

RENDERED: JUNE 27, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001414-ME

BROOKE KAYLEY MEANS

APPELLANT

APPEAL FROM CLARK CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 08-CI-00174

JOSH ROSS STAMPER

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

TAYLOR, JUDGE: Brooke Kayley Means brings this appeal from Findings of

Fact and Conclusions of Law entered in the Clark Circuit Court, Family Court

Division, on August 2, 2013, denying Brooke's motion to modify time-sharing as

to the parties' minor child. We affirm.

Brooke and Josh Ross Stamper were never married but cohabitated and had a child together. The parties' child was born June 26, 2007. Shortly thereafter, the parties' relationship ended, and Brooke expressed her intention to move to Tennessee and live with her mother. In response, Josh filed a petition for custody. Subsequently, the parties entered into an agreed temporary custody order that provided the parties would have joint custody of the child and would share physical custody equally. The agreed temporary order entered on June 24, 2008, specifically provided that the child would alternate staying with each parent for two week periods.

On April 26, 2008, Brooke married Scott Pettibone and moved to Georgia where Scott was stationed for his military service. A few months later, on October 28, 2008, a final order of custody was entered in the family court. Pursuant to the October 28, 2008, order, the parties were awarded joint custody, and Josh was designated the primary residential parent. The family court ordered that Josh would have the child for four weeks and then Brooke would have the child for two weeks. Brooke was also permitted to visit the child during any trips she made to Kentucky.

The parties' operated under the October 28, 2008, order with very little conflict until the summer/fall of 2012 when the child started kindergarten. Brooke had divorced Scott and moved to Tennessee to live with her mother. Josh had married, was getting a divorce, and had moved back in with his mother in Clark County. On February 22, 2013, Brooke filed a motion to modify time-

sharing. Therein, Brooke asserted that the time-sharing arrangement set forth in the October 28, 2008, order (four week/two week rotation) was no longer feasible as the child had started kindergarten. Brooke further asserted the child should reside primarily with her in Tennessee instead of with Josh in Kentucky. In support thereof, Brooke alleged that Josh was not adequately caring for the child.

While Brooke's motion to modify time-sharing was pending, the parties entered into an agreed order regarding summer visitation for 2013. On June 24, 2013, a hearing was conducted on Brooke's motion to modify. Following the hearing, the family court issued a ruling from the bench. The family court determined that the parties would continue to have joint custody, but the child would reside primarily with Josh. Brooke was granted visitation. A written order was entered on August 2, 2013, wherein the family court made the following findings of fact:

[Josh] and [Brooke] are the parents of one minor child, name [J.R.M.], age 6. The Court finds that there has been no significant change in circumstance since the Order on October 28, 2008[,] which designated [Josh] as the primary residential custodian. The child is healthy, happy and appropriately attached to both parents. The child has lived most of her life here in Clark County and is adjusted to her extensive family here. Her home life is here and she is excelling in school here. This Court finds that based upon the facts and history of this case, it is still in the best interest of the child to remain in the primary custody of [Josh] here in Clark County. However, both parties acknowledge that due to changes in the actual distance between the parties, as well as the fact that the child is now in school, it is necessary to modify timesharing to some degree.

The family court denied Brooke's motion to modify time-sharing and to be designated the primary residential parent. This appeal follows.

Brooke contends that the family court erred by denying her motion to modify time-sharing and designate her as primary residential parent. Brooke specifically contends the family court failed to apply the best interests standard of Kentucky Revised Statutes (KRS) 403.320 when it denied her motion to modify time-sharing. Alternatively, Brooke asserts that the family court's findings of fact were clearly erroneous and its decision was an abuse of discretion.

We begin our analysis by noting that the Kentucky Supreme Court has held that post-decree motions related to modification of time-sharing in domestic relations cases require a hearing and adjudication on the merits, which includes making findings of fact, and conclusions of law. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). Accordingly, our standard of review is governed by Kentucky Rules of Civil Procedure (CR) 52.01. *Id.* CR 52.01 provides that the family court's "[f]indings 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." This Court will not disturb those findings unless they are clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Findings of fact are not clearly erroneous if supported by substantial evidence. *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

Modification of a time-sharing or visitation arrangement is governed by Kentucky Revised Statutes (KRS) 403.320(3).¹ This statute provides that a court may modify visitation “whenever modification would serve the best interests of the child.” Accordingly, a motion seeking to be designated the primary residential parent is treated as a motion to modify time-sharing. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Thus, a parent seeking to modify time-sharing and/or the primary residential parent designation must present evidence that modification is in the child’s best interests. *Id.*

In the case *sub judice*, the family court heard extensive testimony regarding the facts relevant to the best interests of the parties’ child. The testimony established the following: that the child was doing well in school; that Josh was involved with her education; that the child had a close relationship with Josh; and that Josh’s family in Clark County had adjusted well with the child in her current environment. Brooke attempted to show that Josh was not involved with the child on a day to day basis, that Josh was unemployed, that Josh had neglected the child’s dental needs and that Josh had ignored flea bites on the child. However, the testimony presented at the hearing on these allegations was conflicting.

The child’s kindergarten teacher unequivocally testified that the child was “academically performing above and beyond expectation.” Josh’s Brief at 3. The child’s teacher also testified that Josh was actively involved in her education. The testimony offered by Josh and his mother also demonstrated that Josh was

¹ The Kentucky Supreme Court has determined that time-sharing and visitation are interchangeable terms. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).

actively parenting the child and that Josh's mother merely provided assistance as needed. As for the child's dental needs, the evidence demonstrated that Josh had taken the child to the dentist for examination and the dentist recommended waiting to see if her baby teeth would fall out on their own. The evidence presented on the "flea bites" allegation was inconclusive, at best.

The totality of the evidence presented was sufficient to support the family court's decision that designating Josh as the primary residential parent was in the child's best interest. The family court, as the trier of fact, is responsible for judging the credibility of the witness testimony and its findings of fact were supported by substantial evidence and not clearly erroneous.

For the foregoing reasons, the Findings of Fact and Conclusions of Law of entered by the Clark Circuit Court, Family Court Division are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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