RENDERED: NOVEMBER 4, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000222-ME

CHRIS ROSS APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 09-CI-00585

BRANDY ROSS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

TAYLOR, CHIEF JUDGE: Chris Ross brings this appeal from a December 16, 2010, Order of the Greenup Circuit Court, Family Court Division, granting Brandy Ross's motion to modify time-sharing with the parties' minor child. For the reasons stated, we affirm.

Chris and Brandy were married June 30, 1998. One child was born of the marriage. The parties were divorced by Decree of Dissolution of Marriage entered in the Greenup Circuit Court on November 4, 2009. The decree incorporated a property settlement agreement previously executed by the parties. The agreement provided that "[t]he parties agree that they shall have joint legal custody and shared physical custody of the minor child herein. [Chris] shall have liberal visitation with the parties' child as agreed between the parties." Neither party was designated primary residential parent.

On September 21, 2010, Brandy filed a motion to modify the time-sharing agreement and to be designated primary residential parent. Following a hearing, the family court entered an order to continue joint custody but designated Brandy as primary residential parent with Chris exercising time-sharing with the child. This appeal follows.

Chris contends that the family court erred by designating Brandy as primary residential parent and by modifying the parties' time-sharing arrangement. Chris specifically contends that the family court did not have jurisdiction to decide Brandy's motion as the requirements of Kentucky Revised Statutes (KRS) 403.340 as to modification of a custody decree were not satisfied.[1] Essentially, Chris

[1] Kentucky Revised Statutes (KRS) 403.340(2) states:

> No motion to modify a custody decree shall be made earlier than two (2) years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe that:
>
> (a) The child's present environment may endanger seriously his physical, mental, moral, or emotional health; or

argues that Brandy was seeking to modify custody and that KRS 403.340(2) controlled. When filed within two years of the initial custody decree, Chris points out that a motion to modify custody must be accompanied by at least two affidavits demonstrating that the child's present environment seriously endangers the child's physical, mental, moral, or emotional health according to KRS 403.340(2). Chris asserts that Brandy's motion was not accompanied by two affidavits as required by KRS 403.340(2) and that the circuit court lacked jurisdiction to rule upon the motion. We disagree.

In 2008, the Kentucky Supreme Court decided the case of *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Therein, the Court determined that a change in the primary residential parent designation is not a change in custody but a modification of timesharing under a joint custody arrangement. The Court pointed out that a change in the primary residential parent designation is actually just a change to "where and to what extent the child spends time." *Id.* at 769. And, where a modification of time-sharing is sought "the specific language of KRS

(b) The custodian appointed under the prior decree has placed the child with a de facto custodian.

403.320(3)[2] controls, which allows modification of time-sharing "whenever modification would serve the best interests of the child." *Id.* at 769.

In the case *sub judice*, Brandy and Chris were initially granted joint custody of their child without either parent being designated primary residential parent. When Brandy sought to be designated the primary residential parent, she was merely seeking to modify time-sharing. Brandy was not seeking to modify the award of joint custody; thus, KRS 403.340 is inapplicable. In fact, the family court expressly concluded that it would be in the best interest of the child to continue joint custody. Accordingly, KRS 403.320 controls, and the proper standard is best interests of the child. Chris has failed to demonstrate that the family court's findings on this issue are clearly erroneous, or that the court's ruling was an abuse of discretion. *Young v. Holmes*, 295 S.W.3d 144 (Ky. App. 2009). For these reasons, we believe Chris's argument to be without merit.

For the foregoing reasons, the Order of the Greenup Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

[2] KRS 403.320(3) states:

> The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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