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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000857-ME

BRETT MAGGARD — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM EVANS LANE, JUDGE
ACTION NO. 08-CI-00204

ASHLEY WARREN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Brett Maggard (Appellant) appeals from an order of the Rowan Circuit Court naming Ashley Warren (Appellee) as the primary residential parent of the parties' child. In doing so, the court modified the parties' prior timesharing arrangement, which had the child spending an equal amount of

[1] Senior Judge Joseph E. Lambert 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.

time with each parent. Appellant contends that the trial court erred in modifying timesharing in this manner because Appellee's husband had demonstrated a history of substance abuse and violent proclivities. However, after reviewing the record, we conclude that the trial court did not commit reversible error. Therefore, we affirm.

The parties are the parents of A.S.M., who was born on May 21, 2006. They were never married, and after their relationship ended Appellant filed a petition to establish custody. The parties subsequently entered into an agreed order establishing joint custody of A.S.M. as well as an alternating timesharing schedule. This arrangement was intended to afford equal parenting time to each party and required the child to live with one parent on Monday, Tuesday, Thursday, Saturday, and Sunday and the other parent on Wednesday and Friday, with the parties switching this schedule every week. The agreed order further provided that this arrangement would be revisited when A.S.M. began school.

On June 3, 2009, Appellee filed a domestic violence petition against her boyfriend Travis Archer, with whom she had been cohabitating. The petition stemmed from a series of events that had occurred during several days in May after Appellee had ended her relationship with Archer. According to the petition, Appellee and Archer had an argument that ended with Appellee telling Archer that she was leaving him. Archer told Appellee that he would rip up the hardwood laminate in Appellee's mobile home or tear the entire home down if she left him. He also threatened to cut the brake lines in her vehicle and told her that he "knows

people" that could get her son taken away from her. Archer also threatened to kill himself, put a handgun to his head, and pulled the trigger. Appellee believed the gun had jammed, but Archer later revealed that it had not been loaded. Two of Archer's friends subsequently took the gun from him and tried to help him with his suicidal feelings.

The petition further revealed that Appellee called Archer's parents the following morning and told them to come and pick him up. This occurred after he had asked for his gun back. As Archer and his parents were leaving Appellee's home, Archer jumped out of the vehicle and ran into the woods, after which he would not leave the property for two hours. At some point, Archer also told Appellee that if she left him, she would be sorry and that he knew someone that could "take care" of her. When asked what he meant, Archer told her that he could pay this man to hurt, rape, or kill someone. He then told her that he could never think of someone raping her, so he would just have the guy "beat [her] up." He also threatened to shoot anyone that she began dating. Appellee also alleged that Archer had followed her around Wal-Mart and a party after the break-up and had repeatedly called her to see what she was wearing and what she was doing. A domestic violence order was subsequently entered, but sometime later Appellee had the order dismissed because she had reconciled with Archer.

On November 10, 2009, Appellant filed a motion asking the trial court to modify the parties' timesharing arrangement pursuant to KRS 403.320 because the child was "seriously endangered" by his exposure to Archer. Appellant

specifically alleged that Archer was "violent and unstable" and was "known to have a substance abuse problem." Appellant asked the court to severely restrict Appellee's time with the child and to order that Archer not be present during any visits with her. Appellee responded to this motion with her own motion to modify timesharing. She alleged that the parties' current timesharing arrangement made it difficult for the child to have stability in his life because he was constantly being shuttled back and forth between the parties' homes. Appellee also noted that the child would be starting preschool soon and needed a more structured routine. She indicated that her job enabled her to be readily available if he needed to be picked up from school or taken to the doctor. She further noted that Appellant was living in the home of his girlfriend's parents and that this only added to any instability. Essentially, then, each party sought to be named as A.S.M.'s primary residential parent.

