RENDERED: FEBRUARY 21, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001764-ME

BRITTANY MULVANEY — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE JOHN F. VINCENT, JUDGE
ACTION NO. 13-CI-00771

ERIC HALE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brittany Mulvaney brings this appeal from a November 9, 2018, Order of the Boyd Circuit Court denying her motion to relocate out-of-state with the parties' minor child. We affirm.

Brittany Mulvaney and Eric Hale were never married but had one child in common, a daughter, A.H. On September 6, 2013, Eric filed a Petition for Custody of two-year-old A.H. Thereafter, Brittany and Eric entered into an

Agreed Order on November 18, 2013 (2013 Agreed Order) that provided they would have joint custody of A.H. with equal timesharing. Pursuant to the terms of the 2013 Agreed Order, the parties would alternate time with A.H. on a "two-two-three day" schedule. 2013 Agreed Order at 1. Following entry of the 2013 Agreed Order, the parties did not adhere to the timesharing schedule. Instead, the parties agreed to share time with A.H. according to their work schedules. And, for approximately three years, the parties were able to agree upon timesharing. In the fall of 2016, Eric began renovating his home and moved in with his fiancée, their new baby, and his fiancée's son. As a result Eric did not exercise overnight timesharing with A.H.

Then, on Easter weekend 2017, Eric was exercising timesharing with A.H. on Saturday. Brittany had expected A.H. home that afternoon but agreed to allow Eric to extend the timesharing by a few hours. Although A.H. had not had an overnight visit with Eric in some nine months, Eric decided to keep A.H. that night. Despite repeated requests by Brittany, Eric refused to return A.H. on Saturday. Brittany then expected Eric would return A.H. on Easter Sunday. The terms of the 2013 Agreed Order provided Brittany was to have timesharing with A.H. on Easter Sunday. Eric did not return A.H. on Sunday either. On Monday morning, Eric stopped by Brittany's home to get A.H.'s school backpack before taking her to school. From that weekend forward, Brittany and Eric were unable to

agree upon timesharing and instead followed the terms of the two-two-three-day schedule as provided in the 2013 Agreed Order.

On April 20, 2017, Brittany filed a Verified Motion for Contempt alleging Eric had violated the terms of the 2013 Agreed Order by keeping A.H. on Easter weekend. Eric responded and also filed a motion seeking a specific timesharing schedule. The matter was set for a hearing before the Domestic Relations Commissioner. Before the hearing was conducted, Brittany filed a Verified Motion to Modify Timesharing and Notice of Intent to Relocate on October 27, 2017. Therein, Brittany asserted that A.H. had not adjusted well to the two-two-three-day schedule. Brittany requested that Eric's timesharing occur on weekends and other times A.H. was not in school. Brittany further requested that A.H. be permitted to relocate with her to Toledo, Ohio, for a job Brittany's fiancé had taken. Eric objected to the relocation and requested that he be designated the primary residential parent.

After numerous continuances of the hearing on the pending motions, the hearing was conducted on all pending motions before the Domestic Relations Commissioner over a three-day period - August 14, August 28, and October 3, 2018. At the hearing, Brittany testified that she had married her fiancé in

November 2017, and he had subsequently accepted a job in Pennsylvania. Brittany was now seeking permission to relocate with A.H. to Beaver, Pennsylvania.[1]

By Report and Recommendation of Domestic Relations Commissioner (DRC) entered October 26, 2018, the DRC recommended, in relevant part, the following:

> 1. That [Brittany's] Motion for Relocation is overruled.
>
> 2. [Eric's] home shall be designated as home base for purposes of enrolling the parties' child in school.
>
> 3. Should [Brittany] decide to move, she shall receive parenting time with the parties' minor child pursuant to the Boyd County Long Distance Timesharing Guidelines.

October 26, 2018, Report and Recommendation of DRC (DRC Report) at 9. Brittany filed exceptions to the DRC's recommendation, to which Eric filed objections thereto. The exceptions were denied by the circuit court and by Order entered November 9, 2018, the circuit court followed the recommendation, holding it was in the best interests of the child not to relocate to Pennsylvania. This appeal follows.

