RENDERED: MAY 6, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001938-ME

MICHAEL YOUNG APPELLANT

v.

APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DAN KELLY, JUDGE
ACTION NO. 07-CI-00078

MARTHA YOUNG LANDIS APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, MOORE, AND STUMBO, JUDGES.

CAPERTON, JUDGE: The Appellant, Michael Young, appeals the September 20, 2010 order of the Green Circuit Court denying his motion to change the primary residential custodian from his ex-wife, Appellee Martha Young Landis, to himself. Upon review of the record, the arguments of the parties and the applicable law, we reverse and remand for additional proceedings not inconsistent with this opinion.

Martha filed an action in the Green Circuit Court to dissolve her marriage to Michael on June 8, 2007. The parties have one child, S.Y., who was four years old at the time the divorce action was filed. Approximately a year following the filing of the divorce case, the parties executed a settlement agreement disposing of their property interests and addressing the custody and parenting schedule of their son. At that time, the parties agreed to share joint custody of S.Y. and negotiated a detailed timesharing arrangement with regard thereto.

Thereafter, throughout 2008 and until July of 2009, the parties continued to litigate their case by way of various cross-motions for contempt. Following July of 2009, the record is devoid of motions from either party until the time that Michael filed the motion to modify residential custody that is the subject of this appeal.

Martha married Brian Landis after she and Michael divorced. Michael alleges that on March 24, 2010, Brian physically assaulted S.Y., who was six at the time. Martha disagrees with this characterization and claims that Brian did not "assault" S.Y., but instead "spanked" him. In his brief, Michael agrees that Brian "spanked" S.Y. on March 24, 2010, and that as a result of the spanking, Brian entered a plea of guilty on June 24, 2010, to the charge of fourth-degree assault before the Green Circuit Court. On June 25, 2010, Brian was sentenced to thirty days in jail, probated for a period of twenty-four months. Michael

subsequently filed his motion to modify residential custody with an accompanying affidavit[1] on July 6, 2010.

On September 15, 2010, the circuit court conducted a hearing on Michael's motion. After hearing testimony from three witnesses[2] and reviewing the evidence submitted,[3] the court found that:

> There's a two-tier test here. First, there has to be some evidence that establishes a change in circumstances sufficient to overcome the very strong policy of stability in the relationship, and I'm going to find that the Petitioner has not met that burden. So, we're not going to proceed with any further evidence about what would be in the best interest of the child.

See Video Record at 02:16:48. The court issued a written order memorializing its ruling on September 20, 2010. This appeal followed.

On appeal, Michael argues that the circuit court misapplied the law by failing to conduct a hearing to determine whether changing residential custody as a result of the stepparent's abuse of the parties' child would be in the child's best interest. Michael argues that the court's ruling clearly amounts to an abuse of

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[1] Michael's motion was titled, "Motion to Modify Custody," and the accompanying affidavit stated that, "This Affiant firmly believes it would be in the child's best interest to be placed in his residential care, custody, and control, with the Petitioner receiving visitation as may be appropriate given the circumstances."

[2] The three witnesses who provided testimony were Brian Landis, Martha Landis, and Michael Young. Michael notes that the court heard only his direct testimony, and did not allow him to be cross-examined before making its decision. While Michael acknowledges that this error would be harmless at best, he nevertheless notes his belief that it was unusual for the court to intervene in the proof to such a degree in order to announce its ruling. Martha notes that Michael did not object to the absence of cross-examination at the time, and does not do so now.

[3] This evidence included a copy of Brian's plea agreement from the Green District Court charge of fourth-degree assault, a copy of the sentence received following his guilty plea, and copies of three photographs showing marks on S.Y.'s behind and right leg as a result of the spanking. The parties agreed that these photographs were of S.Y., and Brian conceded to the trial court that he did in fact spank S.Y.

discretion because the facts clearly establish that S.Y. was abused by Brian. Michael argues that he sought modification of the parties' custody and timesharing arrangement in light of his request that the court award him "primary residential custody of the parties' infant child." He states that, because he sought a change in the designation of primary residential custodian and did not seek to modify the inherent nature of the parties' status as joint custodians, the court should have reviewed his motion under Kentucky Revised Statutes (KRS) 403.320[4] and not under KRS 403.340. Michael asserts that in referencing a two-tiered test requiring (1) a change in circumstances, and (2) a best interest inquiry, the court was clearly invoking KRS 403.340(3). Thus, Michael asserts that the court erred in declining to reach the question of S.Y.'s best interest and, in doing so, abused its discretion. In the alternative, Michael argues that even if KRS 403.340 was the correct legal standard to be applied in this case, the court abused its discretion when it determined that the spanking by Brian failed to rise to the level of an adequate change in circumstances to mandate a best interest inquiry.

