

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2011-CA-001638-ME

TRACY DERQUE (F/K/A RAMSEY)

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE M. BRENT HALL, JUDGE  
ACTION NO. 10-CI-01153

DENNIS BRYAN RAMSEY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \*\* \* \*\* \*

BEFORE: CAPERTON, LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Tracy Derque (f/k/a Ramsey) has appealed from an order of the Hardin Circuit Court denying her petition to modify a parenting timesharing agreement with her ex-husband, Bryan Ramsey, concerning their minor son.

Finding neither error nor an abuse of discretion, we affirm.

Tracy and Bryan were married in 2005 and separated in March of 2010. One child, a son, was born to the union in 2007. The parties' relationship deteriorated, leading to a separation on March 10, 2010. A settlement agreement was executed in June of 2010 and was later incorporated into their divorce decree entered on September 14, 2010. The settlement agreement stated the parties would have joint custody of their son with Tracy being designated as the primary possessory parent and Bryan would have liberal visitation. The agreement specifically addressed the issue of parental relocation with the child.

The agreed parenting time schedule is based on the current residences of the parties. Prior to relocation of either party to another county or state, which would require modification of the present agreement, the party intending to relocate shall tender an Agreed Order modifying parenting time or said party shall petition the Court for mediation or a hearing to modify parenting time. A possessory parent shall not relocate the child/children prior to modification. The parties agree that the Family Court of Hardin County shall continue to have jurisdiction of the matter of parenting time until said modification is approved by the Court.

Thus, Tracy and Bryan specifically agreed that a possessory parent must seek court approval and the settlement agreement must be modified before that parent may relocate with the child.

In early 2011, Tracy planned to marry Josh Derque who resided in Festus, Missouri. When informed of the possible move, Bryan became extremely upset and refused to give his consent. On April 27, 2011, Tracy petitioned the court to modify the parenting schedule set forth in the settlement agreement to

enable her to relocate to Missouri with the child. In response, Bryan filed his objection to the motion and moved the court to designate him as the primary possessory parent. A hearing was convened on the motions on July 20, 2011. At the conclusion of the hearing, the trial court orally denied both motions. A thirteen-page opinion and order comporting with the earlier ruling was entered on August 10, 2011. This appeal followed.

Tracy contends the trial court abused its discretion and clearly erred in denying her motion to modify the parenting schedule to permit her relocation to Missouri with the child. She alleges the trial court's order is clearly contrary to the weight of the evidence presented and does not adequately reflect the best interest of the child. Finally, she contends the trial court improperly injected its personal experiences into the proceedings. We have carefully reviewed the record, the briefs, and the law, and disagree with Tracy's allegations of error.

The applicable standard of review is well-established. Questions as to the weight and credibility of a witness are purely within the province of the court acting as fact-finder and due regard shall be given to the court's opportunity to judge the witness' credibility. CR<sup>1</sup> 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777 (Ky. App. 2002) (*overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008)). A factual determination made by the circuit court will not be disturbed on appeal unless it is clearly erroneous. CR 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence. *Sherfey*, 74 S.W.3d

---

<sup>1</sup> Kentucky Rules of Civil Procedure.

777. If the testimony before the trial court is conflicting, as in this case, we may not substitute our decision in place of the judgment made by the trial court. *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998).

“Every case will present its own unique facts, and the change of custody or modification of visitation/timesharing must be decided in the sound discretion of the trial court.” *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). Because Tracy and Bryan failed to agree about relocating their son, “the trial court, with its continuing jurisdiction over custody matters, must conduct a hearing to evaluate the circumstances and resolve the issue according to the child’s best interest.” *Burchell v. Burchell*, 684 S.W.2d 296, 300 (Ky. App. 1984).

Once the required findings of fact have been made, the trial court must then apply the law to those facts. Trial courts are vested with broad discretion in matters concerning custody and visitation. *Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). In the absence of an abuse of discretion, we will not disturb a trial court’s decision. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009). “Abuse of discretion in relation to the exercise of judicial power implies an arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey*, 74 S.W.3d at 783 (internal quotation marks omitted). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993

S.W.2d 941, 945 (Ky. 1999) (citation omitted); *see also Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). The test is not whether we as an appellate court would have decided the matter differently, but whether the trial court's rulings were clearly erroneous or constituted an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982).

Tracy first contends the trial court's decision to deny her motion to modify the parenting schedule constituted an abuse of discretion because it was not in her son's best interest to remain in Kentucky. Tracy recounts much of the testimony she presented at the hearing as support for her argument that the trial court erred in its assessment. Essentially, Tracy contends that the trial court's factual findings must be incorrect as they did not follow the testimony and evidence she presented. She presents alternate ways in which the trial court should have assessed the credibility of the witnesses and weighed the evidence presented. No legal precedent is cited in support of her argument on appeal.

“It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence.” *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991) (citing *Gen. Tire & Rubber Co. v. Rule*, 479 S.W.2d 629 (Ky. 1972)). Further, as we previously stated, an “[a]buse of discretion in relation to the exercise of judicial power implies an arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Sherfey*, 74 S.W.3d at 783.

We discern no abuse of discretion by the trial court. The court utilized the correct legal standard in its review of the evidence presented and placed substantial weight on the relationships of all parties involved in the child's life, his adjustment to his current living situation and community, and the course which would cause the least disruption in his life. The court, in its discretion, determined that a move to Missouri would not be in the child's best interest. "While some of the evidence conflicted with the trial court's conclusions, and a different trial court or a reviewing appellate court might disagree with the trial court, the standard on appellate review requires a great deal of deference both to its findings of fact and discretionary decisions." *Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008).

Finally, Tracy makes much ado about the trial court's criticism of her and her lifestyle choices. She contends the trial court improperly injected its personal experiences into the proceedings and avers that the trial court's actions indicated its inability "to consider any type of relationship or post-relationship behavior which is dissimilar to its own experiences to be acceptable." Tracy cites us to no legal authority supportive of her position and we are convinced none exists. Although we agree that the trial court may have gone beyond what was necessary to adjudicate this matter, and though we may disagree with the trial court's collateral comments and demeanor, we cannot say that the comments or conduct constituted reversible error. Likewise, the mere fact that the trial court was "noticeably much less critical" of Bryan does not equate to error.

ALL CONCUR.

BRIEF FOR APPELLANT:

Caleb T. Bland  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

Lyn Taylor Long  
Elizabethtown, Kentucky