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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000428-ME

MICHAEL GREENE APPELLANT

v. APPEAL FROM OLDHAM FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 11-CI-00810

ELIZABETH GREENE APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Michael Greene appeals from orders denying his motions to become the primary residential parent of his children.

Michael and Elizabeth Greene were married on December 30, 2000, and have two daughters. After the parties separated in California, Elizabeth moved back to Kentucky with the children to be near her family and Michael relocated to

Chicago, Illinois for his employment. On July 13, 2012, their marriage was dissolved. Michael and Elizabeth were granted joint custody with Elizabeth serving as the primary residential parent and Michael exercising timesharing. Subsequently, Michael remarried and relocated to Missouri for his employment. The parties frequently appeared before the family court on timesharing issues. Michael is currently receiving timesharing every other weekend, alternating holidays and five non-consecutive weeks during the summer.

On January 23, 2015, Michael filed a motion with the family court requesting a modification of the parties' current parenting schedule so that the children would primarily reside with him. In Michael's affidavit, he explained that in his current home each child had her own room, his daughters loved spending time with their older step-sister, his oldest daughter had been asking to come live with him for more than a year and he believed modification would be in the best interest of the children.

On February 13, 2015, the family court summarily denied this motion, determining Michael's request was tantamount to asking for a change in custody and his motion was insufficient to require a hearing under the "best interest" of the children standard because "there is no allegation that the children are not well cared for in their mother's primary care, nor that Mr. Greene is being denied his regular court ordered visitation."

Later that same day, Michael filed another motion seeking to modify the parties' parenting schedule. In this motion, he clarified he was not seeking

custody but was only seeking a reassignment of timesharing and to be the primary residential parent. On February 20, 2015, the family court summarily denied this motion as being substantially the same as his previous motion.

On February 27, 2015, Michael filed a motion to alter, amend or vacate the previous orders, arguing the family court erred in not conducting an evidentiary hearing, arguing his original motion appropriately referenced factors which should be considered in determining his children's best interest. On March 6, 2015, the family court summarily denied this motion, explaining as follows: "The Court has previously ruled that Petitioner's motion operates to modify the custody of the children and that Petitioner's pleading has not met 'the best interests of the child' standard pursuant to KRS 403.320."

Michael timely appealed, arguing the family court erred by treating his initial and subsequent motions as requesting a change in custody and that it was obligated to conduct a hearing on his motion for modification. Because Michael challenges the family court's legal conclusions regarding how to treat his motions and whether a hearing was required, we review them under a *de novo* standard. *Carpenter-Moore v. Carpenter*, 323 S.W.3d 11, 14 (Ky.App. 2010)

We disagree with the family court that Michael's motions should be construed as attempts to modify custody. Under *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), a motion to change the primary residential custodian is not a motion for a modification of custody but instead is a motion for a change in timesharing. *Shafizaden v. Bowles*, 366 S.W.3d 373, 375 (Ky. 2011).

Having carefully reviewed what Michael is actually requesting, and his repeated efforts to correct the family court's impression that he was attempting to change the parties' joint custody arrangement, it is clear Michael's motions were not for a modification of custody but for a modification in timesharing. Although KRS 403.320(3) uses the term "visitation" rather than "timesharing," it provides the relevant standard for determining whether a modification should be granted. *Pennington*, 266 S.W.3d at 765, 768-69; *Humphrey v. Humphrey*, 326 S.W.3d 460, 464 (Ky.App. 2010).

The family court denied Michael's request for modification under KRS 403.320(3) without a hearing. KRS 403.320(1) and (2) require that a hearing be held before restricting or prohibiting reasonable visitation or timesharing. However, section (3), which is the basis for Michael's motions, omits any reference to a hearing: "The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]"

Despite the omission of any reference to a hearing in section (3), in *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), the Kentucky Supreme Court established that a hearing is required in any motion to modify timesharing, explaining as follows:

> [B]y saying that a timesharing modification can be done "whenever" it is in the best interests of the *child* to do so, the legislature effectively gave the family court continuing jurisdiction to hear such motions until the

> child reaches the age of majority or is emancipated. Motions to modify timesharing are motions to reopen the final divorce decree to the extent stated in the motion and require payment of the reopening fee…. The Court is clearly obligated to determine questions of law and fact in the original custody proceeding. *See* KRS 403.310. Part of that proceeding is granting visitation or time sharing. Thus motions for modification are not new actions and the case number remains the same. And by virtue of being brought post-decree, they are not motions being made in a pending action.
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> . . . [T]he intent of CR 52.01 is to direct judges in cases tried by the court without a jury to make separate findings of fact and conclusions of law whenever they render a judgment on the merits. *See* CR 41.02(2). And certainly, a determination regarding modification of custody is a judgment on the merits.
>
> Consequently, though named a "motion," a motion for modification [of timesharing] is actually a vehicle for the reopening and rehearing on some part of a final order, which asks for adjudication on the merits presented at a required hearing. As such, family courts must make findings of fact and conclusions of law, and must enter the appropriate order of judgment when hearing modification motions.

Id. at 456-57 (footnotes omitted). *See McNeeley v. McNeeley*, 45 S.W.3d 876, 877-78 (Ky.App. 2001) (determining a motion to modify under KRS 403.320(3) cannot be granted without a hearing, because a hearing is required for the purpose of determining the best interest of the children). *See also N.B. v. C.H.*, 351 S.W.3d 214, 222 (Ky.App. 2011) (determining when joint custodians fail to agree about the primary residential parent relocating with child, which could impact timesharing, a hearing must be held to resolve whether the move is in the child's best interest).

Therefore, the family court erred in summarily denying Michael's motion to modify timesharing. On remand, the family court is required to hold a hearing on whether Michael can establish that a modification of timesharing to make him the primary residential parent is in the best interest of the children, and then make an adjudication on the merits which would include findings of facts and conclusions of law.

Accordingly, we reverse and remand the orders of the Oldham Family Court interpreting Michael's motions as seeking a change in custody and denying Michael a hearing on his motions to modify timesharing.

ALL CONCUR

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