

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000006-ME

ANGELA L. BAILEY

APPELLANT

v. APPEAL FROM GALLATIN FAMILY COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 05-CI-00120

JASON R. BAILEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Appellant, Angela Bailey, appeals from the November 24, 2008, order of the Gallatin Family Court, relieving her as primary residential parent of the parties' two minor children. Discovering no abuse of discretion, 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.

Angela Bailey and Jason Bailey were married on May 1, 2004, and two children were born of their marriage. On December 27, 2005, the Gallatin Family Court rendered findings of fact and conclusions of law, and dissolved the parties' marriage. Joint custody was established, with Angela being named the primary residential parent² and Jason being granted parenting time on the first three weekends of the month and at various other times during holidays and school breaks.

On September 8, 2007, Jason filed a motion to modify custody. The trial court held a hearing on November 20, 2008, and an order was entered, on November 24, 2008, continuing joint custody, but designating Jason as the primary residential parent. Angela was given parenting time on the first three weekends of each month, and at various other times during holidays and school breaks. Angela appeals from that order.

Where child custody is concerned, this Court will not disturb the trial court's determination unless there has been an abuse of discretion. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782-83 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 529 (Ky. 2008).

Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and

² The Supreme Court of Kentucky recently rendered *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), in which many of the nuances of joint custody were addressed. The Court criticized certain commonly-used terminology and suggested that "primary residential custody" was a misnomer. The Court suggested that a better term would be "primary residential parent" and we will use that language where appropriate herein.

unfair decision. The exercise of discretion must be legally sound.

Id. at 783 (quotations and citation omitted).

On appeal, Angela argues that the trial court's modification of custody was inappropriate. Specifically, she argues that the court's findings and conclusions were erroneous and unsupported by substantial evidence.

Custody modifications made earlier than two years from the initial custody award are appropriate only where there is reason to believe that "the child's present environment may endanger seriously his physical, mental, moral, or emotional health." KRS 403.340(2). As Jason's motion was styled as seeking a custody change, the trial court observed this standard. However, the Supreme Court of Kentucky in a recent decision, *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), clarified the substantial distinction between modification of custody and modification of timesharing where the parents have joint custody. The Court held that a parent's motion seeking to change the primary residential parent was actually a motion to modify timesharing and not to modify custody. Accordingly, the Court instructed that when a party seeks to change the primary residential parent designation, the legal standard to be applied is the child's best interest pursuant to KRS 403.320, not the higher standard of KRS 403.340 required for a custody modification. We observe that Jason's motion was filed prior to the Supreme Court's rendition of *Pennington v. Marcum*.

Although Jason's motion states that he seeks a custody change, the record reveals that he actually sought modification of the primary residential parent timesharing arrangement. The trial court granted this relief. However, the trial court applied the more stringent standard of KRS 403.340 and found that the children's environment, while living with Angela, endangered seriously their physical, mental, moral and emotional health. In support of this conclusion, the court found numerous probative facts, including the presence of domestic violence in Angela's home, drug and alcohol abuse in the home, permissive drug and alcohol use by the oldest child, Angela's allowing various paramours to reside in the home, and her failure to provide adequate psychological help for the oldest child. Upon review, we are satisfied that the trial court's findings of fact are amply supported by the record and by the testimony of Angela, Jason, and the children. As the trial court applied KRS 403.340, a statute that far exceeds the standard required for a modification of timesharing, KRS 403.320, we hold that the trial court did not err in its findings of fact and conclusions of law.

Accordingly, there was no abuse of discretion in the trial court's final order and it is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William R. Adkins
Williamstown, Kentucky

BRIEF FOR APPELLEE:

Marcus S. Carey
Erlanger, Kentucky