[1] Brittany Mulvaney never relocated with A.H. to Toledo, Ohio. Before the hearing was conducted on the pending motion to relocate, Brittany's fiancé/husband accepted a job in the Pittsburgh, Pennsylvania area.

We begin our analysis by noting that a motion to modify timesharing is deemed an action tried without a jury. *Anderson v. Johnson*, 350 S.W.3d 453, 458-59 (Ky. 2011). Thus, our standard of review is governed by Kentucky Rules of Civil Procedure (CR) 52.01. CR 52.01 provides that the circuit court's "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This Court will not disturb those findings unless they are clearly erroneous. *Moore v. Asente*, *110* S.W.3d 336, 353-54 (Ky. 2003). Findings of fact are not clearly erroneous if supported by substantial evidence of a probative value. *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). A circuit court's rulings as to timesharing may be reversed only for an abuse of discretion. *Hempel v. Hempel*, 380 S.W.3d 549, 551 (Ky. App. 2012).

Brittany contends the circuit court erred by failing to apply the proper standard for deciding motions to relocate as set forth in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Specifically, Brittany contends the court failed to apply the best interests of the child standard to determine the relocation issue.

It is well-established that "[a] residential parent who wishes only to change the visitation/timesharing due to his relocating with the child may bring the motion to modify visitation/timesharing under KRS 403.320." *Pennington*, 266 S.W.3d at 769. And, "when only visitation/timesharing modification is sought, the

specific language of KRS 403.320(3)[2] controls, which allows modification of visitation/timesharing whenever modification would serve the best interests of the child[.]" *Id*. at 769 (quotations omitted).[3]

When determining the best interests of the child, the court must consider all relevant factors including those set forth in KRS 403.270(2). Among those enumerated in KRS 403.270(2), the following are relevant herein: wishes of the child's parents; interaction and interrelationship of the child with her parents, siblings, and other persons who may significantly affect the child's best interests; and child's adjustment to her home, school, and community.

In the case *sub judice*, the circuit court made several findings relevant to A.H.'s best interests as follows:[4]

> [T]he parties agreed that they should share parenting duties for their child on an equal basis. Both parents

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[2] Kentucky Revised Statutes (KRS) 403.320 provides, in relevant part:

> The court may modify an order granting or denying visitation rights whenever modification would serve the *best interests* of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

KRS 403.320(3) (emphasis added).

[3] Brittany makes references to KRS 403.340. However, KRS 403.340 applies to a modification of custody and not to a modification of timesharing. Neither party sought to modify the award of joint custody; thus, any reliance upon KRS 403.340 is misplaced. *See Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008).

[4] The circuit court effectively adopted the findings recommended by the Domestic Relations Commissioner as provided for in the Kentucky Family Court Rules of Procedure and Practice 4.

> have been very active in their child's life. . . . That [the] move would make shared parenting impossible. . . . All of the child's extended family on both sides reside in the Ashland, KY area. . . . There is no doubt that she is used [sic] to being with each of her parents almost on a daily basis. . . . [S]he has not been away from either parent for any extended length of time. In the Ashland, KY area, she has not only [Eric], but her sister and another sibling that may already be born, as well as the majority of her extended family.

DRC Report at 7-8.

The court also stated that because Brittany would not be employed after the move, she would be free to travel back to the Ashland area to have parenting time with A.H. Based upon consideration of these factors, the circuit court determined it was in A.H.'s best interests that she not relocate to Pennsylvania with Brittany.

After a thorough review of the record, we do not believe the circuit court's findings of fact were clearly erroneous or that the court abused its discretion in denying Brittany's motion to relocate with A.H. to Pennsylvania. Further, we hold the circuit court correctly applied the best interests of the child standard to determine the relocation issue.

For the foregoing reasons, the Order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Sharon E. Rowsey
Ashland, Kentucky

BRIEF FOR APPELLEE:

Paul Craft
Greenup, Kentucky