RENDERED: NOVEMBER 25, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001447-ME

SHAWNNA SUZANNE GARY APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 08-CI-01147

JUSTIN BRADLEY HENSLEY APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING AND
DENYING MOTION TO DISMISS

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Appellant, Shawnna Gary (Shawnna) appeals the July 1, 2008, Findings of Fact, Conclusions of Law, and Order issued by the Fayette Family Court modifying custody in favor of Appellee, Justin Hensley (Justin).

[1] Senior Judge David C. Buckingham, 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.

After a thorough review of the law, the arguments of the parties, and the record below, we reverse and remand for proceedings not inconsistent with this opinion.

Preliminarily, we must decide Justin's motion to dismiss this action based upon the assertion that this Court lacks jurisdiction over same pursuant to CR 76.34(6). More specifically, Justin asserts that the appeal is not within this Court's jurisdiction because the issue appealed by Shawnna was not properly preserved at trial.

Justin asserts that Shawnna failed to voice her objection to the trial court's modification of custody in writing or in open court. Further, he notes that she did not move for a new trial pursuant to CR 59.01, nor move to alter, amend, or vacate the court's order under CR 59.05. Accordingly, Justin asserts that as the trial court was not given the opportunity to correct its ruling on modification of custody, this Court should not have jurisdiction over the issue now. Further, Justin asserts that Shawnna failed to comply with the requirements of CR 76.12(4)(v), which requires a statement regarding whether the issue was properly preserved for review. We disagree.

We understand the inclination of those interested to become so involved, whether emotionally or intellectually, to fail to step back and view the issue in a new light. We hereby switch the focus of the parties' arguments to CR 52.03, which we believe by its plain language is dispositive of the issue.[2] Having

[2] CR 52.03 provides that, "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment or a motion for a

found CR 52.03 to be dispositive of this issue, we hereby overrule Justin's motion to dismiss and proceed to the merits of the appeal.

Justin and Shawnna were married on October 21, 2001, and their son, Ashton, was born on September 19, 2003. Justin and Shawnna were divorced on August 9, 2005. The Decree of Dissolution entered on that date granted joint custody to the parties, with Shawnna being named as primary custodian.

Of dispute in this matter is whether or not Ashton has behavioral problems, including Attention Deficit Disorder (ADD), and the extent thereof. According to Shawnna, Ashton has serious behavioral problems, and has "meltdowns", sometimes without any provocation. Justin's current wife and sister-in-law testified that Ashton would become violent at these times. Further, Ashton's Independent Education Plan, admitted into evidence at the May 14, 2008, hearing indicates that Ashton has a social delay, and recent findings by expert Sharon Edwards were entered into the record indicating that Ashton had been diagnosed with ADD in March of 2008. Justin did not submit any expert testimony to refute those findings, but is of the opinion that while Ashton may have some behavioral issues, they are not as serious as Shawnna portrays them.

The parties do not dispute that Justin has a history of substance abuse. It was Justin's testimony that he only abused Lortab, a drug which he was originally prescribed as the result of an injury, but to which he became addicted. Justin testified that he came out of a drug treatment program in December of 2004,

new trial."

and that with the exception of a prescription for Percocet while on active duty for the military in June of 2005, he has not used or abused any drug since. Shawnna also testified that the last time she had any knowledge or proof of Justin's abuse of drugs was in September of 2004, when he failed a drug screen, which led to a revocation of his visitation.

Following his treatment for substance abuse, Justin was deployed to Iraq, and returned in the spring of 2006, at which time he resumed his timesharing with Ashton. Since returning from Iraq, Justin has held numerous jobs. He was dismissed from the state police academy in 2007 for dishonesty.

In 2006, Shawnna moved to Hardin County, where her parents live, so she could support herself while pursuing a master's degree. Shawnna eventually put her degree on hold to work in Louisville and commuted there from Hardin County. While Shawnna worked, her father, Brian Gary, usually provided childcare for Ashton. Ashton had also spent some time in daycare while in Shawnna's custody.

In August of 2007, Shawnna moved the family court to review child support. At that time, Justin was in training to become a truck driver. Both parties agreed to wait until his training was complete before proceeding with income information exchange, such that a more accurate assessment of the parties' income could be made.

Thereafter, in late November of 2007, Shawnna and her mother had an argument over Ashton's behavior and Shawnna left her parent's house with

Ashton at her mother's request. Shawnna testified that she already had plans to move to Louisville because of her employment.

