RENDERED: NOVEMBER 18, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000313-ME

L.W. APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. MICHAEL DIXON, JUDGE
ACTION NO. 10-CI-00244

S.W. AND P.C. APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: L.W. (hereinafter Father)[1] appeals from a Jessamine Family Court order denying his motion to modify timesharing. S.W. (hereinafter Mother) and P. C. (hereinafter Grandmother) did not file briefs in this appeal. Father argues that the trial court incorrectly found that Grandmother was the sole custodian of his child S.W. (hereinafter Child) and that he could not request a change of custody. We find the trial court did err and reverse and remand.

[1] This case involves a minor child; therefore, we will not use the parties' names.

Father and Mother were divorced on August 7, 2006. The divorce decree stated that the parties were to have joint custody of Child. Mother was the primary residential custodian and Father had reasonable visitation rights.

On December 1, 2008, a neglect petition was filed against Mother. As a result, Child was removed from Mother's care and placed with Grandmother. When Father discovered this, he petitioned the court to place Child with him. Even though no neglect petition had been filed against Father, the court refused to place Child with Father until he had worked a case plan with the Department for Community Based Services. The record before us does not contain specifics as to the disposition of the juvenile neglect action.

On November 19, 2009, Child was returned to Mother. On February 1, 2010, Grandmother filed a dependency petition stating that Mother was going to rehab and would be unable to care for Child. The court again placed Child with Grandmother.

On March 1, 2010, Father filed a petition for custody in the Jessamine Family Court seeking custody of Child. Before it would rule on the petition, the court held a hearing to determine if Grandmother was a de facto custodian. On May 11, 2010, the court held the hearing and determined Grandmother to be a de facto custodian of Child. After this determination, the parties met privately, reached an agreement regarding custody and visitation, and placed the terms of the agreement on the record. The parties agreed to a "joint custody type" arrangement.

In essence, Mother and Father would keep joint custody and Grandmother would act as a joint custodian, having the authority to make major decisions when Child was in her care, without specifically being declared a joint custodian. Grandmother would also be the primary residential custodian. This arrangement was then put into a judgment.

Since then, Father and Grandmother have had conflicts regarding Child's upbringing. On January 5, 2011, Father filed a motion to modify timesharing. He requested that he be the primary residential custodian of Child. The trial court denied the motion finding that Grandmother was the sole custodian of Child and that Father was actually seeking a modification of custody. This appeal followed.

Father argues that the trial court erred in finding Grandmother had sole custody of Child and that he properly sought a modification in timesharing. We agree.

> The Court of Appeals, however, [is] entitled to set aside the trial court's findings only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men."

Moore v. Asente, 110 S.W.3d 336, 353-354 (Ky. 2003)(citations omitted).

Here, it is clear from the record that Grandmother does not have sole custody of Child. Father has never lost joint custody of Child. We agree with

Father that the actual wording of the custody arrangement is confusing, but when viewed in context with the recorded May 11, 2010 hearing and the remainder of the record, Grandmother was never granted sole custody of Child. It appears as though the trial court simply misread the custody order.

Because the trial court found Grandmother to be the sole custodian, it viewed Father's motion to modify timesharing as a motion for change of custody. These two motions have different legal standards and analysis. "If a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so." *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). In this case, because a change was sought within two years of a custody decree, a motion for change of custody would require a showing that the child was seriously endangered and multiple affidavits to that effect. *Id.* at 767. In order to modify timesharing or visitation, it must be shown to be in the best interest of the child. *Id.*

The trial court used the change in custody standard and denied Father's motion. As stated above, Father was a joint custodian. He was seeking to become Child's primary residential custodian, which is a change in timesharing/visitation. On remand, the trial court should use the best interest of the child standard.

Based on the above, we reverse and remand this case.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Joshua L. Nichols Nicholasville, Kentucky	No Brief Filed