RENDERED: SEPTEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002331-ME

EDWARD GUY JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA SHERLOCK, JUDGE
ACTION NO. 06-CI-503813

LEAH HAUNZ JOHNSON — APPELLEE

OPINION
REVERSING IN PART AND AFFIRMING IN PART

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

ACREE, JUDGE: The question presented on appeal is whether, consistent with Kentucky Revised Statute(s) (KRS) 403.320, a family court may include in an order denying modification of time-sharing a "one[-]year moratorium" on subsequent modifications absent "good cause shown," and "a therapeutic opinion that the . . . [time-sharing] schedule . . . is harmful to the children." We find that

such a limitation contravenes the statute and must be reversed. The remainder of the order denying the motion to modify time-sharing is supported by substantial evidence and is affirmed.

I. Facts and procedure

Edward Johnson and Leah Johnson were married in 1993 and had two children. Edward filed a petition for dissolution of the marriage in 2006. The decree of dissolution, which did not resolve financial matters or issues relating to the parties' minor children, was entered July 24, 2007.

In August 2007, the parties agreed to a temporary parenting plan following mediation. The family court incorporated the plan into its supplemental decree of dissolution entered November 5, 2007. The agreement provided in relevant part that the parties would share joint custody of the children and that neither would be designated the primary residential parent. It further provided that, while the children would spend most of their time with their mother, they would spend increasing time visiting with Edward. The parties also agreed that they would revisit and renegotiate the time-sharing agreement in six months; if at that time the parties were unable to reach an agreement, either party could petition the family court for entry of an order.

Leah filed a motion on February 21, 2008, requesting that the court enter a permanent parenting schedule. She represented in the motion that, in accordance with the parenting agreement and accompanying family court order, the parties had

attempted to agree to a time-sharing arrangement but had been unsuccessful. In response, the family court ordered additional mediation.

An agreed order was entered on May 27, 2008, following a renewed attempt at mediation. The order provided that the joint custody arrangement would remain unchanged. The order further established that neither party would pay child support, designated the children's school, and allocated various expenses. With respect to time-sharing, the children would continue to spend most of their time with Leah, but every Tuesday and every other weekend would be spent with Edward. The order also divided time-sharing between the parties for summer vacation, birthdays, and holidays. Finally, the parties agreed that if either party wished to modify the time-sharing arrangement in the future, attempts at mediation would be the first resort.

This order remained in effect for nearly two years before the parties returned to the family court. In a motion filed on February 10, 2010, Edward requested modification of the time-sharing order.[1] He represented that the parties had attempted mediation which resulted in only minor changes to the previous agreed order. Edward remained dissatisfied and requested that the family court proceed with an evidentiary hearing. He contended it was in the best interests of the children for parenting time to be split equally.

Following a hearing and submission of memoranda by both parties, the family court entered an order on October 4, 2010, resolving the time-sharing

[1] In this motion Edward also requested that the court appoint a parenting evaluator pursuant to KRS 403.300.

dispute. Edward's motion for equal parenting time was denied, but he was given more time with the children during the holidays and school breaks. In addition to adjusting the holiday visitation schedule, the court declared as follows: "This Order shall not be modified for a period of one year unless good cause be shown." Edward and Leah filed cross-motions to alter, amend, or vacate various portions of the order,[2] and the family court entered an order on December 1, 2010. It added to the October order provisions for time-sharing during the children's summer break, which had been omitted from the previous order. The family court also added the following:

> The parties in this matter have been heavily and steadily litigating the parenting schedule. . . . The Court has considered the therapist's [a court-appointed custodial investigator] recommendations and all other evidence and issued a ruling. The Court will reconsider said ruling only upon the receipt of a therapeutic opinion that the school break and holiday schedule put into place is harmful to the children.
>
> With regards to the Court requiring that the current order stays into [sic] place for a period of one (1) year unless good cause be shown, the Court believes that this ruling is in the best interest of the children. The children need some stability in the parenting schedule. The constant litigation between these parents and changes to the schedule are no doubt unsettling and stressful to the children. The one[-]year moratorium on changes is an effort to create some stability in the lives of the children and protect them from this constant power struggle between their parents.

(Emphasis in original). This appeal followed.

II. Standard of review

[2] Edward's motion also requested entry of additional findings pursuant to CR 52.02.

Kentucky Rules of Civil Procedure (CR) 52.01 establishes the standard for review of a trial court's findings of fact: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A finding of fact is clearly erroneous when it is not supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence, in turn, is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable [people]." *Id.* (citations omitted). We will therefore reverse the family court's findings of fact only if the record does not support them.

A trial court's conclusions of law are reviewed *de novo* and are owed no deference. *Pinkhasov v. Petocz,* 331 S.W.3d 285, 291 (Ky. App. 2011) (citation omitted).

III. Analysis

Edward argues on appeal that the family court's order was erroneous in two respects: (1) that it was a contravention of KRS 403.320(3) to forbid future modifications of the time-sharing order for one year absent "good cause shown" and "receipt of a therapeutic opinion that" the current order "is harmful to the

children;"[3] and (2) that substantial evidence does not support the factual finding that a one-year prohibition of modification is in the best interests of the children.