A hearing was held on February 12, 2010. At that hearing, the trial court heard testimony from Appellant, Appellee, Archer, and Appellant's fiancée, Sarah Burchett. Appellant testified that he had been a union carpenter for approximately two years and that while he had previously been living with his fiancée's parents, he had recently purchased his own mobile home. Appellant noted that he often worked away from home in places like Lexington or Ashland, so on days when he had A.S.M. and was working, the child was watched by Burchett and his parents. He also noted that his mother had taken care of most of A.S.M.'s doctor's visits. Appellant testified that A.S.M. seemed to be well-

adjusted to his routine at Appellant's home and that A.S.M. enjoyed spending time with him and Burchett. As for the issue of schooling, Appellant wanted A.S.M. to go to the preschool at Upper Tygart Elementary in Carter County in large part because its location was convenient to both parties. Appellant believed that modification of timesharing was necessary (and that the child needed to spend more time with him) because of the presence of Travis Archer in Appellee's life. Appellant indicated that he was "surprised" and "alarmed" when the two reconciled and were married because he was concerned about the events of May 2009 and Archer's drug use during that incident. Appellant also noted that he, unlike Archer, had never had a DVO or EPO issued against him.

Sarah Burchett, Appellant's fiancée, testified that she and Appellant were going to be married soon and that she and Appellant had never had any incidents involving domestic violence or drug abuse and had never argued in front of A.S.M. Burchett also testified that she was a stay-at-home mother capable of watching A.S.M. as well as her own child. She also agreed with Appellant that Upper Tygart Elementary was the most feasible education option for A.S.M.

Appellee testified that her relationship with Appellant had ended after the two had had a series of verbal and physical conflicts that had occasionally left her with visible bruising and marks. However, she acknowledged that she had never called the police on any of these occasions and had never sought an EPO. In terms of her current residential situation, Appellee indicated that while she had moved in with her mother after her separation from Archer, she was now living in

her mobile home again and was working from home handling financial and human resource matters for a telecommunications company. Consequently, on days when she had A.S.M., she was able to watch him herself. Appellee further testified that she believed the current timesharing schedule had become unworkable because A.S.M. "had no sense of belonging" or "stability." She noted that A.S.M. seemed to have a hard time dealing with a different set of rules for each parent – particularly with respect to discipline – and with having to leave one home for another so frequently. This was a specific concern given that A.S.M. was about to begin preschool. Appellee expressed her desire that A.S.M. attend schools in the Rowan County school system because she had previously worked as a teacher's aide in that system and was familiar with the schools. She did not want A.S.M. to attend Upper Tygart because she was unfamiliar with the Carter County school system and also because the middle school and high school were on the opposite end of the county, creating potential difficulties in the future in terms of transportation. Appellee also expressed concern about A.S.M. spending time at Appellant's parents' home because it was "filled with mold." She also indicated that Appellant had confided in her that he was likely facing future financial difficulties. Consequently, she believed that A.S.M. would be better off if he spent the majority of his time with her.

As for her relationship with Travis Archer and the events leading to Appellant's motion to modify timesharing, Appellee testified that she had begun dating Archer in early 2008 and that the two had begun cohabitating several

months later. She acknowledged that the events leading to the DVO petition against Archer had occurred and that the allegations therein were factual. However, she indicated that Archer had consumed ten Valium pills in the previous two or three days and had drunk a fifth of liquor on the day that the two fought because of his inability to deal with the pressures of being unemployed. She also acknowledged that the child had witnessed approximately four or five minutes of an argument between her and Archer that had taken place during that weekend while Archer was in an intoxicated state. Because of his conduct, Appellee ended her relationship with Archer and asked him to move out. She subsequently received a phone call from a member of Archer's family in August 2009 and was told that since then he had begun attending church and had made other positive changes in his life. She and Archer began talking by phone and eventually reconciliated, as a result of which she had the DVO dismissed. The two were later married.

