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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000174-ME

SHEENA HENSLEY — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WALTER F. MAGUIRE, JUDGE
ACTION NO. 04-CI-00344

VERNON HENSLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

VANMETER, JUDGE: Sheena Hensley appeals from the judgment of the Pulaski Circuit Court granting Vernon Hensley's motion to modify the primary residential parent designation of the parties' minor child. For the following reasons, we affirm.

[1] Senior Judge Ann O'Malley Shake 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.

Sheena and Vernon Hensley lived together as husband and wife from June 22, 1995 until their separation in November, 2000. The parties had a child together, born August 22, 1997. Since the time of their separation, the minor child has resided with Sheena. The parties were divorced on July 9, 2004 by decree of dissolution, in which the court awarded the parties' joint custody of the minor child and designated Sheena as the primary residential parent.

In February, 2009, Vernon moved to modify the primary residential parent designation, requesting the court to designate him the primary residential parent of the parties' minor child. The court ordered the parties to participate in mediation and requested the Cabinet for Families and Children to conduct an investigation of the parties' homes and living situations. The court also appointed a guardian ad litem (GAL) for the minor child. The parties were unable to complete mediation, and the matter was set for a final hearing.

During the final hearing, the court heard testimony from Vernon, Sheena, and Vernon's wife, Lauren Hensley, as well as a report from the GAL. The hearing revealed that Sheena and the minor child were residing in the rental home of Sheena's boyfriend Jack Adams, whose name is the only name on the lease. The hearing also confirmed that Sheena and the minor child have lived in nine residences since the parties' separation in 2000. In addition, Sheena does not possess a valid driver's license and relies upon Mr. Adams and her mother for transportation. In 2008, the minor child suffered a lice infestation, which lasted several months.

The GAL reported to the court that the minor child expressed concern about the numerous changes in residence while living with her mother. The child also stated that her mother and she had left Mr. Adams' home on one occasion after an argument between her mother and Mr. Adams. Due to these concerns, the child told the GAL that she had asked her father to seek the modification of her primary residence. The GAL opined that Vernon's residence would provide more stability in the child's life and the minor child would adequately adjust to living with her father.

At the conclusion of the hearing, the court designated Vernon as the primary residential parent, and granted Sheena standard visitation in the manner previously exercised by Vernon according to the decree of dissolution. This appeal followed.

A trial court's findings of fact are reviewed under a clearly erroneous standard. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005) (citations omitted). Such findings are not clearly erroneous if supported by substantial evidence. *Id*. (citations omitted). Substantial evidence is evidence that "has sufficient probative value to induce conviction in the mind of a reasonable person." *Id*. (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Id*. (citations omitted).

Sheena first argues the trial court erred by granting Vernon's motion to modify the primary residential parent designation because its findings were not supported by the evidence. We disagree.

A motion to modify the primary residential parent designation is considered a motion for a change of visitation/timesharing. *See Pennington v. Marcum*, 266 S.W.3d 759, 770 (Ky. 2008) (holding that a party seeking a change in the child's physical residence or the amount of time spent with each parent is not a change from joint custody). Under KRS 403.320(3), "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" Thus, a motion to modify the primary residential parent designation will be granted if it "would serve the best interests of the child."

To determine whether modification would serve the "best interests of the child," we look to the standard provided in KRS 403.340(3) which explains, in relevant part:

> 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 the 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.

Furthermore, KRS 403.270(2) asserts, in pertinent part:

> 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[.]

In this case, substantial evidence was presented to support the court's designation of Vernon as the primary residential parent. The record reveals that Sheena resides in the rental home of Mr. Adams, but her name is not on the lease agreement. Additionally, the relationship between Sheena and Mr. Adams was found to lack stability, with one recorded instance of Sheena leaving the home after an argument. Sheena does not possess a valid driver's license, admitted to transporting the child without a driver's license, and exclusively relies on Mr. Adams and her mother for transportation of the child. On the other hand, Vernon

resides with his wife in a home he owns and has lived in continuously for the past seven years. Thus, based on the record, the trial court did not err by finding the child's best interests would be served by designating Vernon as the primary residential parent.

Sheena next contends the trial court erred by considering evidence of her prior residences before the parties were divorced in 2004. Specifically, Sheena claims evidence of her residential history prior to the divorce is irrelevant because said evidence was not considered by the court when it designated her as the primary residential parent in the decree of dissolution. We disagree.

The record reveals that Vernon introduced a document identifying nine residences in which Sheena and the minor child have lived since the parties' separation in 2000. The purpose of introducing this evidence was to establish the continued instability of Sheena's living arrangements while caring for the child. As such, evidence illustrating that Sheena has lived in nine residences since 2000 was relevant for purposes of establishing the best interests of the child, irrespective of whether the evidence was considered at the time of dissolution. Since KRS 403.270 directs the court to consider all relevant factors to determine the best interests of the child, the court did not err by considering this evidence.

Sheena finally argues the trial court erred by treating the report of the GAL as evidence. We disagree.

RFC[2] 602 authorizes the Pulaski Circuit Court, *sua sponte*, to take appropriate action to address parenting arrangements, including the "[a]ppointment

[2] Rules of Family Court – 28th Judicial Circuit.

of a Guardian ad Litem to represent the best interest of the child(ren)[.]" In this case, consideration of the report of the GAL during the final hearing was appropriate to ascertain the best interests of the minor child. As previously discussed, since the trial court is directed to consider all relevant evidence in determining the best interests of the child, the report of the GAL was properly considered. In addition, Sheena did not object to the appointment of the GAL or the admission of the report of the GAL even though she had an opportunity to do so at the final hearing. *See Davis v. City of Winchester*, 206 S.W.3d 917, 918 (Ky. 2006) (when a party fails to timely raise objection, the claim of error is not properly preserved for appellate review). Accordingly, any claim of error in regards to the report of the GAL is without merit.

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Joseph B. Venters Somerset, Kentucky	No brief for Appellee