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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO.2010-CA-000148-ME

BRIDGET DASCH APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA MASTERTON, JUDGE
ACTION NO. 06-CI-01225

STEVE KELLEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; SHAKE,[1] SENIOR JUDGE.

NICKELL, JUDGE: Bridget Dasch has appealed from the December 9, 2009, order of the Fayette Circuit Court, Family Division, denying her motion to strike Steve Kelley's motion to modify the timesharing arrangement for the couple's children. She has further appealed from the family court's January 13, 2010, order

[1] Senior Judge Ann O'Malley Shake 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.

modifying the parties' timesharing arrangement, making Steve the primary custodian during the school year and preventing her from relocating out-of-state with the children. We affirm.

Steve and Bridget divorced in late 2006. They agreed to share joint custody of their two minor children following the dissolution of their union. Neither party was named as primary residential custodian. In the Separation Agreement incorporated into their decree of dissolution, Steve and Bridget agreed that while the children remained minors, neither parent would move from Fayette County, Kentucky, except for the most compelling of reasons. The agreement went on to state:

> If such move becomes necessary, the moving parent shall notify in writing the other of his/her intention to move no less than three months in advance of the move and the parties shall attempt to agree upon modification of this agreement as to custody and timeshare. The parties agree to apply the criteria of KRS 403.270 (best interest) irregardless (sic) of the timing of the review, thus foregoing the requirements of KRS 403.340 (modification).

Steve and Bridget each remarried. In April of 2009 Bridget e-mailed Steve to inform him of her intention to relocate with the children to be with her new husband upon his return from active military duty in Afghanistan. She requested that the two attempt to negotiate a modification of the custody arrangement. Steve did not respond. Bridget contacted Steve again in June reminding him of the pending move, requesting a meeting to work out a new timesharing schedule, and informing him of the likely move date of November 1,

2009. A subsequent mediation on June 23, 2009, was unsuccessful in resolving the matter. The following day, Bridget informed Steve she still did not have a definitive move date nor location, but that she believed she would be moving to Ft. Benning (near Columbus, Georgia) or Ft. Bragg (near Fayetteville, North Carolina).

During a court appearance in a related domestic violence action between the parties on August 12, 2009,[2] Bridget informed the court of her proposed move and her belief that Steve had no objection to the relocation as he had failed to raise a formal objection or file a motion to oppose it. Steve verbally objected to the move. The trial court directed Steve to file a formal motion in the divorce action stating the basis for his objection to the move. The court also appointed a guardian *ad litem* for the children.

On October 26, 2009, Bridget filed a notice of compliance with the terms of the separation agreement regarding her proposed relocation which offered a proposed timesharing schedule for Steve and requested the trial court enter an order accepting the proposed timeshare arrangement. Three days later, Steve filed a written response noting his objection to the relocation and requesting a hearing on the matter. The trial court scheduled a hearing for December 8, 2009. At a pre-trial conference, Bridget alleged Steve had acquiesced in the move as he had failed to file an objection to the relocation or a motion to modify the timesharing

[2] The record from the domestic violence action is not before us in this appeal. However, in their briefs, the parties agree to the events that occurred at the August 12 hearing. We also note the same judge presided over both actions.

agreement in the seven months that had passed since receiving notification of same from Bridget. Steve informed the trial court that a motion would be forthcoming and the case was allowed to proceed.

On November 19, 2009, Bridget filed a renewed notice of compliance and requested the trial court enter her proposed timesharing schedule. The following day, Steve filed an objection to the proposed relocation and a motion seeking modification of the timesharing agreement. In his motion, Steve alleged the best interests of the children would be served by allowing them to live with him during the school year and with Bridget during the summer. On November 24, 2009, Bridget moved the trial court to strike Steve's motion as untimely. The trial court overruled Bridget's motion.

Following the evidentiary hearing on December 8-9, 2009, the trial court entered its order finding the best interests of the children would be best served by having them live with Steve during the school year and with Bridget during the summer. The trial court also set forth a timesharing schedule for holidays and school break periods. This appeal followed.

Bridget contends the trial court erred in failing to strike Steve's motion to modify the timesharing agreement as being untimely filed. She further argues the trial court abused its discretion in entering an order preventing her from relocating with the children. After a careful review of the record, the law, and the briefs, we affirm.

First, Bridget contends the trial court erred in denying her motion to strike Steve's motion to modify the timesharing agreement and in allowing the motion to proceed. She alleges Steve's failure to file his motion for more than seven months following her notification to him of the proposed relocation resulted in a waiver of his right to object. She further argues the trial court erred in scheduling a hearing on the matter before Steve actually filed his motion. We disagree.

