

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

NO. 2015-CA-000679-ME

APRIL HOLLAND (NOW SAVAGE)

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT  
HONORABLE LISA HART MORGAN, JUDGE  
ACTION NO. 12-CI-00515

JAMES HOLLAND

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, KRAMER, AND STUMBO, JUDGES.

CLAYTON, JUDGE: April Holland (now Savage) appeals from the Scott Family Court's findings of fact and conclusions of law denying her motion to modify the parties' timesharing schedule to allow her to relocate with the children. After careful review, we affirm.

## FACTS AND PROCEDURE

April and James Holland were married November 15, 1997, and divorced on June 25, 2008. The decree of dissolution incorporated their settlement agreement, which provided that they would share joint custody of their two minor children. The agreement designated that April would be the children's primary custodian. The agreement, however, did not provide a specific timeshare schedule but merely advised that James was entitled to timesharing with the children.

For approximately five years, April and the children lived with her parents in Menifee County. April then married Geoffrey Savage and moved to Sadieville, Kentucky. Sometime later, April and Geoffrey returned to Menifee County and again lived with her parents. The move was precipitated by Geoffrey's loss of his job and the resulting loss of the family home. During this period, James's timesharing typically consisted of one night per week with the children. However, he claimed that April frustrated his efforts to spend more time with the children.

On April 24, 2014, April filed a notice of intent to move within sixty days to Orange Park, Florida. In the notice, she explained that the move was because her family lived in that area, and her husband had found employment there. April further noted that the children had lived with her since the divorce and that James had the children one evening per week. She received no response to the notice, and on May 13, 2014, filed a motion to relocate to Florida. In the motion, she stated that the relocation would be in the children's best interest since her new

husband had employment; most of her extended family lived in the area; and, she had received a Pell Grant, which would allow her to attend college there.

The next day, May 14, 2014, James filed a motion to modify the timesharing schedule so that it had a specific timeshare schedule and to prohibit April from relocating the children. He asserted that his new work schedule allowed him to spend more time with the children. After James's motion was proffered, the parties negotiated a new timeshare schedule that permitted James to have the children on Thursdays and every other weekend. Regarding the relocation, however, on June 6, 2014, James responded to April's motion and contested that relocation served the best interests of the children.

April is a stay-at-home mother and author. She does not have an independent means of support and has relied on her parents, her husband, and James for support.<sup>1</sup> April and her husband have a two-year-old child. Geoffrey is a salesman in Florida earning approximately \$35,000.00 per year. James is a driver for Pilot Transportation and has also remarried. He has two older stepchildren who live with him and his new wife in Scott County.

A trial was held on February 9, 2015. At the time of the trial, the children were eleven years old and eight years old. In the family court's findings of fact, it was noted that based on the testimony of the parties and the maternal grandmother, both parents were good parents. Though April has been the primary

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<sup>1</sup> After April filed a Kentucky Rules of Civil Procedure (CR) 59 motion, the family court did correct its original findings and noted that April, at one time, had been employed at a nursing home for three years.

caretaker, James consistently exercised his timesharing with the children and worked to expand his time with them. In addition, he kept in regular phone contact with the children when they were not with him. April testified that she was relocating to Florida with her youngest child even if the trial court denied the motion. The parties also noted that one of the children's grades have dropped over the past two months because of anxiety about the possible move. James does not wish the children to relocate and offered that he would be able to care for them full-time if April moved to Florida.

On March 20, 2015, the family court entered findings of fact and conclusions of law denying April's motion to modify the timesharing arrangement by relocating to Florida. The family court then granted James primary custody of the children. April filed a motion for the family court to alter, amend or vacate its decision pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, which was denied. She now appeals the March 20, 2015 decision.

#### STANDARD OF REVIEW

An appellate court will only reverse a trial court's determination regarding visitation, that is, timesharing, if the trial court's decision constitutes a manifest abuse of discretion or was clearly erroneous in light of the facts and circumstances of the case. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

Further, whether the proper law was applied to the facts is reviewed *de novo*.

*Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

April maintains that her claim should be performed under a *de novo* standard since the facts are undisputed. This is simply not the case, here. First, it is the constellation of facts and the judge's discretion that trigger the standard of review in timesharing disputes. Second, a *de novo* review is only appropriate if a trial court misstates or uses incorrect law. Finally, the facts are disputed.

Our review is not based on whether we would have decided the issue differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

## ANALYSIS

In *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), the Kentucky Supreme Court specified a clear structure for a trial court to consider the modification of visitation/timesharing including those involving relocation. In particular, the Court explained that a request for a change in the physical possession of the child is not necessarily a motion for a change of custody, and if it is not a motion for change of custody, it does not trigger Kentucky Revised Statutes

(KRS) 403.340. Rather, if the parent, who is the primary custodian, makes a motion to change timesharing in order to relocate, the motion is reviewed under KRS 403.320. *Id.* at 769.

Contrary to April's assertion that James has the burden of proof because of his motion to modify primary residence, she initially made a motion to relocate, and therefore, she has the burden. When James made his motion, it was in response to her motion to relocate. As provided in *Pennington*, "[t]he party seeking modification of custody or visitation/timesharing is the party who has the burden of bringing the motion before the court." *Id.* She moved to relocate, and James responded in a motion to prohibit relocation.

Here, although April did not cite a particular statute in her motion for relocation, we conclude that the modification sought is for the timesharing arrangement and not custody. The motion does not mention a change in custody and also included a proposed timeshare schedule if the motion was granted. Thus, the issue is whether to modify timesharing, not custody.

Because this case involves the modification of timesharing, it is governed by KRS 403.320(3), which provides that "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child..." Hence, as authorized by KRS 403.320, a court may modify timesharing/visitation whenever it is in the child's best interests to do so. *Pennington*, 266 S.W.3d at 765. Furthermore, as provided in *Frances v. Frances*, 266 S.W.3d 754, 758 (Ky. 2008), the person who is the primary residential

custodian is not entitled to any preference in ascertaining whether relocation is proper. Rather, other factors are significant to a determination of whether the relocation motion should be granted. *Id.*

In the case at bar, the family court's decision was thorough and supported by substantial evidence. Additionally, the family court appropriately considered the best interests of the children. Contrary to April's assertion that the family court's analysis must specifically track the language of KRS 403.270, in fact, it is only necessary that the family court address whether the change in visitation would serve the children's best interests. Clearly, the family court addressed the factors regarding best interests that were implicated in this case.

April argues, in particular, that her children wanted to move to Florida and that the family court did not consider this matter. But although the wishes of the children are part of the family court's analysis, the wishes of two preteen children are only a part of the calculus. Further, a child's wishes do not dictate the decision, they merely inform it.

As enumerated by the family court, while April wants to relocate and James wishes to remain in Scott County, the children love both parents; are bonded with their step-siblings, as well as their half-sibling; are adjusted to their surroundings in Kentucky where they were born and raised; are doing well in school notwithstanding some anxiety over the possible move; and will have their own home with James. Further, April stated that regardless of the family court's decision, she is moving to Florida. In light of the facts, the family court held that

the best interests of the children were met by remaining in Kentucky with their father.

April had the burden to establish by a preponderance of the evidence that a change in timesharing by relocating to Florida was in the best interests of the children. *N.B. v. C.H.*, 351 S.W.3d 214 (Ky. App. 2001). Although the family court opined that the decision was difficult, it held that April did not meet this burden and that long term, the best interests of the children were better served by remaining in Kentucky with James.

Moreover, while a different family court or a reviewing appellate court might disagree with the family court's decision, the standard on appellate review requires a great amount of deference both to the family court's findings and its discretion, because it was in the best position to resolve the conflicting evidence and make the determination about the children's best interests. In the instant case, the decision of the Scott Family Court was neither clearly erroneous nor an abuse of discretion.

#### CONCLUSION

We affirm the decision of the Scott Family Court denying the motion to modify timesharing.

ALL CONCUR.



BRIEF FOR APPELLANT:

Barbara Anderson  
Lexington, Kentucky

BRIEF FOR APPELLEE:

Ethyle Noel  
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