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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001933-ME

KARI MICHELLE MADDIN — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE ALISON C. WELLS, JUDGE
ACTION NO. 12-CI-00127

BUDDY ALLEN CHILDERS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Kari Michelle Maddin appeals from both the October 28, 2015 order of the Perry Circuit Court denying her motion to modify the parties' timesharing schedule and also the November 19, 2015 order denying the portion of her motion to alter, amend, or vacate the above-cited order. After careful consideration, we affirm.

## BACKGROUND

Maddin and Buddy Allen Childers are the parents of a son born on April 24, 2009. They were never married and separated when the child was two years old. Originally, the parties entered into an agreed custody order on May 24, 2012, which was amended on August 29, 2012. (This order was entered *nunc pro tunc* on November 6, 2015.) The agreed custody order gave the parents joint custody, named Maddin as the primary residential custodian, and provided Childers with a timesharing schedule.

This particular matter began on July 2, 2015, when Maddin filed a motion to modify the current timesharing schedule. The basis of Maddin's motion for relocation was that she had married, and her husband, who was in the Navy, was being transferred to California. In her motion, Maddin requested that the trial court modify the current timesharing arrangement by allowing her to relocate to California with the child and remain the primary residential custodian. Childers responded to Maddin's motion with a motion to modify custody.

Initially, the domestic relations commissioner (DRC) heard the motions. The commissioner recommended that Maddin retain the designation of primary custodian and that the child be permitted to move with her to California.[1] Childers filed exceptions to the commissioner's recommendations. The trial judge asked the parties if they wanted to have the exceptions addressed with a new hearing or by relying on the evidence in the record. Both parties elected to have

[1] The DRC's written report is not in the record.

the trial court make the determination on the record rather than having a new hearing.

The trial court reviewed the court record and held a hearing to ask questions of both parties. On October 28, 2015, the trial court entered findings of fact, conclusions of law, and an order. The trial court denied Maddin's motion to modify the timesharing arrangement and relocate the child. Instead, the order modified the timesharing arrangement by designating Childers as the primary residential custodian.

Maddin then filed a motion to alter, amend, or vacate, or, in the alternative, have a new trial under Kentucky Rules of Civil Procedure (CR) 59. Again, the trial court held a hearing on the motion, made minor changes in the findings, but denied the motion to alter or vacate and kept Childers as the primary residential custodian. Maddin now appeals from both the original order and the order denying her motion to alter, amend, or vacate.

## STANDARD OF REVIEW

When reviewing a matter involving child custody and timesharing, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous. CR 52.01. 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. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Moreover, the trial court is in the best position to evaluate the testimony and to weigh the evidence, and thus, an appellate

court should not substitute its own opinion for that of the trial court. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

If the findings of fact are supported by substantial evidence and if the correct law is applied, a trial court's ultimate decision regarding custody matters will not be disturbed, absent an abuse of discretion. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). And we review the legal conclusions of a trial court under a *de novo* standard. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003).

In sum, when considering a decision of a trial court, the test is not whether the appellate court would have decided it differently, but whether the findings of the court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.

## ANALYSIS

According to *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008), if a change in custody is sought, Kentucky Revised Statutes (KRS) 403.340 governs, but if modification is sought for timesharing/visitation then KRS 403.320 applies. Maddin maintains on appeal that the analysis should have been under KRS 403.340 since it is her contention that the parties are seeking a change in

custody. Further, she argues that custody should be evaluated under KRS 403.340(2), which maintains that "[n]o motion to modify a custody decree shall be made earlier than two (2) years after its date [.]" After our review of the record, we are not persuaded by these arguments.

First, Childers' initial response to Maddin's motion to modify timesharing was to file a motion to change custody; both parties at the October 2, 2015 hearing agreed that the matter involved a modification of timesharing and that they had filed cross-motions for modification of the timesharing. Further, besides agreeing with this assessment, Maddin made no objection at the hearing that the issue involved a modification of timesharing. Hence, the pertinent statute is KRS 403.320.

Second, at that same hearing, the trial court judge pointed out that the April 29, 2012 custody order had never been entered. Both parties admitted that they had agreed to the custody order in 2012. Further, the payment of child support commenced at that time and corroborated the order's existence since 2012. After acknowledging the existence of the agreed custody order, the parties acquiesced to the trial court's entering the custody order *nunc pro tunc*. And Maddin never challenged the effectiveness of this order.

