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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001773-ME

WILLIAM E. RILEY — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE REBECCA LESLIE KNIGHT, JUDGE
ACTION NO. 02-CI-00082

LISA PLUNKETT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

ACREE, JUDGE: William Riley seeks reversal of the Grant Circuit Court's October 21, 2005 order summarily denying his motion to modify "custody" without issuing factual findings and without a hearing. Riley argues, in part, that

the circuit court premised its decision upon the wrong legal standard. We agree. Accordingly, we reverse and remand for further proceedings.[1]

Three children were born to Riley and appellee Lisa Plunkett, an unmarried couple: William Jacob (Jake) in 1999, and twins Chevy and Summer in 2007. Numerous custody and timesharing orders have been entered and modified over the years related to these children.

In 2002, the circuit court granted the parties joint custody of Jake; that custody status has never changed. Later, in 2011, the circuit court awarded Riley and Plunkett joint custody of Chevy and Summer.[2] Plunkett was named primary residential parent of all three children, and Riley was granted liberal timesharing. Pursuant to the most recent timesharing order, entered in the fall of 2012, Riley enjoys parenting time with the children every other weekend, plus four additional weekends during the school year, half of summer vacation, and overnight every Wednesday during the school year.

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[1] Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

[2] From 2007 to 2011 the parties enjoyed an informal custody and timesharing arrangement related to the twins.

On August 14, 2015, Riley filed a motion he captioned "Motion for Change of Custody." Therein, Riley sought to increase his parenting time by establishing an equal, 50/50, shared parenting arrangement. Riley asserted he had fought hard over the years to gain a foothold back in his children's lives; that the children needed the care, guidance, and influence of both of their parents; and that it was in the children's best interests to spend more time with him.

Plunkett opposed the motion. The matter came before a Domestic Relations Commissioner (DRC) on September 2, 2015. The DRC determined Riley's motion failed to articulate a change of circumstances sufficient to warrant further consideration or a hearing. It recommended the motion be denied. Overruling Riley's exceptions, the circuit court approved and adopted the DRC's recommendation without modification on October 21, 2015. Riley appealed.

Generally, the decision to modify custody or timesharing is reserved to the sound discretion of the trial court. *Williams v. Frymire*, 377 S.W.3d 579, 589 (Ky. App. 2012). We will not disturb the trial court's ruling absent an abuse of that discretion.[3] *Id.* With that said, the interpretation of the relevant statutory scheme and the application of the appropriate legal standard in a given case are questions of law that we review *de novo*. *Walker v. Blair*, 382 S.W.3d 862, 867 (Ky. 2012).

Riley contends the circuit court erred in ruling that there was an insufficient change of circumstances to warrant a hearing on his motion. He argues, somewhat amorphously, that the circuit court applied the wrong legal

[3] An abuse of discretion will be found if the trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Bell v. Bell*, 423 S.W.3d 219, 222 (Ky. 2014).

standard when it failed to consider the best interests of the children. Riley also asserts it is particularly disturbing that the DRC, and in turn the circuit court, made its decision without the benefit of any testimony.

We believe the parties' loose use of legal nomenclature hindered the circuit court's decision. To explain, we turn to the well-known case of *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). While *Pennington* primarily relates to modification of custody or timesharing in the relocation context, it also provides helpful guidance in distinguishing between a modification of custody (either from joint custody to sole custody, or vice-versa), and a modification of timesharing. This, in our view, is where the circuit court went wrong in the case before us.

Pennington makes clear that the term *custody* "means more than who has physical possession of the child." *Id.* at 767. Rather, custody refers to who has "responsibility for and authority over [the parties'] children[.]" *Id.* at 764. In the case before us, Riley and Plunkett were awarded "joint custody, wherein both parents are equal legal custodians[.]" *Id.* at 767.

The term *timesharing* refers to "how much time a child spends with each parent[.]" *Id.* Custody and timesharing are distinct legal concepts. Significantly, when parents are awarded joint custody, a modification of the amount of time spent by the child(ren) with each parent does not alter the joint custody arrangement. *Id.* at 768–69.

> The obvious problem is that parties often ask for one thing when they are actually seeking the other, due to the unique nature of their shared (joint) custody or split

> (sole) custody. Courts have struggled ever since the concept of joint custody emerged with what part physical or residential possession of the child plays in each type of custody.

Id. at 767 (footnote omitted).

Pennington requires family courts to assume an active role when reviewing motions to modify custody and/or timesharing to help dispel any lingering cloud of confusion. To accomplish this task, *Pennington* directs that "the first question on a custody modification . . . is, '[i]s the motion actually seeking modification of custody or visitation/timesharing?'" *Id.* at 768. Answering this question requires courts to look beyond the face or title of a motion and, instead, focus on "the substance of the filings rather than their form." *N.B. v. C.H.*, 351 S.W.3d 214, 223 (Ky. App. 2011).

Here, it is evident upon close inspection of Riley's motion that he was not seeking to alter the nature of the joint custody. The substance of his motion, though styled as one to modify custody, reflects that he was actually seeking to modify the parties' timesharing arrangement. Riley was asking the circuit court to consider what is in the best interests of the children as to where and to what extent they spend time with him, not that he become the sole decision-maker. Again,

> [c]hanging how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree. This is true whether the parent has sole or joint custody: decision-making is either vested in one parent or in both, and how often the child's physical residence changes or the amount of time spent with each parent does not change this.

Pennington, 266 S.W.3d at 767.

Pursuant to *Pennington*, a motion to modify timesharing is controlled by KRS[4] 403.320(3). *Id.* at 769. That statute allows a trial court to "modify an order granting or denying [timesharing] whenever modification would serve the best interest of the child[.]" KRS 403.320(3); KRS 403.270(2) (identifying factors to evaluate the child's best interest). Accordingly, in this case, because Riley was actually seeking to modify timesharing, not custody, he was only required to demonstrate that modification of the parties' parenting schedule would serve the best interests of the children. He was not, as found by the circuit court, obligated to identify and prove a material change in circumstances.

We do not fault the circuit court for falling victim to this common trap. Had Riley indeed sought to modify the custodial paradigm, the inquiry would have turned to KRS 403.340, the modification of custody statute. The circuit court was correct that KRS 403.340(3) prevents it from modifying

> a prior custody decree unless after hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child.

Id. But, as explained, the custody-modification standard has no bearing on a request to modify timesharing.

[4] Kentucky Revised Statutes.

Accordingly, we reverse the Grant Circuit Court's October 21, 2015 order denying Riley's modification motion. On remand, we direct the circuit court to hear Riley's motion and evaluate it as one to modify timesharing in accordance with KRS 403.320(3) and KRS 403.270(2). Our opinion is not to be construed as a ruling on the merits; the circuit court remains the finder of fact and determines the weight of the evidence, including the credibility of witnesses. *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003). As with any other motion to increase timesharing or visitation, the parent who brings such a motion – Riley, in this case – bears the burden of proving that the change is in the child's best interests.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Pete W. Whaley Williamstown, Kentucky	Steven N. Howe Dry Ridge, Kentucky