A. Forbidding modification of time-sharing order for one year was error.

Leah expressed a concern during her testimony that the issue of time-sharing had been subjected to constant renegotiation. As a result, she said, the children experienced some anxiety.

The court-appointed custodial investigator, Dr. Jennifer Demling Cebe, also testified that the children needed a sense of stability in the time-sharing arrangement. Dr. Cebe emphasized their fear of change and the anxiety that resulted.

Despite Edward's protestations to the contrary, the record contains evidence that this was a matter of ongoing dispute. The parties engaged in several attempts at mediation of the issue since their divorce in 2007 and turned to the family court for resolution of the matter on at least two occasions. Leah further testified that Edward first approached her about changing the current parenting plan, which had been established in May 2008, only five months later, in October 2008. Since then, the parties had attended mediation sessions with two different mediators, resulting in their eventual agreement to a minor modification which did not become effective until January 2010. Because the parties could not agree on any additional modifications of the schedule, Edward filed his motion for court

[3] Edward actually presented the legal question as two distinct arguments, but they are essentially the same – that the family court's order in effect altered the standard for modification of the time-sharing order in contravention of the statute.

intervention the next month, and the parties litigated the matter through the end of the year. It appears from this evidence that the time-sharing schedule had, in fact, been a subject of negotiation and renegotiation from October 2008 until the entry of the family court's final order in December 2010.

Ultimately, the family court found stability was what the children needed most and concluded that additional changes to the time-sharing arrangement would therefore not be in their best interest. To that end, the family court imposed its "one[-]year moratorium" on further modification of the time-sharing schedule. This was inappropriate.

KRS 403.320(3) permits modification of a time-sharing order "whenever modification would serve the best interests of the child[.]" This means parents do not have to wait any designated amount of time before seeking modification. *See Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008) (holding that when modification of a visitation/timesharing order is sought, the party need not wait until two years have passed from entry of the original order, as required by KRS 403.340, but may seek "modification of visitation/timesharing 'whenever modification would serve the best interests of the child,'" as permitted by KRS 403.320.).

Edward cites *Massey v. Massey* in support of his position. 220 S.W.3d 700 (Ky. App. 2006). In that case, we reversed an order of a family court because it "impose[d] modification terms upon an open-ended maintenance award not

authorized by KRS 403.250(1) [the statute governing modification of open-ended maintenance awards]." *Id.,* at 703.

While *Massey* addresses a different statute and a different set of issues than are present here, it nevertheless serves as a valuable illustration: where a statute creates a right and establishes procedural and evidentiary guidelines for securing that right, the legislature's articulation of the standards governing the matter are exclusive. A court is not free to impose additional burdens on the movant. It was erroneous for the family court to preemptively refuse to modify its time-sharing order for one year absent "good cause shown" or "a therapeutic opinion" that the current order is harmful because KRS 403.320 requires only a showing that modification is in the children's best interests.

That is not to say that it was error to deny Edward's motion to modify; that matter is still within the sound discretion of the family court.[4] Indeed, stability may be an ongoing concern for parties and their children, and while the family court may not impose a year-long moratorium, it may find, given the evidence presented in support of any particular motion to modify time-sharing, that it is in the children's best interests to maintain stability rather than to modify the time-sharing schedule. Any such determination, however, must be made on a motion-by-motion basis.

Furthermore, there is no issue of judicial economy in this case. There has been no allegation that either party filed excessive or meritless motions or that

[4] Edward has not appealed the portion of the family court's orders denying his proposed time-sharing schedule, which would have split parenting time between him and Leah equally.

there has been any abuse of judicial resources. This opinion is not at variance with a family court's authority to control the proceedings before it, and in a different scenario it may be appropriate to take steps to prevent the parties from repeatedly seeking reconsideration of a court's order when there are no legitimate grounds for such action. In so doing, however, a court is not permitted to modify the parties' respective statutory standards of proof. Rather, it may turn to CR 11 or the court's inherent powers of contempt to maintain order and protect a party from motion practice that amounts to harassment – an unnecessary choice in this case, and one that would not have been supported by the evidence.

B. Substantial evidence supports the denial of the motion to modify the order.

While the family cannot add threshold elements to KRS 403.320 based on the need for stability, that same need for stability can be the basis for denying Edward's motion to modify time-sharing. Here, substantial evidence supported the family court's finding of fact that it is in the children's best interest not to modify the time-sharing order. Dr. Cebe testified that the children required stability and recommended only minimal changes to the existing time-sharing order. Edward even acknowledges that Dr. Cebe's report presents "evidence supporting the immediate denial of [his] request for an equal summer schedule[.]" Leah's testimony echoed that sentiment. That part of the order denying Edward's motion to modify time-sharing is supported by substantial evidence.

IV. Conclusion

That portion of the family court's order prohibiting modification of the time-sharing arrangement for one year is reversed because it contravenes KRS 403.320's pronouncement that modification is permitted "whenever modification would serve the best interests of the child[.]" We affirm the remainder of the order on appeal with the admonition that no part of that order can prevent either party from seeking modification as provided by KRS 403.320.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Janice Lintner
Louisville, Kentucky

BRIEF FOR APPELLEE:

Melanie Straw-Boone
Louisville, Kentucky