

RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000100-ME

BENETTA JO EMERY

APPELLANT

v. APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 02-CI-00272

JOSHUA DARRIN BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND NICKELL, JUDGES.

CLAYTON, JUDGE: This is an action from the denial of the Breckinridge Circuit Court of the appellant, Benetta Jo Emery's, motion for a modification of the timesharing arrangement with her daughter, L.B. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

Emery and Joshua Darrin Board were married on October 16, 1999, and filed for divorce on December 4, 2002. During their marriage, they had one minor child, L.B., who is currently eleven years old. Emery filed a motion for a modification of her parenting time when L.B. was ten years old, asserting that L.B. wished to spend more time with her mother.

A hearing was held before a domestic relations commissioner (the commissioner) of the Breckinridge Circuit Court. At the hearing, L.B. expressed an interest in spending more time with her mother. There was also testimony regarding the living situations at both Emery's and Board's homes. Both parties have remarried and Board has stepchildren.

After the hearing, the commissioner held that it was in L.B.'s best interests to continue the time-sharing arrangement that had been in existence. The Breckinridge Circuit Court adopted the commissioner's Report. Emery then filed exceptions to the Report; however, the Breckinridge Circuit Court denied the exceptions. Emery then brought this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure (CR) 52.01 provides that “[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses.” A judgment 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). Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm’n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

In determining whether the court erred in granting or denying custody, the appellate court must determine whether the findings of the court were clearly erroneous or whether there was an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). With these standards in mind, we review the trial court’s decisions.

DISCUSSION

In determining whether custody should be modified, Kentucky Revised Statutes (KRS) 403.320(3) provides that:

The court may modify an order granting or denying visitation rights whenever modification would serve the best interest of the child; but the court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral, or emotional health.

In determining the best interests of the child, KRS 403.270(2) provides that the following factors shall be considered:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any *de facto* custodian. The court shall consider all relevant factors including:

- (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;
- (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.

The commissioner made the following conclusion in her Report:

Both parents desire to be designated the primary residential parent of LB. LB present testimony during the hearing and did not express a preference for custody. LB interacts well with her father, step-mother and the other children residing in the home. LB appears to be well adjusted to her community and school. [Board] works with LB's teachers to assist LB in receiving the appropriate services. [Emery] has not been involved with LB's school. There was not any testimony presented concerning the mental or physical health of the individuals involved. The only testimony concerning domestic violence occurred in [Emery's] home while LB was present. Factors (g)-(i) are inapplicable. LB's best interest would not be served by removing her from the family and environment that she has grown accustomed to.

Commissioner's Report at p. 4. Emery contends that the commissioner's findings are clearly erroneous and that the trial court abused its discretion when it overruled her motion for modification.

Emery is correct in her assertion that L.B. testified she had a preference in living with her mother. There is evidence, however, that Emery's husband, Phil, drank too much one evening and became violent. While there was no physical contact with L.B., Emery did take her to be with her mother during this altercation. L.B. testified that Phil drank too much occasionally when he was home.

Emery also asserted several issues regarding the commissioner's findings regarding L.B.'s school. She contends that L.B.'s performance had not improved at her new school, that the reason L.B.'s Map scores were better at her former school was because the former school utilized a reader for its Map testing. Board argued that Emery had not been involved in L.B.'s education and after-school activities. There was evidence at the hearing, however, that all of the above issues involving school had taken place. While there were reasons associated with why Emery was not involved with L.B.'s after-school activities, the fact remains that there was testimony provided that she was not.

As set forth above, we must review the findings of fact and conclusions of a trial court under the clearly erroneous standard. There was evidence supporting the commissioner's findings and conclusions regarding the factors relating to L.B.'s

best interests. They also support her finding that it was in L.B.'s best interests to remain with the current timesharing agreement.

Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donna M. Dant
Calhoun, Kentucky

BRIEF FOR APPELLEE:

Herbert M. O'Reilly
Hardinsburg, Kentucky