RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001328-ME

WHITNEY CAUDILL — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JEFF MOSS, JUDGE
ACTION NO. 13-CI-00566

LEIGH J. HUFFMAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Whitney Caudill (mother) and Leigh J. Huffman (father) lived together for many years. Two children were born of the relationship, A.H. and J.H. After the parties separated in 2013, Huffman filed a petition for custody and paternity. On March 31, 2014, the Jessamine Family Court entered a Final Order granting permanent residence of the two children to Caudill.

On April 8, 2015, Huffman filed a motion to modify timesharing. Thereafter, Huffman introduced evidence that Caudill's live-in boyfriend left voicemails with Huffman in which the boyfriend threatened physical harm to A.H. The trial court then entered a temporary order making Huffman the primary residential custodian of A.H. and J.H. Two weeks later, the court entered an order permitting J.H. to reside with Caudill and A.H. to reside with Huffman.

The trial court then conducted multiple hearings on the motion to modify timesharing. At the conclusion of those hearings, the trial court entered detailed findings of fact and conclusions of law:

> This matter having come on for hearing on August 4, 2015 on Petitioner's Motion to Modify Timesharing filed April 8, 2015 and Petitioner's Motion to Alter, Amend or Vacate Judgment pursuant to Rule 59.05 filed July 21, 2015. Testimony was taken from the parties as well as Jason Stone, [Caudill's] boyfriend. Both of the parties' children had been previously interviewed in camera. [A.H.] stated a desire to live with her father. [J.H.] stated a desire to live with his mother. At the close of the hearing the Court overruled the Motion to Alter, Amend or Vacate the Court's decision regarding contact between [J.H.] and Jason Stone but reserved the right to address their contact in this final order.
>
> Prior to [Huffman's] motion on April 8, 2015 both of the parties' children, [A.H. and J.H.], resided primarily with the Respondent in Lexington, Kentucky. The Court entered a temporary order on April 15, 2015 making [Huffman] the primary residential custodian but requiring the two children to complete the school year in Lexington. This became problematic because the Fayette County School system would not allow the children to remain in Fayette County Schools while in the custody of someone that lived outside of the county without paying tuition. After a conference call between the Court and

parties' counsel it was agreed that [J.H.] would stay with [Caudill] and attend Fayette County schools until the school year ended. [A.H.] was to stay with Petitioner and transfer to Jessamine County schools.

The Court believes [Huffman] was very honest in his testimony, which appears to be different from what has occurred in previous hearings according to the Court's review of the written record in this matter. As is often the case honesty can cut both ways. [Huffman] acknowledges some behaviors and actions that are inappropriate for the children. [Huffman] admits to smoking marijuana a couple of times per week. The fact that the kids are asleep is of little consequence to the Court, especially in light of the fact that [J.H.] found marijuana at his father's house. [Huffman] appears proud of the fact that he didn't lie to his child but he also did not state any plan to stop smoking marijuana. This despite the fact that he also acknowledges that what he does is "not a good example for the children."

The Court also considers the acts of allowing [A.H. and J.H.] to listen to the Jason Stone voice mails, taking [J.H.] on a motorcycle ride at excessive rates of speed with no helmet, and the past and current criminal charges and convictions as negative factors for [Huffman]. After consulting the notes from the interview with [J.H.], it appears that [Huffman's] current girlfriend is an issue between [J.H.] and his father. [J.H.]'s belief that [Huffman] had a relationship with his girlfriend prior to his parent's divorce, rather true or not, is impacting his relationship with his father going forward. The record is devoid of any attempts by [Huffman] to address this issue. The blocking of [Caudill's] phone by [Huffman] is immature and not in keeping with the nature of joint custody.

The Court is not as impressed with [Caudill's] honesty during testimony. She was evasive in her answers to questions not only from [Huffman's] counsel but also her own counsel and the Court. [Caudill's] responses to questions regarding the voice mail calls by Mr. Stone, especially involving the transportation of [A.H. and J.H.]

and the return to the home, were not credible. To [Caudill's] credit she does not have a criminal record or a history of substance abuse. To her detriment she has introduced an individual into the equation that shares [Huffman's] record (though to a lesser extent) and issues with alcohol and drugs. Jason Stone's voice mail messages were reprehensible and inexcusable. In his testimony he acknowledged making additional calls of similar quality the next morning after sleeping. The effectiveness of the defense of intoxication, while slight initially in the Court's eye, also decreases over time.

With regard to Mr. Stone, [Caudill] has clearly shown and testified that he will be a part of her life, and by association her children's lives. When asked by her own attorney what would happen if her children were returned and Mr. Stone was not allowed to be around them, she stated that "would probably break us up." Later [Caudill] testified that she is in a relationship with Mr. Stone, that she loves him and that she plans to marry him. She stated if she got her kids back she would not move him back in "immediately."

Regarding the phone messages [Caudill] attempts to downplay them as one-time events brought on by intoxication that is not a problem for him. Later she testified that he was "doing tons better." The Court is unsure how there is a room for, or need for, "tons" of improvement from an issue that is allegedly not a problem.

The Court sees no way in which it could prudently return [A.H.] to [Caudill's] home while she is in a relationship with someone who threatened to put her daughter in a chokehold. Drunk or not that is unacceptable and cannot be remedied by quitting alcohol cold turkey or going to see a doctor (whose name he cannot recall) on two occasions. Mr. Stone's comments that his friends are commenting on how much better he is doing is both self-serving and somewhat contradictory to [Caudill's] testimony of a one-time event.

