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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000307-ME

MELINDA SUZANNE COLEMAN

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 03-CI-00144

NICHOLAS BERTRAM COLEMAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Melinda Suzanne Coleman appeals the denial of her motion to modify custody. We affirm.

Pursuant to a divorce decree, Melinda and Nicholas Bertram Coleman have joint custody and equal timesharing of their two daughters. Melinda requested a modification in custody, claiming that it would be in the children's best

interest to reside primarily with her because the timesharing arrangement seriously endangered the children's physical, mental, moral or emotional health. She alleged that Nicholas used obscene and profane language around the children, has spanked the younger child causing bruises, neglects helping the children with their homework, drinks in excess around the children and serves alcohol to individuals at his home late at night.

After hearing from witnesses, but not the parties' oldest daughter who was ten years old, the circuit court denied the motion. Melinda appealed, claiming that it was error for the court to not take testimony from this daughter. We agreed and remanded for the circuit court to determine the child's competency before excluding her testimony. *Coleman v. Coleman*, 323 S.W.3d 770, 772 (Ky.App. 2010).

Upon remand, the circuit court interviewed the child, considered previous taped testimony and considered new testimony. Although Melinda's allegations were supported by her testimony and the testimony of other witnesses, they were contradicted by other witnesses' testimony. The allegations of improper discipline were investigated by child protective services and found unsubstantiated. All of the witnesses agreed that the children love and are attached to both their parents. They also agreed that both children and their parents are satisfied with the children's current school. Witnesses for Nicholas raised concerns about the effects on the children of Melinda's frequent changes in employment and residence, and her lifestyle.

The oldest daughter described differences in Melinda's and Nicholas's parenting styles. She explained that her father is more of a strict disciplinarian who expects the children to do their homework on their own, do their chores, and behave properly. One time, years earlier, her father spanked her sister hard enough to cause bruises. Since that time, he spanked her sister less and used other forms of discipline. She described her mother as the more nurturing parent, being especially sympathetic when they are sick and providing more direct assistance on homework. She stated that both of her parents spanked and used alcohol. She expressed a preference for spending the weekdays with her mother and the weekends with her father.

After considering all the evidence, the circuit court again denied the motion to modify custody.

While Melinda styled her motion as one to modify custody, she was seeking to modify timesharing and becoming primary residential custodian, rather than seeking sole custody. Because Melinda and Nicholas are joint custodians, a modification of custody under Kentucky Revised Statutes (KRS) 403.340 would only be required if Melinda was seeking sole custody of the children. *See Shafizadeh v. Bowles*, 366 S.W.3d 373, 376 (Ky. 2011). A modification to visitation/timesharing is sought pursuant to KRS 403.320, rather than under KRS 403.340. *Pennington v. Marcum*, 266 S.W.3d 759, 768-770 (Ky. 2008); *Humphrey v. Humphrey*, 326 S.W.3d 460, 463-464 (Ky.App. 2010). Therefore, we will review this as a motion to modify the parties' visitation/timesharing

arrangements under *Pennington* and apply the best interest standard of KRS 403.320.¹ *Caskey v. Caskey*, 328 S.W.3d 220, 221 (Ky.App. 2010).

Our review of an order denying modification of timesharing is reviewed under the clearly erroneous standard. Kentucky Rules of Civil Procedure (CR) 52.01. *See Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). “This Court will only reverse a family court’s determinations as to visitation and designation of primary residential parent if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case.” *Caskey v. Caskey*, 328 S.W.3d 220 at 223. “[F]indings of fact are clearly erroneous only if they are manifestly against the weight of the evidence.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). Where there is conflicting evidence, the reviewing court shall give due regard for the opportunity of the trial court to judge the credibility of the evidence and determine the weight to be given to the evidence. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Under *Pennington*, the word “visitation” in KRS 403.320, is to be interpreted as meaning “visitation/timesharing.” *Pennington*, 266 S.W.2d at 765-770. KRS 403.320(2) requires that if domestic violence and abuse are alleged, the court shall determine which if any visitation/timesharing arrangement “would not endanger seriously the child’s . . . physical, mental, or emotional health.” KRS

¹ Both parties assumed that KRS 403.340 provided the relevant standards and the circuit court considered Melinda’s motion under KRS 403.340. However, because the circuit court made specific rulings on the best interests of the children, we can properly review the court’s decision under KRS 403.320.

403.320(3) allows the court to modify a visitation/timesharing order “whenever modification would serve the best interests of the child[.]”

The relevant factors set forth in KRS 403.270(2) to determine the best interests of the children are as follows:

(a) The wishes of the child’s parent or parents . . . 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;

. . . .

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

The circuit court determined that Melinda’s allegations of domestic violence by Nicholas against the younger daughter were unfounded. In considering conflicting evidence about Nicholas’s discipline of the children, the court determined that “[t]he testimony of others regarding the interaction between the children and their father was more credible than the concerns [the older daughter] expressed about [Nicholas’s] strict discipline during the interview.” This Court will defer to the circuit court’s determination of credibility.

The circuit court considered the relevant factors in KRS 403.270(2): Melinda’s and Nicholas’s wishes; the children’s wishes; the interaction between

the children and their parents, grandparents, and the parents' significant others; and how well the children were doing in school and in their current homes. The circuit court found that the witnesses all agreed that the children were well-adjusted and performing well in school under the current timesharing arrangement. Although it considered the oldest child's desire to spend more time with her mother, it determined that the current shared custody agreement was in the best interests of the children because it maximized the time that the children spent with each parent and their extended family.

The circuit court's findings were supported by substantial evidence and are not clearly erroneous. The circuit court was entitled to believe some witnesses over others. The circuit court did not err in failing to follow the older child's expressed wishes that she spend more time with her mother, because it determined that was not in the children's best interests. *See Shepherd v. Shepherd*, 295 S.W.2d 557, 559 (Ky. 1956).

We affirm the Washington Circuit Court's denial of the motion to modify custody.

ALL CONCUR.

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