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 NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001862-ME

NORITA ANN GARDNER

APPELLANT

APPEAL FROM MARION CIRCUIT COURT
v. HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 05-CI-00353

JAMES BRANDON GARDNER

APPELLEE

OPINION
AFFIRMING

*** * * * *

BEFORE: CLAYTON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Norita Ann Gardner brings this appeal from an August 16, 2008, order of the Marion Circuit Court modifying the parties' visitation/timesharing arrangement with their minor child. We affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Norita and James Brandon Gardner were married December 11, 2004, and divorced by decree of dissolution of marriage entered in the Marion Circuit Court April 11, 2007. One child, James Bailey Gardner (Bailey), was born of the marriage on October 24, 2005. The parties entered into a property settlement agreement which was subsequently incorporated into the decree of dissolution. Thereunder, the parties were awarded joint custody of Bailey and Norita was designated “primary residential custodian.” James was also awarded standard visitation and ordered to pay child support.²

On June 10, 2008, James filed a “Motion to Modify Custody.” Therein, James sought to be designated Bailey’s “primary residential custodian.” In support thereof, James alleged that the present environment endangered Bailey’s physical, mental, moral, and/or emotional health. Two affidavits were filed in support of James’s motion.

The court conducted an evidentiary hearing on July 31, 2008, on the motion to modify custody. The court heard testimony from both parties and six other witnesses. Following the hearing, the circuit court entered an order on May 16, 2008. Therein, the court designated James is the “primary residential custodian” and awarded Norita visitation. Norita was also ordered to pay child support. This appeal follows.

Norita contends that the circuit court “erred by finding that the minor child’s present environment seriously endangered his physical, mental, moral or

² Specifically, James Brandon Gardner was granted visitation with the minor child pursuant to the Standard Visitation Schedule of the 11th Judicial Circuit.

emotional health and modification was in the best interest of the child.”

Essentially, Norita claims the circuit court erred by modifying custody to appoint James as the primary residential custodian. We disagree.

We begin our analysis by noting the recent Supreme Court decision of *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). In *Pennington*, the Court clarified the distinction between modification of custody (e.g., sole custody versus joint custody) and modification of visitation/timesharing arrangements (e.g. change in visitation schedule). *Id.* The Court pointed out that if parents were granted joint custody with one parent designated the primary residential parent and the other parent exercising visitation, this arrangement should be specifically referred to as “shared custody.” *Id.* In *Pennington*, the Court clearly held that a parent’s motion seeking to change the primary residential parent was merely a motion to modify visitation/timesharing and not one to modify custody. *Id.* The Court further instructed that a motion seeking to change the primary residential parent was properly brought under Kentucky Revised Statutes (KRS) 403.320, “Visitation of Minor Child.” *Id.* Under KRS 403.320, the Court noted that the parent seeking to be designated primary residential parent must demonstrate that it was in the child’s best interest. *Id.*

Here, the record reflects that James and Norita were previously operating under a shared custody arrangement pursuant to the April 11, 2007, decree of dissolution. Under the precepts of *Pennington*, James’s “Motion to Modify Custody” and to be designated “primary residential custodian” was

actually no more than a motion to modify visitation/timesharing under KRS 403.320. *See Pennington*, 266 S.W.3d 759. To modify visitation/timesharing, it must be demonstrated that “modification would serve the best interests of the child.” *Id.* at 769. Simply stated, a parent seeking to modify visitation/timesharing under a joint shared custody arrangement must only prove that modification is in the best interests of the child under KRS 403.320(3).

In the case at hand, the circuit court specifically found that “modification is necessary to serve best interests of the child.”³ In support thereof, the circuit court outlined a plethora of evidence:

[T]he Court is most troubled by the number of times that [Norita] has moved and the many places she and Bailey have stayed since January 1, 2008. Her movement has been so frequent that she had trouble during the hearing recalling all of the places that she stayed and the duration. . . .

....

Each time that [Norita] has moved from one place to the next Bailey has also made the transition. While [Norita] is an adult and is free to live wherever she wishes, the child needs stability and should not have to endure this nomadic lifestyle. As a result of [Norita’s] frequent moves, Bailey literally has no idea in whose bed he will be sleeping from one night to the next.

Furthermore, at least one of the places where [Norita] stayed was not suitable. The Jeffries’ residence,

³ The circuit court also found that modification was proper because James Bailey Gardner’s “present environment endangers seriously his physical, mental, moral, or emotional health.” In so finding, it appears that the circuit court utilized the legal standard applicable to modification of custody rather than visitation. However, since the standard for modification of custody also requires a finding of best interests, we view any error as harmless. Kentucky Rules of Civil Procedure 61.01.

where [Norita] and Bailey stayed for over a month was unsanitary and smelled of animal urine as well as feces on multiple occasions. Garbage and dirty dishes cluttered the interior. The photographs that were introduced showed the exterior of the residence was not being properly maintained. In addition when [Norita] and Bailey were there in July, a man from New York who Ms. Jeffries recently met over the internet was also living there.

The Court also is troubled by the testimony regarding Bailey's condition on May 31, 2008. When [James] and Shawna [James's fiancée] picked up the child at the Jeffries' residence, he was very lethargic and unresponsive. Four witnesses including the paternal grandfather, Ray Gardner, who was a trained law enforcement [sic] and formerly employed as a Marion County Deputy Sheriff, testified that the child's pupils were very large and dilated [sic]. Although the child showed no signs of distress that required medical attention, he proceeded to sleep for over five hours which he had never done. [Norita] denied over-medicating Bailey, but offered no explanation for his behavior. However, Mary Hartley with whom [Norita] lived for a period of time, testified that she had seen [Norita] over-medicate Bailey with Tylenol to make him sleep so she wouldn't have to care for him. Mrs. Hartley also expressed concerns about the care that Bailey received from [Norita] when they resided with her. . . .

Our review of the circuit court's decision to modify visitation/timesharing is limited to determining whether substantial evidence supported the court's findings of fact and whether the court abused its discretion. *See Pennington*, 266 S.W.3d 759. Given the considerable evidence cited by the circuit court, we are simply unable to conclude that the court abused its discretion or its findings of fact were clearly erroneous. Accordingly, we hold that the circuit

court properly modified the parties' visitation/timesharing arrangement by appointing James as primary residential parent and granting Norita timesharing.

For the foregoing reasons, the order of the Marion Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph R. Stewart
Lebanon, Kentucky

BRIEF FOR APPELLEE:

James L. Avritt, Jr.
Lebanon, Kentucky