Shawnna testified that rather than have Ashton stay with friends or at a motel while she sought a residence, she asked Justin and his wife, Sarah, to let Ashton stay with them temporarily, as he was familiar with their home and had his own bed there. The parties initially agreed that this arrangement was to be temporary until Shawna could secure a residence and appropriate childcare for Ashton. Initially, the parties planned for Ashton to be returned to Shawnna on January 13, 2008, provided she had secured child care for Ashton by that time.

Shawnna had initially planned that upon Ashton's return that he was to stay in Hardin County during the week with her parents. Justin testified that he disagreed with this arrangement because on nights that she worked late, she would not drive to Hardin County. Accordingly, Shawnna advised Justin that alternatively her father would come to Louisville and watch Ashton. However, in January of 2008 and before Ashton's return, Shawnna's father decided that he could not do so because Shawnna's mother was not well enough for him to leave her alone. According to Justin, on the day that Ashton was to be returned to Shawnna's care, she called Justin, "crying her eyes out," and informed him that her father was not able to watch Ashton as expected.

Justin testified that soon after the exchange fell through, he asked Shawnna to allow Ashton to remain in Justin's care as her situation was not yet stable, and she had not secured childcare. Justin testified that Shawnna was

contemplating such an arrangement, but that something changed her mind. Justin testified that immediately after the conversation with Shawnna, he asked his employer for a dedicated route in order to be home to raise Ashton. Justin testified that his employer agreed, and he was moved to a dedicated route in which he is released from work on most days at 2:00 in order to pick Ashton up from daycare.

Justin testified that approximately two weeks following the failed January 13, 2008, exchange, Shawnna contacted him to discuss Ashton returning to her care. According to Justin, Shawnna explained that she had located a special needs teacher, whom she had talked to on the phone but had not met face to face, to care for Ashton. Justin states that Shawnna further informed him that she was not sure whether or not this teacher would be able to work late into the night.

Justin testified that he objected to Ashton being cared for by a special needs teacher because he was not special needs, and further, because the hours which the teacher could work were uncertain. Shawnna testified that Justin then refused to return Ashton to her care, but that she did not involve the authorities because she wanted to attempt to reach a reasonable solution.

Justin testified that it became clear to him that Shawnna would not be able to provide a stable home for Ashton. Accordingly, on January 31, 2008, Justin filed a motion to modify custody. Shawnna responded to Justin's motion to modify, requesting that Ashton be immediately returned to her care. A brief hearing was held, and as Justin had already placed Ashton in a daycare, the court determined that Shawnna would have Ashton two days per week temporarily, until

a hearing concerning modification of custody could be held. In so doing, the court indicated that this timesharing arrangement would not be used to the detriment or advantage of either party at the custody hearing.

As neither party continued to reside in Madison County, the case was transferred to Fayette County, where Justin now lives. Prior to the hearing, Shawnna moved the trial court to appoint a guardian ad litem for Ashton. According to Shawnna, she made this motion because of disturbing comments Ashton was making, and because she felt he needed an independent voice during the hearing. The court took the matter under advisement and indicated that if a guardian ad litem was necessary after hearing the evidence presented, one would be appointed.

As noted, the court held a May 14, 2008, hearing on the motion to modify custody. Evidence included Ashton's Independent Education Plan, exhibits illustrating the daycare in Louisville where Shawnna hoped to place Ashton, the testimony of expert Sharon Edwards concerning Ashton's March 8, 2008, ADD diagnosis, the testimony of Melissa Quarterman, the director of Ashton's current daycare, the testimony of Jenny, Justin's sister-in-law, the testimony of Karen Middleton, Justin's mother, the testimony of Amanda Wheeler, Shawnna's sister, the testimony of Kathy and Brian Gary, Shawnna's parents, the testimony of Sarah, Justin's wife, the testimony of Shelton McElroy, one of Shawnna's co-workers, and the testimony of Justin and Shawnna.

As noted, Justin called Melissa Quarterman, the director of Ashton's daycare at the time of the hearing. Quarterman was a former co-employee with Justin's wife, Sarah. She testified that employees at the daycare come and go, and that no one has consistently been with Ashton during the time that he had been enrolled there. Quarterman testified that the daycare, which is located in a basement, has no special programs for ADD or other developmental disorders. Quarterman testified that she took an ADD class the year prior to her testimony, but could not remember the symptoms of ADD. Further, she stated that most of the time, Justin's wife Sarah picks Ashton up, and that Shawnna was not placed on the initial pick-up list.

