

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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000315-ME

WALTER NOVOTKA

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 05-CI-00096

LINDA R. DITROIA-NOVOTKA

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Walter Novotka appeals from the Hardin Family Court's order denying his motion to be designated as the primary residential parent of his minor child, Nick, in order to relocate to Pennsylvania. Finding the family court adequately considered the best interests of Nick, we affirm.

Walter and Linda Ditroia-Novotka were married in September 1987. During the course of the marriage, the parties had two children, Matthew and Nick, born in 1992 and 2001, respectively. The parties were divorced in October 2005 and, per a settlement agreement, shared joint custody of their children with Linda designated the primary residential parent. In December 2009, Walter was awarded sole custody of Matthew; the parties continued to share joint custody of Nick. In April 2010, Matthew was adjudged wholly disabled and upon his eighteenth birthday in June 2010, the parties were appointed his co-guardians by the Hardin District Court.¹ In the guardianship proceedings, Walter was granted the authority to make decisions regarding Matthew's living arrangements and Linda was granted parenting time.

In February 2011, Walter filed the underlying motion to modify the timesharing arrangement between the parties to designate him as the primary residential parent of Nick and allowing him to relocate with both children to Pennsylvania.² The family court denied Walter's motion, determining the best interests of Nick to be served by remaining in the current timesharing arrangement. Walter appealed.

¹ Matthew has Angelman syndrome, a neuro-genetic disorder. The parties stipulated to the court that children with this syndrome require personal care and supervision twenty-four hours a day and require life –long care.

² Linda also petitioned the Hardin District Court to remove Walter as a co-guardian of Matthew. The Hardin District Court trial judge who presided over the disability and guardianship hearings, sat at the bench during the family court hearing.

On appeal, Walter argues the family court erred by not considering the best interests of both children when considering his motion to modify the timesharing arrangement. We disagree.

The factual findings made by a family court will not be set aside unless clearly erroneous. *Humphrey v. Humphrey*, 326 S.W.3d 460, 463 (Ky. App. 2010) (citing CR³ 52.01). Due regard is extended to the opportunity for the family court to judge the credibility of witnesses and weight of evidence. *Id.* (citation omitted).

A visitation/timesharing arrangement can be modified at any time upon a showing the modification is in the best interests of the child pursuant to KRS⁴ 403.320(3). *Pennington v. Marcum*, 266 S.W.3d 759, 767 (Ky. 2008). In analyzing the best interests of a child, a court is to take into consideration all relevant factors, including the following:

- (a) The wishes of the child's parent or parents, and any de facto custodian, 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;
- (e) The mental and physical health of all individuals involved;

³ Kentucky Rules of Civil Procedure.

⁴ Kentucky Revised Statutes.

- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
- (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
- (h) The intent of the parent or parents in placing the child with a de facto custodian; and
- (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

KRS 403.270(2)(a)-(i).

Here, Walter insisted that his relationship with Nick was strained due to the time and attention required of him to care for Matthew. Walter testified that Matthew lives with him 95% of the time, and Linda only utilizes twenty-four hours of visitation per month. He stated that Nick is the only family assistance he has within 500 miles; the rest of his family lives in Scranton, Pennsylvania. Walter wishes to foster long-term relationships for both children with his family in Pennsylvania, and claims Matthew would receive more attention and care in Pennsylvania due to his family's help. That said, Walter stated that if he was not allowed to relocate with both children, he would remain in Kentucky.

Crystal Miller, Nick's fifth-grade teacher, testified that he was developmentally intact, performed at his grade level, and has good behavior. She further stated that he was an impressive child and has no concerns about him if he

were to stay or move with Walter. Jodie Bodnar, Lisa's best friend, testified she has known Nick since he was born and she believes he is doing well and that a move to Pennsylvania would not be beneficial for him.

The court noted the scarcity of evidence presented which related to the benefits or detriments facing Nick if the sought after modification to the timesharing arrangement were granted. Ultimately, the court determined Nick's best interests would be served by remaining in his current school and custodial arrangement. Expressing concern over Walter's ability to maintain a relationship with Nick while assuming the total care for Matthew, the court stated:

While the Court has no jurisdiction to address the guardianship issue between the parents, it is clearly in everyone's best interest for [Linda] to take a more active role in caring for Matthew. Both parents' stability and their relationships with both children would be benefited, and this will allow [Walter] to have more one (1) on one (1) time with Nick as well as more respite for himself.

Clearly, if the standard was anything other than what is in the best interest of the child, and had Matthew still been under the age of majority, then the Court's decision may be vastly different.

Walter takes issue with the court's statement regarding its jurisdiction over Matthew, on the basis that KRS 405.020(2) provides that parents maintain joint custody of wholly disabled children over the age of eighteen. In spite of Walter's argument, only the best interests of Nick were required to be considered by the family court per KRS 403.320(3). Walter correctly argues that determining the best interests of Nick includes factors such as the interaction and relationship

between siblings and the mental and physical health of all individuals involved; however, our review reveals that the court's order addresses both issues.

Specifically, the court determined that the siblings had little in common due to Matthew's disability and attended to the interests and health of all parties. The court noted that Walter presented no evidence that Matthew's or Nick's physical or mental well-being would benefit from a modification of the timesharing arrangement, but suggested his family in Pennsylvania would assume responsibility of caring for Matthew. Since evidence was presented that Nick was successfully developing in his current environment, and the family court considered the factors set out in KRS 403.270, we find the family court did not err by denying Walter's motion to relocate.

The order of the Hardin Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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