In response, Martha asserts that there was no abuse of discretion by the trial court. Martha asserts that, rather than requesting a modification of the timesharing arrangement, Michael was actually requesting that the court modify the joint custody arrangement of the parties to a sole custody situation in which he would be the custodian. In support of that assertion, Martha directs our attention to

[4] KRS 403.320(3) provides that, "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."

the fact that Michael titled his motion, "Motion to Modify Custody," and to the information contained in the accompanying affidavit. Martha asserts that the court's decision was based upon substantial evidence, and that it correctly ruled that there had not been a change in circumstance as required by KRS 403.340.

In reviewing the arguments of the parties, we note that Kentucky Rules of Civil Procedure (CR) 52.01 provides that findings of fact made by the trial court shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to determine the credibility of the witnesses before it. *See* CR 52.01. A factual finding is not clearly erroneous if supported by substantial evidence. *See Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is that which has sufficient probative value to induce conviction in the mind of a reasonable person when taken alone or in light of all the evidence. *Golightly* at 414. We also note that the trial court has very broad discretion when determining matters pertaining to custody of children. *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983). A trial court's custody award, that is, the application of the law to the court's findings of fact, will not be disturbed unless it constitutes an abuse of discretion. *See Allen v. Devine,* 178 S.W.3d 517, 524 (Ky. App. 2005). A court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Whether the trial court properly applied the law to the facts is a question that we review *de novo*. *Allen* at 524. We review this matter with these standards in mind.

Upon review of the record, we note that Michael titled his motion, "Motion to Modify Custody," and therein stated that he "moves the court to award him primary residential custody of the parties' infant child . . . ."[5] In the affidavit attached thereto, Michael alleged that "he is the fit and proper person to have residential custody of the parties' minor child," that Martha regularly failed to provide proper care for the minor child, and that the timesharing arrangement agreed upon by the parties has been difficult for Michael to enforce since its inception. Further, Michael stated concerns about the relationship between Brian and S.Y., that Brian physically abused S.Y. on March 24, 2010, and, among other things, that it "would be in the child's best interest to be placed in his residential care, custody, and control, with the Petitioner receiving visitation as may be appropriate given the circumstances."

Having reviewed Michael's motion and the remainder of evidence in the record, this Court is of the opinion that, although Michael titled the motion "Motion to Modify Custody," it would in fact have been more appropriately considered as a motion to modify the primary residential custodian from Martha to Michael. Indeed, in the motion itself, Michael specifically requested that he be named, "primary residential custodian," and the court characterized his motion as one to "modify the residential custody status, whereby he would be named as the custodian . . . ."[6]

[5] *See* Appellant's Motion to Modify Custody, July 6, 2010

[6] *See* September 20, 2010 Order of the Green Circuit Court.

In its recent holding in *Pennington v. Marcum,* 266 S.W.3d 759 (Ky. 2008) our Kentucky Supreme Court made it clear that, if a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so. *Id.* at 765. In an attempt to elucidate the difference between a change from joint custody to sole custody, and a mere change in timesharing, the Court stated:

> 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.

Id. at 767. Thus, when the issue is merely deciding how much time a child spends with each parent, timesharing, and not custody, is the issue. Clearly, KRS 403.320 governs such a determination.

Our review of Michael's motion indicates that, although he titled it "Motion to Modify Custody," he in fact specifically sought to change the primary residential custodian from Martha to himself. The motion does not indicate that Michael sought to become the sole decision-maker on S.Y.'s behalf, or that he sought to change the fundamental nature of the custodial arrangement from joint custody to sole custody. As the separation agreement between Michael and Martha

makes clear, they agreed to joint custody of S.Y., with significant timesharing, Martha being the primary residential custodian. A review of Michael's motion does not indicate that he intends to change the fundamental nature of their agreement, but rather that he sought to shift the nature of the timesharing arrangement, such that S.Y. resided primarily at his residence as opposed to Martha's residence; thus, his request to be named "primary" and not "sole" residential custodian.

Having concluded that Michael's motion was in fact a motion to modify timesharing and not a motion to modify custody, we believe the best interest standard set forth in KRS 403.320 to have been the appropriate inquiry in this matter in contrast to the serious endangerment standard provided in KRS 403.340. Necessarily, KRS 403.320 requires a consideration of whether or not modification would serve the "best interests" of the child. This is a less stringent standard than the standard of serious endangerment set forth in KRS 403.340(3), and we believe that the court was in error in failing to consider the evidence before it under the less stringent "best interests" standard. Accordingly, we reverse and remand this matter for additional proceedings consistent with the holding in *Pennington* and other applicable law.

Wherefore, for the foregoing reasons, we hereby reverse the September 20, 2010 order of the Green Circuit Court and remand this matter for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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