RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001646-ME

AMBER HESS — APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 15-CI-00632

JOSHUA HESS

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MAZE AND NICKELL, JUDGES.

ACREE, JUDGE: The issue before us is whether the Hardin Family Court abused its discretion when it granted appellee Joshua Hess's motion to modify timesharing by naming Joshua the primary residential parent of two of the parties' minor children. We find no abuse, and affirm.

FACTS AND PROCEDURE

Joshua and appellant Amber Hess were married in 2002 and had three children: Halle Hess, born in 2002; Ethan Hess, born in 2004; and Sadie Hess, born in 2007. Amber petitioned for dissolution of the marriage in 2015. The decree of dissolution, entered December 4, 2015, incorporated the parties' property settlement and child custody agreement, which named the parties joint custodians of their children, and designated Amber the primary residential parent.

Three months later, on March 9, 2016, Joshua filed a motion to modify timesharing, requesting he be named the primary residential parent of Ethan and Sadie. A hearing was held on August 6, 2016. The testimony revealed a contentious separation filled with animosity and antagonism. The parties bickered over missed counseling appointments and extracurricular activities, interference by grandparents, unfulfilled requests for reimbursement for medical and other expenses, inappropriate name calling and comments about the other, and more. The parties did agree upon one thing: Halle desired to stay with Amber, and Ethan and Sadie expressed their desire to spend more time with Joshua.

The family court interviewed each child privately. All three children expressed their love for and desire to spend time with both parents.

Halle, then 13 years old, stated she preferred the school year timesharing arrangement[1] and gets along with Joshua most of the time, but does

[1] The school year timesharing arrangement consisted of three weeks with Amber, and one week with Joshua with alternating weekends. During the summer, the parties equally share parenting time on a week on/week off basis.

not get along with her paternal grandparents. It upsets her when her paternal grandmother makes inappropriate comments regarding Amber.

Ethan, then 12 years old, indicated he did not like being away from either parent too long, and preferred the summer alternating week schedule. He sensed Amber favors Halle over him and Sadie, and prefers not having his maternal grandmother present when he does spend time with Amber.

Sadie, then 8 years old and an articulate child, stated she did not get to see Joshua enough, particularly during the school year, and she wanted to spend more time with Joshua. She also preferred the week on/week off schedule.

The family court entered findings of fact, conclusions of law, and an order on September 6, 2016, naming Joshua the primary residential parent of Ethan and Sadie. It reasoned, in part:

> The parties in their separation agreement which was executed on or about November 2015 provided for joint custody with [Amber] being designated [as] the primary residential parent and giving [Joshua] local rules parenting time except the parties agreed to equally divide the summer months. This arrangement did not work well for the younger children especially for the parties' minor son early on after the parties divorced. It has been somewhat difficult for the minor children to adjust to the parties' divorce and their forced separation [from] their father. Both of these children are amazing children who are very bright, articulate, and just plain adorable, and who, given their circumstances, explained to the Court their feelings and desires.
>
> The paternal grandparents had babysat for these children extensively and it is clear that these children love their paternal grandparents. It can often be difficult for children to adjust to being separated from a parent they

> love and even more so to adjust to other individuals that parents may seek to introduce into their lives before they have really had an opportunity to adjust to being away from one parent for a substantial part of the week. . . .
>
> Since [Joshua's] motion only sought modification of the two younger children the Court will not address any parenting time for the older daughter, Halle, only the two younger children. The Court have [sic] taken into consideration all of the testimony and evidence presented by the parties and taking into consideration the statements of the minor children that the Court interviewed believes that it would be in the best interest of the two younger children if [Joshua] was designated the primary residential parent and that [Amber] be awarded parenting time consistent with the local rules except for summer parenting time which will stay the same as in the parties separation agreement which is sharing equally the summer time by rotating possession on a weekly basis. KRS[2] 403.320.

(R. 198-99). Upset with the family court's decision, Amber filed a CR[3] 59.05 motion to alter, amend, or vacate the order or, in the alternative, to provide more specific factual findings. CR 52.01; CR 52.02. The family court denied Amber's motion. This appeal followed.

STANDARD OF REVIEW

The decision to modify timesharing is reserved to the sound discretion of the family court. *See Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). We will not disturb the family court's ruling absent an abuse of that discretion.[4]

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[2] Kentucky Revised Statutes.

[3] Kentucky Rules of Civil Procedure.

[4] "An abuse of discretion will only be found when a 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).