Justin's sister-in-law Jenny also testified at the hearing. She stated that she watched Ashton for the first three weeks he lived with Justin. Jenny stated that Ashton had frequent meltdowns and would sometimes become aggressive. Further, Jenny testified that she guessed Ashton would benefit from preschool, but did not know that Ashton had an IEP. Jenny conceded that she never met Shawnna nor saw her interact with Ashton.

Karen Middleton, Justin's mother, also testified at the hearing. Karen testified that Ashton would have terrible meltdowns, in which he would have tantrums, spit, scream, and throw things.

Shawnna's sister, Amanda Wheeler, testified at the hearing as well. Wheeler has a Bachelors of Science in middle grade education, and is four classes from obtaining her masters degree in elementary education. Wheeler stated that

she was close to Ashton as he was growing up, and described his tantrums. She testified that she had worked with children with ADD, and that it is best if the children are diagnosed early. Wheeler further stated that she would have watched Ashton for free and would have travelled to pick him up in order to do so, but that Justin declined her offer, and chose instead to enroll Ashton in the aforementioned daycare. Wheeler testified that as soon as Shawnna left her parents' home in November, she immediately began actively searching for housing. Finally, Wheeler testified that Ashton had recently experienced a meltdown on a family trip in April of 2008 to New York for a wedding.

As noted, Shawnna's parents, Kathy and Brian Gary, also testified. Kathy stated that Shawnna had lived with her parents for approximately two years. She described Ashton's behavioral problems, and stated that although Shawnna wanted Ashton to be enrolled in preschool, she attempted to speak to Justin in that regard and he felt that both preschool and behavioral evaluations were unnecessary. Kathy described the fight that occurred between her and Shawnna in late November, and confirmed that she asked Shawnna to leave at that time. Kathy stated that the two had now mended their relationship.

According to Kathy, in January of 2008, Justin wavered on who he would allow to watch Ashton while Ashton was in Shawnna's care, and that Ashton had asked Kathy why he could not just stay with his mother and grandparents. Kathy further testified that Justin used to berate Shawnna, had once thrown a chair at her, and had, on one occasion "chewed her [Shawnna] out

because Kathy and Gary had tried to work out a pick-up/drop-off arrangement with him."

Gary discussed the close relationship he had with Ashton. He also stated that he was present for the creation of Ashton's IEP, whereas Justin was not. Gary stated that as of January 2008, it would not have been feasible for him to drive back and forth to Louisville to watch Ashton.

Justin's wife Sarah was also called to testify at the hearing. Sarah stated that Ashton's residence with she and Justin was supposed to be a temporary situation. She confirmed that Ashton had meltdowns which were sometimes violent.[3] Sarah stated that she, and not Justin, selected Ashton's daycare, and further stated that she was listed as "mother" on the daycare information sheet, and not Shawnna. Sarah testified that she is the person who drops Ashton off and picks him up at daycare. Sarah stated that she did not know many details concerning Justin's prior substance abuse, but was aware that he did not complete treatment for same. Finally, Sarah testified that she was not sure that Ashton had been accurately diagnosed with ADD.

Justin also testified at the hearing. Justin testified that Ashton does not have fits.[4] He conceded that the parties are in the process of reviewing child support. Justin testified that he was unfamiliar with an IEP, and confirmed that he did not attend Ashton's IEP. Justin further confirmed that he had not attended any

[3] As previously defined herein, "meltdowns" were events where Ashton would become angry or agitated, and would spit, scream, and throw things.
[4] "Fits" was a term used by the witness. For purposes of this appeal, we will assume "fit" and "meltdown" to be synonymous.

of Ashton's medical appointments prior to November of 2007. Justin admitted that he chose Sharon Edwards, the professional who diagnosed Ashton with ADD, but stated that after she diagnosed Ashton with ADD, he felt that someone else should make another diagnosis. Justin stated that the only way he would believe that Ashton has ADD is if he "gets to watch the diagnosis".

Justin stated that he believed Shawnna did the responsible thing by bringing Ashton to his residence when she left her parents home, and stated that he initially believed the situation to be only temporary. He stated that he expected to be able to "veto" certain daycares, but admitted that he had not extended the same authority to Shawnna.

At the time of the temporary hearing, Shawnna testified that she had several potential options for child care. She stated that Ashton cries every time he leaves after a visit. According to Shawnna, she has been the only stability in Ashton's life, and that she implements techniques during Ashton's tantrums which were shown to her by Justin's sister-in-law, Jenny. Shawnna also states that she repeatedly told Justin that Ashton needed a schedule. Shawnna testified that Justin did not inform her of Ashton's initial appointment with Sharon Edwards.