Archer was the final witness to testify. When questioned about the events leading up to the DVO, he fully acknowledged that they had occurred. However, he indicated that he had not intended to carry out any of the threats he had made and that he had "said a lot of stuff to keep [Appellee] in my life" because he had been scared of losing her. Archer testified that in the days leading up to those events, he was in a bad mental state because he had been unable to find work and was feeling, for the first time, the pressure of paying bills and putting food on the table. He admitted that he had obtained a number of Valium pills from

Appellee's father to address sleep issues and had taken at least ten of them in the days prior to the argument with Appellee, which caused him to act abnormally. He also acknowledged drinking a considerable amount of alcohol at a party on the night of the argument and claimed that he was intoxicated that night and the next morning during the incidents in question. However, Archer noted that he was now steadily employed as a heavy equipment operator and that he had passed numerous drug screens since that time.

Archer further admitted that A.S.M. had witnessed him "yelling" and "cussing" at Appellee for four or five minutes during their argument, but he noted that no other such incident had occurred before or since then. He also spoke about his relationship with A.S.M. and how much he enjoyed spending time with the child. Archer additionally testified that he no longer owned the handgun that had been part of the aforementioned events but that he did own a shotgun that he kept locked in a gun safe. Further testimony reflected that Archer had previously pled guilty to fourth-degree assault after a fight with his father several years ago but that the two now had a good relationship. He also acknowledged that he had a prior DUI conviction in 2001 or 2002 and that he had been the subject of another EPO by an ex-girlfriend. However, he indicated that the EPO had been dismissed and that the ex-girlfriend in question had made up the allegations leading to it because he had told her that he no longer wanted anything to do with her because of her issues with drug abuse.

On March 17, 2010, the trial court entered an order modifying the parties' timesharing arrangement. As a result of this order, Appellee was named the child's primary residential parent and Appellant was given "timesharing with the child pursuant to the standard visitation of the Rowan Circuit Court." The trial court justified its decision thusly:

> 1. The parties are the parents of a son, [A.S.M.], age 3½ years old.
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> 2. The parties share the joint custody of [A.S.M.], and exercise split timesharing of the child pursuant to an Agreed Order entered in the Rowan Circuit Court on May 16, 2008.
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> 3. Brent Maggard, Petitioner, resides with his girlfriend/fiancée in a mobile home he purchased since filing his Motion for Modification of Timesharing. He is employed in construction work and usually works on projects in Lexington and Ashland, KY. He resides in Carter County, KY.
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> 4. Ashley Warren is employed by C-3 Communications but works from a home office. She is married to Travis Archer. She is able to provide care for the child while working since she works from her home. She resides in a mobile home that she owns which is located on her grandparent's farm.
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> 5. The Timesharing arrangement is unworkable due to the many rotations which take place each week and will continue to be more difficult as the child ages.
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> 6. Even the parties determined that this issue would need to be revisited in its Agreed Order referenced above.
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> 7. Ashley Warren secured a Domestic Violence Order against Travis Archer, for verbal threats made to her during a weekend when they were having relationship difficulties. This was an isolated event.

> 8. Ashley Warren and Travis Archer later reconciled and are now married.
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> 9. The Court finds that Travis Archer is not a danger to the child.
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> 10. The Court finds that it is in the best interest of the child for Brett Maggard to have timesharing with the child in accordance with the standard visitation order of the Rowan County Circuit Court and that the Respondent have visitation at all other times.
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> 11. In its Legal Analysis this Court has considered the factors of KRS 403.320 and finds that timesharing with the mother would not endanger the child's physical, mental, moral, or emotional health. The Court finds that Ashley Warren took necessary steps to protect the child after her relationship difficulties with Travis Archer. The Court finds that the series of events were isolated and that Mr. Archer does not impose any future threats to the minor child. The Court considered KRS 403.270 regarding the issue of Domestic Violence and Abuse and found that all threats made to Ashley Warren were verbal, that she was not a victim of physical violence and the child only heard the parties cursing on one occasion. The child will not be endangered by timesharing in the Archer household [since] he is not seriously in danger as to his physical, mental, or emotional health and neither are the custodial parents.
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> 12. The Court further finds that pursuant to KRS 403.320(3) this order modifying timesharing serves the best interest of the child.

This appeal followed.

