

each child, the GAL indicated her belief that there had been inappropriate discussions in the presence of the children about the other parent and about time-sharing. She stated that Edward continued to make derogatory comments about Donna to the children, and then told Hailey she would be just like her mother. Hailey related that she was uncomfortable in her father's presence and did not wish to visit with him at all. The GAL then recommended that no time-sharing take place until counseling had occurred. Regarding Devin, the GAL stated that he appeared well adjusted, but expressed concerns about the long-term effect Edward's derogatory comments about Donna and Hailey in his presence might have on him.

The matter then came before the court on March 19, 2010, for a final custody hearing. In his memorandum filed prior to the hearing, Edward specifically requested that he be named Devin's primary residential parent and that the court enter time-sharing orders between Devin and Donna, and between Hailey and him. Furthermore, Edward requested that his visitation with Hailey not be restricted in any way because there was no showing that visitation with him would seriously endanger her pursuant to the applicable statute.

At the hearing, Donna testified about Edward's continuing verbally abusive behavior to Hailey. She described Hailey's panic attacks and problems sleeping due to nightmares. Edward testified that his relationship with his daughter began to sour in the fall of 2009, when he tried to get Hailey back after an incident between him and Donna's boyfriend. He went on to testify that he did not believe

that Donna made correct decisions all of the time, but he admitted that he had badmouthed Donna. Edward stated that he was stricter with the children and that he pushed education with both of them. He also stated that Hailey never acted as if she were afraid of him, but admitted he knew she felt more comfortable with Donna. The family court, in the presence of the GAL, then interviewed both children in chambers, which this Court has reviewed.[1]

On April 8, 2010, the family court entered an order ruling on the pending motion to modify:[2]

> This matter having come before the Court upon the Co-Petitioner's motion to modify timesharing and the Court having conducted an evidentiary hearing, interviewed the children herein, and having reviewed the record, hereby finds and ORDERS as follows:
>
> 1. It is in the best interests of the parties' son, Devin, that the parties have joint custody. It is clear to the Court that Devin loves both parents, but that the father has obviously attempted to influence his testimony. The mother shall be the primary residential custodian and the father shall have visitation every weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. The child shall be exchanged at the maternal grandmother's residence.
>
> 2. It is in the best interests of Hailey that the mother be granted full custody. The Court finds that any contact at this time would seriously endanger the emotional and mental health of the child. The father has continuously berated and degraded the child to the point where the

[1] Because of the confidential nature of the in-chambers interviews, we shall not detail the judge's discussions with either Devin or Hailey.

[2] We note that in one respect, the written order differs from the oral ruling made at the conclusion of the hearing. The Judge orally ruled that Devin was to live with his father during the week and then spend weekends with his mother. We presume this to mean that Edward was to be Devin's primary residential parent. However, the written order did not provide for this.

> child feels afraid and helpless in his presence. Therefore visitation with Hailey is suspended until further orders of the Court.
>
> 3. The parents are ORDERED to immediately enroll and complete parenting classes at Pathways. The parties shall communicate properly when necessary in regard to the children and . . . to accommodate them over and above any desire to argue between themselves.
>
> 4. The Court ORDERS no contact or communication between the Co-Petitioner and Lowell Jason Gilliam.
>
> 5. The parties shall turn over to the Court income information within 20 days of entry of this order to effectuate entry of an order regarding child support.

The record reflects that the Commonwealth filed another motion to modify Edward's child support obligation. The parties later entered into an agreed order, entered by the family court on June 2, 2010, whereby they agreed that Edward was to pay child support in the amount of $298.50 per month starting June 1, 2010.

Edward filed a timely motion to alter, amend, or vacate the April 8, 2010, order. In the motion, Edward contended that the portion of the order awarding Donna full custody of Hailey was improper and should be set aside because Donna had never filed a motion to modify custody with an accompanying affidavit. Edward also argued that the family court's action in naming Donna as Devin's primary residential custodian did not take into consideration Devin's desire to stay with his father. Finally, Edward argued that the family court improperly restricted his visitation with Hailey without any expert or medical evidence to support its finding that visitation with him would seriously endanger her health. In her

response, Donna contends that the family court properly considered the best interests of the children in making its decision as to the primary custodial parent and properly determined that Hailey was under severe emotional distress based upon the testimony presented.

On May 19, 2010, the family court denied Edward's motion to alter, amend, or vacate, and this appeal follows.

On appeal, Edward confines his three arguments to the rulings concerning Hailey's custody and his ability to have visitation with her. He argues that the family court abused its discretion in awarding sole custody to Donna, was clearly erroneous in finding that any contact between him and Hailey would cause serious endangerment to Hailey, and abused its discretion by failing to award him visitation. In her brief, Donna contests each of these arguments and states that the family court did not abuse its discretion or commit any error in its rulings.