After hearing the aforementioned evidence, the court sustained Justin's motion, and granted Justin primary residential care of Ashton with the parties retaining joint custody. The court issued oral findings of fact and conclusions of law on May 21, 2008.

In so doing, the court stated that it was "very sad" that the parties had to have this hearing and that there was no question that Ashton had two very loving parents. The court also stated that it was unfortunate that the parties lived so far away, and that equal timesharing would have been appropriate if the parties lived closer. The court also stated that Justin is very "left-brained", and therefore very structured, as correlates to his job as a truck driver, while Shawnna is very "right-brained", and likes things to be loose and flexible, as correlates to her field of social work.

The court went on to state that Ashton was a very "challenging child," and then stated as follows:

> [It is common] in these days of women centric education, especially primary education, for little boys to be labeled early. Because women have a hard time, frankly, this sounds like a very sexist comment, but women do have a harder time dealing with little boys who are kind of wild. And I think that, you know, from my own experience and my own observations, that there is a little bit in my belief, of over-diagnosis.

The trial court also found that Ashton's step-mother and auntie, "get it", and in fact "are more removed from the problem and they understand it better than Shawnna and Justin do." The court also stated that "Shawnna brings pieces to Ashton's life that Justin does not bring. But, Justin can provide the structure that Ashton needs to deal with his ADD and social delay." The court found that Justin would be the primary residential custodian, but that Shawnna would have

timesharing three of every four weekends, including any three-day weekends. The court also ordered the parties to equally divide holiday timesharing.

Further, the court held that Ashton "may or may not" require a special educational plan to deal with his possible social delay and ADD, but ordered both parents to be involved in the process if one was needed. Finally, the court stated that it would like Ashton's close relationship with his maternal grandparents to continue, and stated that it would like Ashton to have time with the grandparents provided they "buy in" to the new arrangement and follow Shawnna and Justin's parenting directives.

The court's oral findings and conclusions of law were incorporated into a written order entered of record on July 1, 2008. It is from that order that Shawnna now appeals.

In reviewing a child custody decision, the appropriate standard of review is whether the factual findings of the family court are clearly erroneous. *See B.C. v. B.T. and K.F.*, 182 S.W.3d 213, 219 (Ky.App. 2005). 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. *Id.* It is not for this Court to disturb the family court's ultimate decision regarding custody absent an abuse of discretion. *See id*.

An abuse of discretion implies that the family court's decision is unreasonable or unfair, and the dispositive question is not whether the appellate court would have decided it differently, but whether the findings of the family

court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See id.* at 219-220. We review this matter with these standards in mind.

Shawnna argues that while the trial court made extensive findings on the record, which were incorporated into the written decree, those findings were clearly erroneous and not supported by substantial evidence. Accordingly, Shawnna asserts that the decision of the trial court to modify custody was an abuse of discretion, and that its findings did not support its conclusion that Justin met the statutory requirements for modifying custody.

In response, Justin asserts that the trial court's findings met the statutory requirements for modification of custody, and were based on substantial testimony given in the course of the hearing. Having reviewed this matter in detail, and for the reasons set forth below, we find that the decision made in this instance exceeded the discretion of the trial court, making reversal of the trial court's order appropriate.

As Justin's motion to modify custody was filed more than two years after the parties' decree of dissolution containing the initial child custody order, KRS 403.340(3) provides the applicable statutory standard for modification.[5] That provision provides as follows:

[5] In reviewing this matter, we note that an initial award of custody is determined under different standards than those which are considered for a modification. In an initial custody award, the court shall consider the factors set forth in KRS 403.270, whereas for a modification of custody, the court shall consider the factors enumerated in KRS 403.340(3), which, as set forth herein, requires the consideration of additional factors above and beyond those enumerated in KRS 403.270, in light of the presumption in favor of the parent initially awarded custody.

> (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
>
> (a) Whether the custodian agrees to the modification;
> (b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.

Clearly, under this statute, the trial court must find that there has been a change in circumstances that warrants modification, and that such modification serves the best interest of the child. In making that determination, the court is to be guided by the factors listed in KRS 403.340(3), as well as those listed in KRS 403.270(2), which governs initial child custody determinations. That provision provides:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720, and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Thus, the trial court must find that there has been a change in circumstances which warrants modification, and further, that modification serves the best interest of the child at issue. We further note that in *Wilcher v.Wilcher*, 566 S.W.2d 173, 175 (Ky.App. 1978), this Court held that the change in circumstances warranting modification must be substantial and continuing.

