

RENDERED: OCTOBER 8, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-002366-ME

MICHAEL DIRE

APPELLANT

APPEAL FROM BARREN CIRCUIT COURT  
FAMILY COURT DIVISION  
v. HONORABLE W. MITCHELL NANCE, JUDGE  
ACTION NO. 02-CI-00732

MELISSA DIRE (NOW BAILEY)

APPELLEE

OPINION  
AFFIRMING

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BEFORE: FORMTEXT TAYLOR, CHIEF JUDGE; COMBS AND NICKELL,  
JUDGES.

TAYLOR, CHIEF JUDGE: Michael Dire brings this appeal from a November 23,  
2009, order of the Barren Circuit Court, Family Court Division (family court),  
modifying visitation to designate Melissa Dire (now Bailey) as the primary  
residential parent. We affirm.

Michael and Melissa Dire were married July 1, 1990. Three children were born of the parties' marriage.<sup>1</sup> The parties were divorced by decree of dissolution of marriage entered in the family court on April 16, 2003. The decree incorporated a separation agreement executed by the parties. Therein, the parties agreed to joint custody of the children with Michael "being the primary residential parent."

In July 2008, Melissa filed a "Motion to Modify Custody." Essentially, Melissa sought to be designated the primary residential parent of the parties youngest child, Sam.<sup>2</sup> In support thereof, Melissa alleged that Michael was criminally charged with cultivating marijuana, admitted to personal use of marijuana, was not properly administering medication prescribed to Sam, and was refusing to allow communication with Sam. Following a hearing, the family court entered an order granting Melissa's motion and designated her the primary residential parent of Sam. Michael was awarded visitation. This appeal follows.

Our analysis begins by noting the recent Kentucky Supreme Court opinion of *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). In *Pennington*, the Supreme Court held that a parent seeking to change the primary residential parent designation is merely seeking a modification of visitation/timesharing and not a modification of custody. The Court further held that a motion to change the

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<sup>1</sup> Michael Allen Dire, Jr., was born December 27, 1990; Gerald Lee Dire was born May 26, 1992; Sam Tyler Dire was born August 9, 1998.

<sup>2</sup> There are no issues presented on appeal as to Michael, Jr., or Gerald.

primary residential parent designation is properly brought pursuant to Kentucky Revised Statutes (KRS) 403.320, “Visitation of Minor Child.” *Id.* Pursuant to KRS 403.320, a parent must demonstrate that a change in the primary residential parent designation is in the child’s best interest. Simply put, a parent seeking to modify visitation/timesharing pursuant to a joint shared custody arrangement must demonstrate that such modification is in the child’s best interest. KRS 403.320(3).

In the case *sub judice*, the family court made extensive findings that modification of the parties’ visitation/timesharing arrangement designating Melissa as the primary residential parent would serve Sam’s best interests. In support thereof, the family court identified the following evidence: (1) Michael was convicted of cultivating marijuana and possession of drug paraphernalia; (2) Michael has a disability diagnosed as intermittent explosive disorder; (3) Michael’s wife was diagnosed with severe anxiety/depression and was hospitalized for a nervous breakdown; and (4) the children had poor school attendance and poor academic performance while in Michael’s care.

As an appellate court, our review of the family court’s decision to modify visitation/timesharing is limited to reviewing whether the findings of fact were supported by substantial evidence and whether the court abused its discretion. *See* Kentucky Rules of Civil Procedure (CR) 52.01; *Pennington*, 266 S.W.3d 759. Considering the ample evidence relied upon by the family court, we cannot conclude that the family court abused its discretion or that its findings of fact were clearly erroneous. The evidence outlined above is more than sufficient to support

the family court's finding of best interests. *See* CR 52.01; *Batchelor v. Fulcher*, 415 S.W.2d 828 (Ky. 1967). As such, we conclude the family court did not err by modifying the visitation/timesharing arrangement of the parties to designate Melissa as primary residential parent of Sam.

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

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT  
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