

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001935-ME

TIMOTHY G. EDLIN

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 09-CI-00247

TAMMY R. EDLIN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,¹
SENIOR JUDGE.

CLAYTON, JUDGE: Timothy G. Edlin appeals from a judgment of the Marion
Circuit Court, which made Tammy R. Edlin the primary residential custodian of
the parties' minor children. After careful review of the record, we affirm.

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.

FACTUAL AND PROCEDURAL BACKGROUND

Timothy and Tammy were married on October 10, 1997, in Marion County Kentucky. The marriage was dissolved by a decree of dissolution on April 20, 2010. During the marriage, they had three daughters, who at the time of the dissolution were eleven, ten, and four. The parties entered into a property settlement agreement, which resolved all issues except for child custody and child support.

The trial court held a hearing on June 1, 2010. Following the hearing and after consideration of the depositions, the trial court entered its decree on October 1, 2010, adopting the August 13, 2009, temporary custody order as modified by the November 7, 2009, order. The trial court granted the parties joint custody with Tammy as the primary residential custodian. In the order, the trial court set Timothy's parenting schedule pursuant to the Standard Visitation Schedule for the Eleventh Judicial Circuit with the modification in the later order. In essence, Timothy's parenting time with the children was every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m., as well as every Thursday evening from 5:00 p.m. until 7:00 p.m. In addition, the modified custody order stated that Timothy takes them to church school on Wednesday evening and is responsible for the children's transportation to sporting events.

Timothy appeals from the June 1, 2010, decree. He argues that the trial court erred in its determination of the best interests of the children and

maintains that the best interests of the children would best be served by dividing the parenting time equally between the parents.

STANDARD OF REVIEW

This Court will only reverse a trial court's determination as to a designation of primary residential parent if the decision constitutes a manifest abuse of discretion, or was clearly erroneous in light of the facts and circumstances of the case. *See e.g., Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000) (citing *Wilhelm v. Wilhelm*, 504 S.W.2d 699, 700 (Ky.1973)). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person." *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). In deciding whether to set aside the trial court's findings of fact "due regard [shall be] given to the opportunity of the trial judge to view the credibility of the witnesses." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (citing Kentucky Rule of Civil Procedure (CR) 52.01). Moreover, a trial court's conclusion of law is reviewed under a de novo standard of review. *McClendon v. Hodges*, 272 S.W.3d 188, 190 (Ky. 2008).

ANALYSIS

The issue for appellate review is whether the trial court abused its discretion in its decision regarding the parenting schedule. The nature of the custodial arrangement however is not being challenged since Timothy is not

contesting the joint custody but rather the time-sharing element of the decree. As stated by the Kentucky Supreme Court in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008),

modification of custody means more than who has physical possession of the child. Custody is either sole or joint . . . 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.

. . . .

While there is no statute that specifically addresses modification of timesharing in a joint custody setting, it is reasonable to infer that modifying it does not alter the nature of joint custody. Also, since the nature of the custody does not change, the trial court is not bound by the statutory requirements that must be met for a change of custody [KRS 403.340], but can modify timesharing based on the best interests of the child as is done in modifying visitation.

Id. at 767-68. Thus, pursuant to *Pennington*, we review the issue as it relates to modification of the parties' visitation/time-sharing arrangement. Consequently, the best interest standard of KRS 403.320 applies. The sole issue for the Court is whether the trial court erred in its determination of the best interests of the children when it designated Tammy as the primary residential custodian.

Timothy posits that the children's best interest is better served by dividing the time equally between the parents rather than designating Tammy as

the primary residential custodian. On appeal, Timothy presents information about the advantages of splitting the parenting time equally between the parents. Yet, Timothy, for the most part, does not refute or dispute any of the evidence, which was considered by the trial court in its determination that the children's best interest was served by naming Tammy as the primary residential custodian.

One major contention that Timothy makes is that Tammy's smoking around the children is not in their best interest. He cites to *Polley v. Allen*, 132 S.W.3d 223 (Ky. App. 2004), in support of his contention that it is in the child's best interest to live with a parent who does not smoke. But we find that case distinguishable from the case at bar. In *Polley*, it was established that the father repeatedly exposed the children to cigarette smoke when in the presence of the children. It has not, in the present case, been established that Tammy exposes the children in a similar manner to second-hand smoke. At best, conflicting evidence exists on that issue. Moreover, apparently Timothy's concern is only related to a half-time split of the children's time. He does not suggest that the children should not spend any time with their mother.

Where conflicting evidence exists, it is the trial court's task to determine the credibility of the witnesses. And appellate courts are to give due regard to the trial court's determination. *Reichle*, 719 S.W.2d at 444. Thus, absent any valid criticism concerning the trial court's findings, it is our decision that they are not erroneous.

Our next action is to ascertain whether the trial court's decision was an abuse of discretion. A trial court has not abused its discretion unless its decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). Statutory direction as to the best interests of the child is found in KRS 403.270(2).

After an examination of the best interest factors, the trial court awarded the parties' joint custody and made Tammy the primary residential custodian. In making this decision, the trial court, in its findings, emphasized Tammy's interaction and interrelationship with her children plus her historical role as the primary caretaker. Besides that, the trial court recognized the substantial time that Tammy spent with the children particularly while working full-time. The trial court also noted that when Timothy spent less time in the home, Tammy increased her time at home. Furthermore, the children now live with Tammy in the same home in which they have always lived. Hence, not only did the trial court have substantial evidence exist to support its findings, Timmy never established that the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Consequently, we have no rationale to show that the trial court abused its discretion.

CONCLUSION

In light of the foregoing, we cannot conclude that any of the findings of fact made by the trial court were clearly erroneous or that the court abused its discretion in naming Tammy as the primary residential custodian. Accordingly,

we affirm the Marion Circuit Court's Findings of Fact, Conclusions of Law, and

Decree entered June 1, 2010.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elmer J. George
Lebanon, Kentucky

BRIEF FOR APPELLEE:

James L. Avritt, Jr.
Lebanon, Kentucky