We further note that, as we have previously held in *Wilcher,* "KRS 403.340 reflects a strong legislative policy to maximize the finality of custody decrees without jeopardizing the health and welfare of the child. The statute

creates a presumption that the present custodian is entitled to continue as the child's custodian." *Id.*

Having reviewed the findings of the trial court, we do not believe that they are sufficient to overcome that presumption or to support a ruling transferring primary custody from Shawnna to Justin. In finding that there had been a change in circumstances sufficient to warrant a modification of custody, the trial court found that Ashton needed "structure" in his life and that Justin was the parent most equipped to provide it. However, the law in this Commonwealth is clear. The trial court was without authority to modify custody absent a consideration of whether the child's present environment seriously endangered his physical, mental, moral, or emotional health, in addition to reviewing the factors set forth in the aforementioned statutes.

Having reviewed the record, we are in agreement with Shawnna that the custodial situation agreed upon by the parties when Shawnna dropped Ashton off with Justin was not one that the parties intended to be continuing. Indeed, by the admission of both parties, Ashton was to be returned to Shawnna on January 13, 2008. However, at that time, Justin refused to return Ashton to the primary residential custodian, Shawnna, and instead filed a motion to modify custody. Presumably, Justin refused to return Ashton because Shawnna had not yet secured a daycare situation. However, according to the testimony, this was because Shawnna was seeking special needs care for Ashton, as opposed to a typical day care such as the one in which Justin enrolled him.

In making its determination, the court was to address the factors set forth in KRS 403.340. First, under subsection (a), the court was required to consider whether the custodian agreed to the modification. Clearly, such is not the case in the matter *sub judice*.

With respect to subsection (b), whether the child has been integrated into the family of the petitioner with the consent of the custodian, Justin argues that although Shawnna voluntarily took Ashton to live with Justin under the assumption that it would be a temporary situation, it quickly became apparent to Justin that the situation should be permanent based upon Ashton's behavior and Shawnna's failure to procure a suitable childcare arrangement.

While this certainly may have been Justin's belief, we note that Shawnna never intended the situation to be permanent and further, that regardless of the intentions of the parties, Ashton was already well-acquainted if not "integrated" into Justin's home and life, as Justin is his father, and has always been involved in his life to the extent the prior custody arrangement would allow. Indeed, since the time of the initial custody determination, the parties had shared joint custody with Shawnna as the primary residential parent, and Justin having two overnight visits per week, as well as holidays. Therefore, we find subsection (b) of equivocal worth to our analysis in this matter especially in view of the trial court's determination that the temporary arrangement would not be used to the benefit or detriment of either party.

Subsection (c) requires a best interest of the child analysis pursuant to KRS 403.270(2). In determining whether modification is warranted, the court must inquire as to whether modification is in the best interest of the child. This subsection shall be fully addressed subsequently herein.

Subsection (d) required the court to consider whether the child's current environment endangered seriously the child's physical, mental, moral or emotional health. While Justin argues that Ashton's present residence at Justin's home is not a danger to Ashton, this is not the analysis required by the statute. The "present" environment for purposes of the statute was that of the primary custodian, in this case, Shawnna, at the time of the motion for modification.

To that end, our review of the record indicates no evidence that Ashton was in any danger while in Shawnna's care, aside from the court's determination that Ashton needed "structure," and determining that Justin, as a "left-brained" person was more equipped to provide it, as opposed to Shawnna, who might have a "difficult time dealing with little boys who are wild."

Having reviewed the record, we simply cannot find that these findings amount to substantial evidence upon which to make a determination that the environment with Shawnna, with whom Ashton had been primarily residing for three years, posed a serious threat to his health of the kind that would warrant a modification of custody. Indeed, our review of the record appears to indicate that Shawnna was of the belief that structure was needed in Ashton's schedule, an opinion consistent with that of the court itself.

Subsection (e) of KRS 403.340(3) required the court to consider whether the harm likely to be caused by a change of environment is outweighed by its advantages to him. Again, having reviewed the record, we simply cannot conclude that there was substantial evidence to establish that the advantages in changing custody to Justin outweighed the harm of disturbing a prior 3-year custodial arrangement with Shawnna.

Certainly, both parties testified in their own interest. Justin testified that Ashton had improved while in his care, and Shawnna testified that Ashton fared better while in her custody. Thus, we cannot conclude that the evidence before the trial court was sufficient to overcome the presumption in Shawnna's favor that, as the present custodian, it was in Ashton's best interest for her to continue as Ashton's custodian.