On the other hand, the Court is cautious of placing [J.H.] in a home in which his father admittedly smokes marijuana a couple of times a week despite the fact he knows it is illegal and despite the fact that he has seven prior convictions for marijuana related offenses. [Huffman's] counsel is correct that the prior Court was aware of [Huffman's] record and still did not prevent contact between [Huffman] and his children. The Court is now faced with the issue of whether or not to place the children primarily with him. Although the convictions are daily moving farther into the past, at least one of the activities (smoking marijuana) that brought [Huffman] to his criminal past is continuing.

Due to the Court's lack of confidence in either parent, foster care for [A.H. and J.H.] was considered. The Court is expressly declining to do so at this time. The Court would like for either parent to undertake one action with [A.H. and J.H.] as the only priority. The Court does not doubt that [Huffman and Caudill] love their children. Past decisions reveal that both parties want their children and something else. [Huffman] wants his kids AND the smoking of marijuana on a regular basis AND his girlfriend AND his activities that lead to an extensive criminal record. [Caudill] wants her kids AND Mr. Stone with all the baggage he brings AND her ability to not directly answer a question. Either parent could have distinguished themselves in this matter by putting [A.H. and/or J.H.] first. Both parents declined that opportunity.

Based on the record in this matter the Court finds as follows:

1. It is in [A.H.'s] best interest to remain in the home of [Huffman] and attend school in Jessamine County.

2. It is in [J.H.'s] best interest to remain in the home of [Caudill] and attend school in Fayette County.

3. The Court previously ordered the children to visit together on the weekends but it does not appear that these visits occurred. The Court is unsure as to why. The Court again orders [A.H. and J.H.] to spend their

weekends together to maintain their bond. The Court understands there is an age difference and that [A.H.] may have other interests but this contact with [J.H.] is important for both of them and should continue. This is not a suggestion. It is a court order. The Court would be receptive to a Show Cause motion if anyone attempts to interfere with this order.

. . .

5. Jason Stone shall have no contact with [A.H.] during her visits with [Caudill]. Jason Stone shall have no unsupervised contact with [J.H.] and may not stay overnight at [Caudill's] home when the children are present.

6. The contact provisions of paragraph 5 may be reviewed by the Court after [Caudill] submits Mr. Stone's file from Beaumont Behavioral Health. The Court is concerned that Mr. Stone does not know the last name of the individual he saw and that there is no Jennifer on the website for Beaumont Behavioral Health.

. . .

8. [Huffman] is directed to immediately unblock [Caudill's] phone number from his phone so that the parties may text about the children.

9. No one shall transport either of the children by motorcycle without the child wearing a helmet.

10. Both parties are prohibited from having conversations with the children about court proceedings. Should questions arise as to this order a copy of same may be shown to the children. If questions persist they should be answered by parties' counsel.

. . .

12. Neither party shall partake of alcohol or unprescribed drugs while the children are in their presence. Neither party shall allow the children to be around anyone who is partaking in or is under the influence of alcohol or unprescribed drugs.

> 13. Both parties shall attend cooperative parenting classes at their own expense. . . .

Caudill then filed a motion pursuant to CR 59.05 to alter, amend, or vacate the order that was entered on August 10, 2015. Caudill claimed the trial court erred when it granted Huffman school-year parent status for A.H. and unsupervised visitation of both children. She also requested more specific findings and that the trial court make the order final and appealable.

The trial court then entered an order on August 25, 2015, clarifying the pick-up and drop off details of the weekend visitation and that both parties share joint custody of the children. The trial court also made more specific findings about A.H.: she desires to live with her father; there have been no reports of interaction or relationship problems between A.H. and her father or her father's girlfriend; and, conversely, mother's boyfriend threatened physical harm to A.H.

Caudill appealed and filed her brief before this Court. Huffman did not file a responsive brief. Caudill then filed a motion for CR 76.12(8) sanctions against Huffman. We have declined that motion by separate Order entered contemporaneously with this Opinion. We now address the issues raised by Caudill.

## ISSUES

Caudill claims the trial court abused its discretion by modifying the timesharing arrangement and by not ordering Huffman's visitation be supervised. Kentucky Revised Statutes ("KRS") 403.320(3) permits a court to modify a

visitation order "whenever modification would serve the best interests of the child[.]" As these cases are fact sensitive, the trial court is vested with "the sound discretion" to decide whether to grant a modification in visitation and/or timesharing. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). Accordingly, we review the trial court's order under an abuse of discretion standard, where a trial court is permitted to make a decision that is "within a range of permissible decisions[,]" and it only abuses that discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge*, 146 S.W.3d 909, 914-915 (Ky. 2004) (citations omitted).

Having reviewed the thorough hearings conducted below and the well-reasoned opinion of the family court judge, we cannot say that the decision to modify timesharing and visitation was an abuse of discretion. The lower court was stuck between two untenable positions. Huffman has an extensive criminal record and continues to flaunt the law by smoking marijuana. Caudill, on the other hand, is tethered to a boyfriend who has a similar criminal record and also made a threat of physical violence toward A.H. Not surprisingly, the trial court found a "lack of confidence" in either parent and considered placing the children in foster care. However, the family court judge split the proverbial baby by placing each child with the parent best suited to nurture and care for the child, while mandating that the two children see each other on a weekly basis.

There is nothing arbitrary, unreasonable, unfair, or unsupported by sound legal principles in the family court judge's decision, nor is the decision

clearly erroneous in light of the facts adduced at the hearings. *Hudson v. Cole*, 463 S.W.3d 346 (Ky. App. 2015). While each parent can make a strong case against the other, the best interests of the children control over the parents' peccancy. And here, to make the best of the parents' poor choices, the trial court decided to split up the children during the week and reunite them on the weekends.

This decision is within the wide range of permissible decisions. It is thus affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rachel D. Yavelak
Lexington, Kentucky

NO BRIEF FILED FOR APPELLEE.