On appeal, Appellant argues that the trial court erred in awarding Appellee primary residential custody of A.S.M. because this left the child exposed to Travis Archer, who Appellant describes as "a man with admitted and proven violent

proclivities." The standards for evaluating a trial court's modification of a timesharing arrangement on appeal are well-established. When a parent in a joint-custody situation seeks to become the primary residential parent, he or she is actually seeking only to modify the existing timesharing arrangement. KRS 403.320 allows a timesharing arrangement to be modified at any time upon a showing that a change would be within a child's best interests. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008); *Humphrey v. Humphrey*, 326 S.W.3d 460, 464 (Ky. App. 2010); KRS 403.320(3).[2] Moreover, a 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." KRS 403.320(3).

Our review is governed by Kentucky Rules of Civil Procedure (CR) 52.01, which provides, in relevant part: "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." Findings 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); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). "When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Frances*, 266 S.W.3d at 756; *see also Pennington*, 266 S.W.3d at 769

[2] Appellant spends a considerable amount of time in his briefs asserting the applicability of KRS 403.340 to our review. However, that statute applies to motions seeking a change in *custody* of a child – not mere modification of a timesharing/visitation arrangement. *See Pennington*, 266 S.W.3d at 765. Thus, it is inapplicable here.

(holding that "modification of visitation/timesharing must be decided in the sound discretion of the trial court."). If no such error or abuse occurred, the fact that this Court might have decided the case differently is irrelevant. *See Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974).

As an initial matter, we note that it is fairly obvious that having A.S.M. bounce back and forth between different residences multiple times per week is an untenable situation given that he is approaching school-age. Indeed, the parties recognized as such in their original agreed order. Thus, modification of the original timesharing arrangement was inevitable and necessary. The question, then, becomes whether the trial court erred in modifying timesharing in the manner in which it did. After reviewing the record here, we see nothing that leads us to conclude that the trial court's findings of fact were clearly erroneous or that the court abused its discretion in applying those facts to the law in naming Appellee as A.S.M.'s primary residential parent.

Appellant mainly argues that it was not in A.S.M.'s best interest for Appellee to be designated as the child's primary residential parent because it would increase the child's exposure to Travis Archer. Appellant specifically contends that the trial court erred in finding that the behavior displayed by Archer in May 2009 was "isolated" in nature. In a related vein, Appellant also contends that since the noted incident between Appellee and Archer occurred in May 2009 and the modification hearing occurred in February 2010, not enough time had

passed for the trial court to conclude that Archer had "reformed himself" since the two had only been reconciled for a short period of time. Appellant further contends that A.S.M.'s continued exposure to Archer endangers the child's physical, mental, moral, and emotional health.

While there is certainly some merit to these arguments, we cannot say that they compelled a different result below. The trial judge had a full opportunity to observe Archer on the witness stand and to determine how much credibility and weight his testimony about this matter carried. While we are deeply concerned about Archer's history of drug and alcohol abuse and violent behavior, the trial judge apparently found his story to be convincing and concluded that the incidents in questions were "isolated" events and that A.S.M. would not be exposed to harm by living with Appellee and Archer. We cannot say that this conclusion was clearly erroneous. The events of May 2009, while concerning, were confined to a limited period of time and A.S.M. had little exposure to what took place. Moreover, Appellee – while verbally threatened – was not physically harmed by Archer, and Archer gave considerable and candid testimony regarding what had led up to his conduct during that time and how he had attempted to change since then. There was also no evidence produced suggesting that A.S.M. was somehow adversely affected by his relationship with Archer or by Archer's relationship with Appellee. Ultimately, this is a classic case in which the trial court likely could have modified timesharing in favor of either party based on the evidence presented at the hearing and what the court chose to believe. Given the extensive discretion

trial courts are afforded in these instances, we see no basis for reversal. *See Pennington*, 266 S.W.3d at 769.

For the foregoing reasons, the judgment of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Grayson, Kentucky

BRIEF FOR APPELLEE:

Leah Hawkins
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