The family court's decision must also be based upon adequately supported facts. Its factual findings shall not be set aside unless clearly erroneous – that is, if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

ANALYSIS

Amber first argues the family court's decision cannot withstand scrutiny because there has been no change in circumstances to justify modifying timesharing. Amber's argument is flawed. That standard – applicable only to a custody modification – has no bearing on a decision to modify timesharing.

Custody and timesharing are distinct legal concepts. Custody refers to a parent's responsibility for and authority over his or her child, while timesharing refers to how much time a parent spends with his or her child. *Pennington*, 266 S.W.3d at 764-67. "Changing how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree." *Id.* at 767. It is undisputed Joshua sought only to modify timesharing, not custody.

A court may "modify an order granting or denying [timesharing] whenever modification would serve the best interest of the child[.]" KRS 403.320(3); *Pennington*, 266 S.W.3d 769 (KRS 403.320(3) controls a motion to modify timesharing). The timesharing modification standard, unlike KRS 403.340(3), which governs a change in custody, does not require a material change in circumstances before timesharing may be amended. *Shafizadeh v. Bowles*, 366 S.W.3d 373, 376 (Ky. 2011) ("Where the 'nature of the custody does not change,

the trial court is not bound by the statutory requirements that must be met for a change of custody, but can modify timesharing based on the best interests of the child as is done in modifying visitation.'" (quoting *Pennington*, 266 S.W.3d at 768)). Amber's argument that no change in circumstances existed to justify modifying timesharing is immaterial and meritless.

Amber next asserts that the family court's decision was clearly erroneous and against the weight of the evidence. She points out that none of the children stated he or she wanted to live with Joshua; they simply said they wanted to spend more time with him. Amber contends that the testimony established that, during Joshua's parenting time, the children spent most of their time with their paternal grandparents, not Joshua. She also faults the family court for declining to offer more specific findings as to why it chose to designate Joshua the primary residential parent of Ethan and Sadie.

Much of the testimony and evidence offered at the hearing amounted to inconsequential bickering over petty issues that had limited applicability to the issue of modifying timesharing. Amber attempted to prove Joshua was irresponsible, failed to keep medical appointments or transport the children to extracurricular activities, and that the children spent most of their time with their paternal grandparents, not Joshua, during his parenting time. Joshua disputed all of this with contradictory evidence of his own. Both submitted evidence that one disparaged the other in front of the children. Neither Amber nor Joshua is without fault. Both must continue to co-parent with their children's wellbeing in mind.

Ultimately, the family court spoke to Ethan and Sadie, both of whom expressed a desire to spend more time with Joshua. These children are old enough, and certainly articulate enough, to have a say as to where and with whom they live. The family court sought to abide by their wishes by naming Joshua their primary residential parent. While there were other ways to accomplish this task – such as Amber remaining the primary residential parent, but giving Joshua additional parenting time – modifying the primary residential parent designee was the method chosen by the family court. Its decision is fully supported by the record and its reasoning articulated in its order.

There is a common desire for parties to want more – more findings and more explanation for a court's decision. While parties are certainly entitled to adequate factual findings, CR 52.01, they are not always entitled to more findings. The family court's order in this case contains sufficient factual findings supported by the record justifying its decision to modify timesharing.

Finally, Amber claims the family court abused its discretion by modifying the primary residential parent designation for Ethan and Sadie. She claims the family court's "bare bones" order fails to reflect the best interest standards of KRS 403.270(2) and, therefore, must be reversed. We again disagree.

Again, the family court may modify timesharing if doing so is in the children's best interests. KRS 403.320(3); *Pennington*, 266 S.W.3d 769. Kentucky jurisprudence does not precisely define the best interest of a child. Instead, KRS 403.270(2) denotes a non-exclusive list of factors to be considered

when making a best-interest determination. The factors relevant to this matter include:

> (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[.]

KRS 403.270(2).

The family court did not specifically reference KRS 403.270 in its order, but it took into consideration the children's wishes, the parents' wishes, and the effect a timesharing modification would have on family dynamics, including the younger children's relationship with their older sister Halle and their maternal and paternal grandparents. There were no claims of post-decree domestic violence, modifying timesharing did not affect the children's school, and all of the parties and children involved are mentally and physically sound. We are convinced the family court's order reflects an appropriate, certainly adequate consideration of the standard required by KRS 403.270(2). It did not abuse or exceed its discretion in

choosing to modify timesharing by naming Joshua the primary residential parent for Ethan and Sadie.

We affirm the Hardin Family Court's September 6, 2016 order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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