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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001100-ME

JACKIE TESSIER — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JASON SHEA FLEMING, JUDGE
ACTION NO. 14-CI-01283

ETHAN BLOMBERG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

DIXON, JUDGE: The Appellant, Jackie Tessier ("Jackie"), appeals the June 14, 2018, order of the Christian Circuit Court, designating the Appellee, Ethan Blomberg ("Ethan") as primary residential custodian of the parties' minor child and granting Jackie visitation. For the reasons set forth below, we affirm.

The parties were never married and are the parents of one minor child, who was born in January 2014. In November 2014, Ethan filed a petition for

custody in Christian Circuit Court. At the time, Ethan was stationed at Fort Campbell in Kentucky and Jackie was living in Fayette, Ohio. After a final hearing, a final order of paternity, custody, and visitation was entered on August 9, 2016. The circuit court granted the parties joint custody, with Jackie as the child's primary residential custodian and Ethan having visitation. The order included detailed guidelines for Ethan's visitation. Neither party appealed the 2016 order.

On November 15, 2016, Ethan filed a motion to hold Jackie in contempt, alleging that she had refused to communicate or cooperate on Ethan's visitation with the child. In his motion, Ethan stated that he had yet to visit with the child because of Jackie's refusal to follow the circuit court's orders. He also requested visitation for the upcoming holiday season. The court initially found Jackie in contempt for willful and intentional violation of court orders, but later vacated that order. However, the circuit court did grant Ethan visitation for Christmas 2016.

On January 4, 2017, Ethan filed an *ex parte* motion for temporary custody, accompanied by an affidavit stating that he wished to be named the child's primary residential custodian. The motion was granted on the same day and Ethan took possession of the child shortly thereafter. Ethan then filed motions to hold Jackie in contempt and to restrict Jackie's visitation. Jackie filed a motion to set aside the *ex parte* order. In an order entered on March 21, 2017, the circuit

court found Jackie in contempt of court for "willfully and intentionally violating the [c]ourt's orders" in a "calculated move . . . to try to keep custody of the child and alienate the father." The court sentenced Jackie to ninety days with sixty days probated on the condition that she comply with the court's orders. The March 21, 2017, order also granted Jackie no visitation until she served thirty days in jail and stated that her primary residential custody would be reinstated after she served her sentence.

On July 13, 2017, Ethan filed a motion to modify custody, again requesting to be named the child's primary residential custodian. Later, the circuit court granted Ethan temporary custody pending a hearing on timesharing and custody. On February 16, 2018, Ethan renewed his July 2017 motion to modify custody.

Following a hearing on custody and timesharing, the circuit court entered a final order on June 14, 2018 maintaining joint custody but modifying timesharing by designating Ethan as primary residential parent and granting Jackie visitation. By this time, Jackie had not seen the child since January 2017 and had not spoken to him in almost one year. The court's order included detailed guidelines for Jackie's visitation, designed to reintroduce her to the child. The circuit court also probated Jackie's thirty-day sentence on the condition that she

comply with all court orders for two years. Jackie's motion for relief under CR[1] 60.02 was denied by the circuit court. This appeal followed.

"[Circuit] courts are vested with broad discretion in matters concerning custody and visitation." *Glodo v. Evans*, 474 S.W.3d 550, 552 (Ky. App. 2015) (citation omitted). As such, timesharing and visitation cases are reviewed under an abuse of discretion standard. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). Under this standard, a reviewing court may "only reverse a [circuit] court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000) (citing *Wilhelm v. Wilhelm*, 504 S.W.2d 699, 700 (Ky. 1973)).

> The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. The test is not whether we as an appellate court would have decided the matter differently, but whether the [circuit] court's rulings were clearly erroneous or constituted an abuse of discretion.

Glodo, 474 S.W.3d at 552 (quotation marks and citations omitted). However, "we afford no deference to the trial court's application of the law to the facts." *Id.* at 553 (quoting *Laterza v. Commonwealth*, 244 S.W.3d 754, 756 (Ky. App. 2008)). Therefore, "we conduct a *de novo* review of the [circuit] court's application of the

[1] Kentucky Rules of Civil Procedure.

law to the established facts to determine whether the ruling was correct as a matter of law." *Id.*

Jackie asserts two claims on appeal. First, she argues that the circuit court erred in failing to apply KRS[2] 403.340 when it modified custody in its June 14, 2018, order. Second, she contends that even if the circuit court was correct on the law, it abused its discretion in designating Ethan the child's primary residential parent.

First, Jackie argues that the June 14, 2018, order impermissibly modifies custody without applying KRS 403.340. In support of her argument, she claims that, though the 2016 order stated that the parties had joint custody, it essentially granted her sole custody because she was designated primary residential parent and Ethan received only visitation. She then argues that the 2018 order modified custody, not timesharing, by granting Ethan sole custody, which required the application of KRS 403.340, not KRS 403.320. In response, Ethan argues that the circuit court granted the parties joint custody in its 2016 order and modified only timesharing in its 2018 order, making KRS 403.320 the applicable standard.

The crux of this case is the question of whether the circuit court modified custody or timesharing in its 2018 order. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), is particularly instructive in distinguishing these two

[2] Kentucky Revised Statutes.

concepts. In *Pennington*, the Supreme Court explained that custody and timesharing are distinct legal concepts and held that the distinguishing feature of custody is not the amount of time spent with each parent, but whether decision-making is vested in either one parent or both. *Id.* at 764. However, the Supreme Court also acknowledges that "[t]o most people, having custody means having possession of the child." *Id*. at 767. This confusion has led parents to often request a modification of custody or timesharing when they are actually seeking a modification of the other. *Id.* Adding to the confusion, "the terms visitation and timesharing are used interchangeably" by many circuit courts when parents share joint custody. *Id*. at 765. Furthermore, when parties share joint custody, "one parent may be designated the 'primary residential parent,' a term that is commonly used to denote that the child primarily lives in one parent's home[.]" *Id*. However, such designations are "often inconsistent with the legal meaning of joint custody, wherein both parents are equal legal custodians, but [these designations are] nonetheless prevalent." *Id*. at 767. *Pennington* makes clear that, regardless of the terminology used to describe a timesharing arrangement, custody concerns only who has the authority to make decisions regarding the child, not the amount of time the child spends with each parent.

