RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000168-ME

MARK ETHEREDGE — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 07-CI-00171

KATHY RENEE ETHEREDGE (NOW BROWN) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Mark Etheredge (Father) appeals from a Nelson Circuit Court order that denied his motion to modify time-sharing and designate him as the primary residential custodian of his minor son (Son). Finding no error, we affirm.

In 2005, Son was born during the marriage of Father and Kathy Etheredge Brown (Mother). Father and Mother divorced in November 2007, and

the court awarded the parties joint custody of Son. The decree designated Mother as Son's primary residential custodian. In May 2008, Mother and Father executed an agreed order modifying visitation to reflect a nearly equal parenting-time schedule utilized by the parties.

In March 2011, Mother was seriously injured in an automobile accident; as a result, Son resided full time with Father for a few months. In July 2011, Son resumed primarily residing with Mother, and the parties followed the agreed parenting-time schedule. Thereafter, Mother moved to a new residence and, without consulting Father, she enrolled Son in a new elementary school.

On August 23, 2011, Father filed a motion to modify the parenting schedule to designate Father as the primary residential custodian. The court held an evidentiary hearing and considered the testimony of the parties, as well as testimony from Father's neighbor, Helen Mudd, and Son's maternal grandfather, John Brown. On December 12, 2011, the trial court rendered an order denying Father's motion to modify the parenting schedule. The court made thorough written findings, concluding that it was in Son's best interests for Mother to continue as the primary residential custodian. This appeal followed.

Pursuant to Kentucky Revised Statutes (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." The statutory "best interests" factors include: the wishes of the parents and child; the interpersonal relationships of the child with its parents, siblings, and others; the child's assimilation to home, school,

and community; mental and physical health of the parties; and evidence of domestic violence. KRS 403.270(2)(a-f).

It is well-settled that "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). On appeal, we will not disturb the trial court's findings of fact "unless they are clearly erroneous, and due regard must be given to the opportunity of the trial judge to view the credibility of the witnesses." *Polley v. Allen*, 132 S.W.3d 223, 228 (Ky. App. 2004). A finding of fact is not clearly erroneous if it is supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

In the case at bar, the trial court held a hearing, heard testimony, and accepted evidence from the parties. Father disagrees with the weight given to the evidence by the court in the "best interests" analysis. Father specifically argues he is the proper primary residential custodian because the evidence established that Mother's boyfriend, Thomas McCubbins, had recently been arrested for cultivating marijuana and that Mother acted inappropriately by unilaterally deciding to enroll Son in a new school.

Despite Father's criticism of Mother's parenting, it was clearly for the trial court to determine the credibility of witnesses and weigh the evidence. *Polley*, 132 S.W.3d at 228. The court carefully delineated each relevant inquiry of the statutory "best interests" standard pursuant to KRS 403.270(2). The court noted that both parents had a normal parent/child relationship with Son; further, the court

found that Son shared a close relationship to his half-brother, Mother's sixteen-year-old son. The court observed that both Mother and Father suffered from physical limitations because Father was disabled due to a back injury. The court stated it was "troubled" that McCubbins had been arrested for cultivating marijuana in his residence; however, the court concluded that Son had not spent any significant time in McCubbins's home. The court also considered that Mother had enrolled Son in a new school without consulting Father. Although the court disapproved of Mother's unilateral decision making, the court concluded that Son was doing well in his new school. Finally, the court was not persuaded by Father's evidence of an affidavit executed by John Brown prior to the 2008 agreed order, which stated Brown believed Father should be the primary residential custodian.

In reaching its decision to deny Father's motion, the court stated:

> Another relevant factor for the Court to consider is the visitation pattern that the parties have recently utilized. From the evidence, it is the Court's understanding that [Father] has been enjoying visitation on all weekends and then returning [Son] to school on some Mondays.
>
> After considering all of the above, this Court finds that it is in [Son's] best interests to maintain the status quo. Although this Court is very troubled by [Mother's] unilateral decision to transfer [Son] from Foster Heights Elementary to Boston Elementary, this Court does not believe that it is in [Child's] best interests to re-enroll him at Foster Heights Elementary in the middle of this school year.

We are satisfied the court applied each of the relevant factors outlined in KRS 403.270(2). Although Father contends the court should have weighed the

evidence in his favor, we are not persuaded that the findings made by the trial court were clearly erroneous. After considering all the evidence and Son's best interests, the court properly utilized its broad discretion to deny Father's motion to modify time-sharing.

For the reasons stated herein, we affirm the order of the Nelson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William T. Hutchins
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Ron Aslam
Louisville, Kentucky