Our standard of review in the area of child custody and visitation is well settled in this Commonwealth. "The party seeking modification of custody or visitation/time-sharing is the party who has the burden of bringing the motion before the court" and "the change of custody motion or modification of visitation/time-sharing must be decided in the sound discretion of the trial court." *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). It is also well settled that an appellate court may set aside a lower court's findings:

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly

> erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted).

First we shall address Edward's argument that the family court abused its discretion in awarding sole custody of Hailey to Donna. He contends that the family court failed to follow the dictates of Kentucky Revised Statutes (KRS) 403.340 when it modified the original custody ruling. We agree that the family court improperly modified the custody decree to award sole custody to Donna.

In *Pennington v. Marcum*, the Supreme Court of Kentucky extensively addressed the concepts of custody and visitation/time-sharing and the distinction between the two concepts when a party moves for modification.

> Though it is often stated that there are two categories of custody, sole custody and joint custody, there is in practice a subset of joint custody that combines the concept of joint custody with some of the patterns of sole custody-often called "shared custody." In shared custody, both parents have legal custody that is subject to some limitations delineated by agreement or court order.

> Unlike full joint custody, time sharing is not necessarily flexible and frequently 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. The weekend parent does not have "visitation," a sole-custody term which is frequently misused in this context, but rather has "time-sharing," as he or she is also a legal custodian. However, in practice, the terms visitation and timesharing are used interchangeably. Additionally, one parent may be designated the "primary residential parent," a term that is commonly used to denote that the child primarily lives in one parent's home and identifies it as his home versus "Dad's/Mom's house." This concept is frequently misnamed "primary residential custody."

Pennington, 266 S.W.3d at 764-65. The Court went on to discuss the difference between a motion to modify custody and a motion to modify time-sharing:

> Courts have struggled ever since the concept of joint custody emerged with what part physical or residential possession of the child plays in each type of custody. However, a modification of custody means more than who has physical possession of the child. Custody is either sole or joint (or the subsets of each) and to modify it is to change it from one to the other. On the other hand, changing how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree. This is true whether the parent has sole or joint custody: decision-making is either vested in one parent or in both, and how often the child's physical residence changes or the amount of time spent with each parent does not change this.

Pennington, 266 S.W.3d at 767 (footnote omitted).

This Court has addressed the effect of *Pennington* on modification in several cases, including *Kelsay v. Carson*, 317 S.W.3d 595 (Ky. App. 2010). In *Kelsay*, this Court held that the mother's motion to change custody, in which she sought to

be named the primary residential parent, was properly treated as a motion to modify time-sharing and, therefore, was governed by KRS 403.320. In *Gardner v. Gardner*, 2009 WL 1811730 *1 (Ky. App. 2009) (2008-CA-001862-ME), this Court, in an unpublished opinion, provided a concise summary of the holding in *Pennington*:

> In *Pennington*, the Court clarified the distinction between modification of custody (e.g., sole custody versus joint custody) and modification of visitation/timesharing arrangements (e.g. change in visitation schedule). *Id*. The Court pointed out that if parents were granted joint custody with one parent designated the primary residential parent and the other parent exercising visitation, this arrangement should be specifically referred to as "shared custody." *Id*. In *Pennington*, the Court clearly held that a parent's motion seeking to change the primary residential parent was merely a motion to modify visitation/timesharing and not one to modify custody. *Id*. The Court further instructed that a motion seeking to change the primary residential parent was properly brought under Kentucky Revised Statutes (KRS) 403.320, "Visitation of Minor Child." *Id*. Under KRS 403.320, the Court noted that the parent seeking to be designated primary residential parent must demonstrate that it was in the child's best interest. *Id*.

Turning to the present case, it is apparent that Edward was seeking a change in the designation of the primary residential parent when he filed his motion to modify, not the nature of the custody itself. In his pretrial memorandum, he specifically asked to be named Devin's primary caretaker. At the hearing, Edward spoke in terms of where he wanted the children to live. He stated that while he initially wanted both children to live with him, he acknowledged that Hailey was more comfortable with Donna. Therefore, he requested that Devin live with him,

that Hailey live with Donna, and that they both be granted visitation with the other child. Accordingly, we perceive that Edward was not seeking a change in custody itself, but in the designation of the primary residential parent. Furthermore, the record does not reflect that Donna filed a motion to modify custody, specifically to change the joint custody award regarding Hailey to sole custody. Therefore, we must hold that the family court *sua sponte* decided to modify custody of Hailey from joint to sole in Donna's favor. This is not permitted by our statutory structure.