Bridget and the trial court believed the burden was on Steve to file an objection to the proposed relocation and a motion seeking modification of the timesharing agreement. However, in *Pennington v. Marcum*, 266 S.W.3d 759, 769-70 (Ky. 2008), our Supreme Court stated:

> [t]he party seeking modification of custody or visitation/timesharing is the party who has the burden of bringing the motion before the court. A residential parent who wishes only to change the visitation/timesharing due to his relocating with the child may bring the motion to modify visitation/timesharing under KRS 403.320. If that parent believes that the relocation will make a joint custody arrangement unworkable, then the motion should be made for a change of custody from joint to sole under KRS 403.340.
>
> Likewise, when one parent indicates an interest in relocating with the child, the parent opposed need not wait, but could file his own motion. A parent who has equal or nearly equal visitation/timesharing and who wants to prevent a child's relocation with the other parent, but does not want to change custody from joint to sole, could bring a motion for a change of visitation/timesharing under KRS 403.320. This could result in a designation of that parent as primary residential parent if the child is not allowed to relocate

> because it is not in his best interests to do so. If that same parent wants to change custody from joint to sole custody to him, he must bring the motion for a change of custody and proceed under KRS 403.340.

Thus, as Bridget was actually the party seeking modification of the timesharing agreement based upon her impending relocation, the burden was upon her to bring the matter before the trial court. Likewise, Steve was permitted to file a motion seeking modification at any time after receiving notice of the proposed move and he did so on November 20, 2009.

The central purpose of a motion is to notify the court and the parties of claims and defenses regarding the issues to be decided, "[d]espite the informality with which pleadings are nowadays treated." *Hoke v. Cullinan*, 914 S.W.2d 335, 339 (Ky. 1995). Although not specifically captioned as a motion, Bridget's notice of compliance and request for entry of an order adopting her proposed timesharing schedule, had the same effect as a motion as it placed the controversy squarely before the trial court. Bridget had clearly asked the trial court for relief and Steve had noted his objection to the matter. As early as October 29, 2009, Steve had requested a hearing on Bridget's notice of compliance and proposed timesharing arrangement. Thus, contrary to Bridget's assertion, we are unable to conclude the trial court set a hearing date for a "non-existent motion." To conclude otherwise would allow function to be circumvented by form. This we are loath to do.

It is the trial court that controls the docket and the admission of evidence, not the litigants. *Commonwealth v. Gonzales*, 237 S.W.3d 575, 579 (Ky. App. 2007). A trial court has the inherent power "to control the disposition of the causes on its docket with economy of time and of effort for itself, for counsel, and for litigants." *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004) (quoting *Landis v. North American Co.,* 299 U.S. 248, 254, 57 S.Ct. 163, 166, 81 L.Ed.2d 153 (1936)). Here, the trial court was keenly aware of the relative positions of the parties with respect to the proposed relocation and the pressing time frame in which the parties were operating. There were no surprises and all parties had sufficient time to prepare and secure witnesses prior to the hearing. We have reviewed the record and are unable to discern any prejudice to the parties relative to the trial court's scheduling of the hearing in this matter. There was no error.

Next, Bridget contends the trial court abused its discretion in modifying the timesharing agreement and ordering the children to remain in Kentucky with Steve during the school year. She contends the trial court's findings were contrary to the evidence and that the trial court completely disregarded evidence she presented. We disagree.

Our standard of review in the area of child custody and visitation is well-settled. "[T]he change of custody motion or modification of visitation/time-sharing must be decided in the sound discretion of the trial court." *Pennington*, 266 S.W.3d at 769. 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). *See also* CR 52.01, *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986).

In her brief before this Court, Bridget recounts much of the testimony she presented. She contends the weight of this testimony warranted a judgment in her favor. Where there is conflicting evidence, it is the responsibility of the fact-finder to determine and resolve such conflicts, as well as matters affecting the credibility of the witnesses. *Bierman v. Klapheke,* 967 S.W.2d 16, 19 (Ky. 1998). The finder of fact may believe any part or all of the testimony of any of the witnesses, or may disbelieve all of it. *Gillispie v. Commonwealth,* 279 S.W. 671, 672 (Ky. 1926).

The trial court conducted a lengthy hearing and took testimony from numerous witnesses. The testimony was thorough and, at times, conflicting. The trial court evaluated the evidence and made detailed findings of fact in its order regarding the best interests of the children pursuant to KRS 403.270. Our review of the record indicates there was substantial evidence to support the trial court's determination. It is reasonable for Bridget to assert there was substantial evidence presented to support a contrary result. However, as we noted above, the mere fact that conflicting evidence is presented does not form a sufficient basis for overturning the judgment of a trial court who viewed the testimony firsthand. Unless there is no substantial evidence in the record to support the trial court's findings, they will not be upset on appeal. *W.A. v. Cabinet for Health and Family Services*, 275 S.W.3d 214, 220 (Ky. App. 2008). The findings here were amply supported and shall remain undisturbed.

Therefore, for the foregoing reasons, the judgment of the Fayette Circuit Court, Family Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jennifer McVay Martin
Lexington, Kentucky

BRIEF FOR APPELLEE:

Catherine Ann Monzingo
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