The rationale of *nunc pro tunc* orders is "to record some act of the court done at a former time which was not carried into the record [.]" *Benton v. King*, 199 Ky. 307, 250 S.W. 1002, 1003 (Ky. 1923). Under Kentucky law, the power to act *nunc pro tu*nc is inherent in the courts. *Munsey v. Munsey*, 303

S.W.2d 257, 259 (Ky.1957). This is exactly the situation here, and thus, the custody order was effective in 2012.

Having ascertained that the issue before us involves the modification of a timesharing arrangement, which is evaluated under KRS 403.320, we address whether the trial court made an appropriate decision. Maddin sought to relocate the child and remain primary residential custodian. Childers desired to keep the child in Kentucky with him and be named as the primary residential custodian. Under *Pennington*, the decision was to be determined under the statutory strictures of KRS 403.320.

As authorized by KRS 403.320(3), modification of visitation/timesharing is permissible when it serves the best interests of the child. *Pennington*, 266 S.W.3d at 769. Further, it is well settled in this Commonwealth that "[t]he party seeking modification of custody or visitation/timesharing is the party who has the burden of bringing the motion before the court" and "the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court." *Id*. Keeping in mind that an appellate court may only set aside a trial court's findings if those findings are clearly erroneous, the dispositive question is whether the trial court's findings of fact are clearly erroneous.

The resolution of the best interest of the child in a modification of the child's timesharing arrangement requires a review of the trial court's factual findings. Here, contrary to Maddin's assertion that the trial court only considered

one factor – the proposed move to California – the trial court prepared a thoughtful and lengthy analysis that considered, among other things, that the child has a strong and loving relationship with both parents and his extended family; the child is excited about his new baby sister; the child has adjusted to his school and community; the parents have no significant mental health issues; the mother's possible multiple sclerosis diagnosis is not a factor; and, the father has been very active in the child's life even though he was not the primary custodian.

The trial court then noted factors in KRS 403.270(2) regarding a determination of best interests for a child and decided that it was in the child's best interests to modify the timesharing and make the father the primary residential custodian. The trial court reiterated in the conclusions of law that both parents love the child and want the best for him; the child has a loving relationship with both parents, his grandparents, and his new sibling; he has adjusted to his current school and community; neither parent has mental health issues; and, the child remaining with the father provides the child stability.

Maddin references Justice Cunningham's dissent in *Pennington* for the proposition that the trial court did not consider all the factors regarding relocation. There is no persuasive authority that the factors discussed in the dissent must be addressed in relocation matters. Further, contrary to Maddin's suggestion, no presumption exists that a child should remain with a mother. Indeed, she cites *Brumleve v. Brumeleve*, 416 S.W.2d 345 (Ky. 1967), for this proposition. But therein is stated:

> Mothers should be given considerable latitude in choosing where they will live. But when this right is challenged by the former husband and father of the children, she should offer some plausible reason for taking minor children out of the jurisdiction of the court to the prejudice of the visitation rights of the father. Mere whim is not enough.

*Id.* at 346. Thus, Maddin had to provide more evidence that her husband's transfer would allow him to spend more time with family to establish it was in her child's best interest to relocate to California. She did not meet her burden.

Finally, for the first time, Maddin, who only mentioned domestic violence at the hearing on the motion to alter, argues that the trial court did not consider domestic violence in its findings. As noted by the trial judge at the hearing, Maddin did not present any such evidence when she made the original motion, or, for that matter, at any time until now. In fact, the only reference to domestic violence in the record dates back to April 5, 2012, when a mutual restraining order was entered and cross-petitions for emergency protective orders were voluntary dismissed. Therefore, no error occurred when the trial court made no finding regarding domestic violence because no evidence was presented.

A motion to modify custody matters "must be decided in the sound discretion of the trial court." *Pennington*, 266 S.W.3d 759, 769 (Ky. 2008). In the case at hand, Maddin incorrectly asserted that KRS 403.340(2) was the proper statutory structure when KRS 403.320 is appropriate. Regarding the issue of domestic violence cited in KRS 403.270(2)(f), the trial court properly determined that no such evidence had been provided. Finally, under our standard of review,

we affirm the trial court's decision since it has not been shown that its findings were erroneous or that the trial court abused its discretion.

## CONCLUSION

The decision of the Perry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Eric E. Ashley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jonathan S. Wilder
Hazard, Kentucky