Several cases have addressed whether the court may modify a prior custody decree on its own motion, and have answered this question in the negative.

> The procedure to modify permanent custody is clearly set forth in KRS 403.340. Simply, the trial court was without authority to modify the custody decree in Deborah's favor on its own motion. *See Chandler v. Chandler*, Ky., 535 S.W.2d 71 (1975). The applicable statute contemplates that a motion for modification be made with supporting affidavits. As in the *Chandler* case, *supra*, there was "no semblance of compliance" with the mandates of KRS 403.340. The motions and affidavits before the court concerned only the issue of visitation. Bruce did not ask for or indicate that he even wanted custody. In fact, he told Dr. Tadajewski that he wasn't sure he should be the day-to-day custodian of Amanda. There being no request for the court to modify custody, it appears the court was punishing Deborah for being, in its opinion, unreasonable in withholding visitation.

Gladish v. Gladish, 741 S.W.2d 658, 661 (Ky. App. 1987). Even the *Pennington* Court made a similar statement: "[A] trial court's *sua sponte* review and

modification of a custody order within the two year period was in error." *Pennington*, 266 S.W.3d at 767.

Accordingly, because the family court erred when it improperly modified custody of Hailey from joint custody to sole custody in favor of Donna when no such motion had been filed by either party, we must reverse that portion of the order.

Next we shall address whether the circuit court abused its discretion in restricting Edward's visitation with Hailey. Our resolution of this issue also includes Edward's remaining argument that the circuit court erred in finding any contact between him and Hailey would cause serious endangerment. The gist of Edward's argument is that Donna failed to present any expert evidence by a mental health professional regarding any emotional or mental danger to Hailey.

KRS 403.320(3) addresses modification of a visitation order, providing as follows: "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." In support of this argument, Edward cites to this Court's opinion in *Hornback v. Hornback*, 636 S.W.2d 24 (Ky. App. 1982), for the statement that "[t]he standards for modifying a judgment to disallow visitation are no less stringent than the standards to deny visitation at the outset of the case." *Id*. at 26. *Hornback* made it clear that in a situation where one party wishes to modify visitation rights that have

previously been granted, "the court may not take away a parent's visitation rights without a showing that the child would be seriously endangered by visitation." *Id*. The Court went on to state that "[o]nce a finding has been made that the children's welfare is endangered, however, the court may not modify the judgment without finding that the best interests of the child are served." *Id*. We note that, as opposed to in this case, *Hornback* involved a situation where the mother was seeking to modify the initial decree, which denied her visitation privileges, so as to allow her to have regular visitation with her three children. As applied to the matter before us, the family court had to find that Hailey's physical, mental, moral, or emotional health would be seriously endangered in order to restrict or suspend Edward's visitation with her.

On this issue, the family court found that Edward "has continuously berated and degraded the child to the point where the child feels afraid and helpless in his presence." Edward argues that the family court's findings are clearly erroneous because the evidence presented in the two hearing was inconsistent and because there was inadequate evidence to establish any serious endangerment to Hailey. The crux of his argument is that that no evidence from a mental health professional was introduced on which the family court could base its findings. However, Donna points out that KRS 403.320 does not require that parties must introduce evidence from a mental health professional in order to establish the serious endangerment standard. She also argued that testimony established the stress

Hailey felt while in her father's presence, which manifested itself in panic attacks, shortness of breath, and nightmares.

Based upon the limited circumstances of this case and despite our holding on the first issue, we hold that the family court did not commit any error in suspending Edward's visitation with Hailey at this time based on a finding that she would be seriously endangered. The testimony presented at the hearing as well as information elicited from Hailey during her interview with the court are sufficient to establish that at least her mental and emotional health would be seriously endangered if visitation with Edward were to continue. The family court specifically found that Edward "has continuously berated and degraded the child to the point where the child feels afraid and helpless in his presence." This finding is supported by substantial evidence in the record and is therefore not clearly erroneous. There is no requirement in KRS 403.320 that the parties introduce evidence from a mental health professional to establish the serious endangerment standard. We note that this ruling is of course subject to modification by the family court upon the filing of an appropriate motion once the parties have complied with the court's directives to attend and complete parenting classes and counseling has been undertaken.

For the foregoing reasons, the orders of the Carter Family Court are affirmed in part and reversed in part. The ruling as to Edward's visitation or time-sharing with Hailey is affirmed, and the ruling as to the award of sole custody of Hailey to

Donna is reversed. This matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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