As noted, subsection (c) of KRS 403.340(3) requires a best interest of the child analysis pursuant to KRS 403.270(2). Shawnna argues that the court failed to establish that modifying custody was in Ashton's best interest in accordance with these factors. Again, having reviewed the record, we agree. Concerning KRS 403.270(a), both parents obviously wish for Ashton to remain primarily in their care. Concerning KRS 403.270(b), the court only had the testimony of the parents as to Ashton's wishes, having declined to appoint a guardian ad litem pursuant to Shawnna's request.

With respect to subsection (c) of KRS 403.270, concerning the interaction and interrelationship of the child with his parents, siblings, and any

other person who may affect his best interest, the court appears to have based its decision on its opinion that Ashton's relationship with Justin was one that provided structure and stability, as well as its consideration of Ashton's relationship with his stepbrother, stepmother, and aunts. In response, Shawnna asserts that Ashton was also close to his maternal grandparents and aunts, as well as to Shawnna herself. Having considered this evidence in its entirety, we do not find it sufficiently substantial to support a modification of custody in this instance.

With respect to subsection (d) of KRS 403.270(2), the court was required to look at Ashton's adjustment to his home, school, and community. Justin has asserted that Ashton has adjusted exceptionally well, and that he has made "dramatic progress" while in Justin's care, and has been enrolled in tee-ball and kindergarten.

In response, Shawnna asserts that Ashton was already "adjusted" to Justin's home previously, because the parties had been timesharing two nights per week and on holidays since the time that Justin returned home from Iraq. Further, Shawnna asserts that Justin has Ashton in a daycare which appears unqualified to deal with children who have ADD or other behavioral disorders. Finally, Shawnna argues that the trial court indicated that the temporary timesharing (i.e. Ashton remaining in Justin's care pending the hearing), would not be considered with respect to custody modification.

With this latter contention we agree, particularly as it concerns Ashton's enrollment in a variety of activities following the court's temporary

timesharing order. Ultimately, we simply do not find the evidence to be substantial enough to support a modification of custody in this instance, particularly when the trial court indicated that the timesharing arrangement would not be used to the detriment or advantage of either party at the custody hearing.[6]

With respect to KRS 403.270(e), concerning the mental and physical health of all individuals involved, the testimony was before the court that Shawnna sees a therapist, and that Justin had previously had problems with substance abuse. Further, the court considered testimony concerning Ashton's behavioral issues. The court also appeared to engage in an analysis of the respective personalities of Justin and Shawnna, calling the former "very left brain: regimented and organized," and calling the latter "very right brain: loose and flexible."

Having reviewed the record, it is difficult for our Court to understand how the trial court could have made such an analysis accurately after observing the parties for such a limited amount of time. Regardless, we do not find those findings alone to be sufficient to support the ruling of the trial court in this instance.

With respect to subsections (f), (g), (h) and (i) of KRS 403.270, we do not find them to be applicable to the matter *sub judice*, as neither domestic violence nor de facto custodians are at issue.

Finally, we address Shawnna's argument with respect to the court's reference to gender in its order, specifically, its statement that "Sometimes women

[6] *See* Record of Court, 02/11/2008, 11:37:53.

have a difficult time dealing with little boys that are wild". Shawnna argues that gender appears to be the overriding reason that the trial court modified custody and timesharing, and states that this is a clear violation of the Equal Protection Clause under the 14th Amendment to the United States Constitution.

While we do not agree that gender was the overriding basis for the decision in this matter, we do note that the courts of the Commonwealth have clearly stated that gender is not to be an issue when a trial court is examining custody or timesharing. Indeed, in *Squires v. Squires*, 854 S.W.2d 765, 770 (Ky. 1993), our Kentucky Supreme Court specifically stated that it is impermissible to prefer one parent over the other based on gender.

Accordingly, we do not believe that Shawnna's gender or the court's determination as to her personality type (i.e. that she was right brained, loose, and flexible) served as findings of a nature substantial enough to support a modification of custody in this instance. The findings made by the court simply were not of a nature sufficient enough to overcome the presumption that the present custodian is entitled to continue as such.

Wherefore, for the foregoing reasons, we hereby reverse the July 1, 2008, order of the Fayette Family Court, and remand for additional proceedings not inconsistent with this opinion.

ALL CONCUR.

ENTERED: November 25, 2009 /s/ Michael O. Caperton

JUDGE, COURT OF APPEALS

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BRIEF FOR APPELLEE:

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