Because of the unique facts of each case, modifications of custody and timesharing "must be decided in the sound discretion of the trial court." *Id.* at 769.

KRS 403.340 governs the modification of custody and "KRS 403.320 either applies directly or may be construed to do so" when a modification of visitation or timesharing is sought. *Id.* at 765. While a modification of custody changes where decision-making is vested, a modification of timesharing "does not change the legal nature of the custody ordered in the decree." *Id*. at 767. Furthermore, "a motion seeking to change the primary residential parent [is] in reality a motion to modify visitation/timesharing and not a motion to modify custody." *Humphrey v. Humphrey*, 326 S.W.3d 460, 463 (Ky. App. 2010). Because modifications of timesharing do not alter custody, the circuit court is not bound by the requirements of KRS 403.340. *Pennington*, 266 S.W.3d at 768.

In this matter, because the circuit court modified only timesharing in its June 14, 2018, order, it was not required to apply KRS 403.340 because it did not disturb the joint custody arrangement found in the 2016 order. The circuit court acted within its discretion when it determined that Ethan's motion was for a modification of timesharing and that a modification of custody was not warranted in this matter. *See Humphrey*, 326 S.W.3d at 464. Furthermore, although Jackie argues that the circuit court's repeated use of the terms "visitation" and "primary residential parent" indicates an intention to grant her sole custody in 2016, which was then modified by the 2018 order, use of these terms refers only to the amount of time spent with each parent and does not alter the nature of joint custody.

Pennington, 266 S.W.3d at 768. Furthermore, though both the 2016 and 2018 orders granted relatively limited timesharing to one parent, an equal division of time is not determinative of custody. *Id*. at 764. Therefore, because the circuit court's 2018 order modified only timesharing, KRS 403.320 was applicable.

Additionally, we note that had Jackie felt that the circuit court erred in granting the parties joint custody in its 2016 order, she had multiple opportunities to address those concerns at the time. She did not do so. Jackie could have filed a motion to alter, amend or vacate the order, pursuant to CR 59.05. Alternatively, she could have filed a notice of appeal within thirty days after entry of the 2016 order. CR 73.02(1)(a). Because Jackie did not timely appeal from the 2016 order, the scope of the present appeal does not extend to consideration of any assignment of error pertaining to that order. *See Gibson v. Gibson*, 211 S.W.3d 601, 605 (Ky. App. 2006).

Jackie next argues that even if the circuit court correctly applied the law, it abused its discretion when it modified timesharing to designate Ethan as the primary residential parent and to grant Jackie visitation. Jackie claims that the circuit court did not make this decision based upon the child's best interests, but rather changed the child's primary residential parent punitively because she did not serve her thirty-day sentence for contempt of court. Furthermore, she argues that,

in considering her misconduct, the circuit court failed to find that those actions affected or were likely to affect the child adversely.

Upon review of the record, it is apparent that the circuit court carefully weighed the testimony and evidence in reaching the conclusion that a modification of timesharing would be in the child's best interest. The circuit court chose to consider the best interest factors in KRS 403.270(2) as a guide, which is not required, but also not barred, by statute. Although the circuit court noted its concern that Ethan had done little to help maintain phone contact between Jackie and the child and the possibility he may be deployed in the future, it was clear that Jackie's misconduct weighed heavily against her. The circuit court found the following:

> [Jackie] has proven time and again that she has very little regard for the orders of the [c]ourt. Her actions have shown that she has not considered how her inappropriate conduct would affect the minor child. She refused to grant [Ethan] his [c]ourt ordered visitation on several occasions before the [e]x [p]arte order was entered. She has refused to serve her jail sentence, which initially was the only thing keeping her from getting possession of the child back. At the time of the [f]inal [h]earing, she had not seen her son in a year and a half. The [c]ourt is troubled by the fact that she would not do everything in her power to see her son[.]

Furthermore, the court listed a number of steps Jackie could have taken to reestablish contact with the child and expressed concern that none of these

"reasonable and obvious" actions was taken. Based upon these facts, the circuit court found the following:

> [Jackie's] repeated attempts to restrict [Ethan's] visitation, her defiant attitude toward the [c]ourt's authority, her refusal to admit fault, her disregard for the [c]ourt's orders, and her refusal to take the necessary steps to maintain a relationship with the minor child all [led] the [c]ourt to find that this factor weighs heavily toward [Ethan] as primary residential parent.

In modifying timesharing, the circuit court must only find that such a change is in the child's best interests and the standard in *Pennington* does not require a finding of wrongdoing on the part of one of the parents. However, Jackie is correct that a circuit court may only consider misconduct of a parent that may have adverse impacts on the child. *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). Here, the circuit court clearly found that Jackie's repeated noncompliance with court orders, denial of Ethan's court ordered visitation, and refusal to serve her thirty-day sentence had adverse impacts on the child, including alienating Ethan from him. Based upon our review, we are not persuaded that the circuit court abused its discretion by modifying timesharing.

For the foregoing reasons, the June 14, 2018, order of the Christian Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
David B. Mour Louisville, Kentucky	James E. Bruce, Jr. Hopkinsville, Kentucky