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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000462-ME

TODD HOUSTON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT[1]
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 00-FC-009168

DEBORAH DUNCAN, NOW FRANK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Todd Houston has appealed from the February 12, 2004, order of the Jefferson Family Court which modified a previous custody order and awarded primary residence and physical custody of the minor child, Brittani Nicole Duncan, to Deborah Frank, the child's maternal grandmother. Having

[1] This case originated in Jefferson Circuit Court with Hon. John W. Potter presiding. On December 11, 2000, following the creation of the family court system, an order was entered transferring this case to the Jefferson Family Court.

concluded that the family court's findings in support of the modification of custody pursuant to KRS[2] 403.340 and KRS 403.270(2) were sufficient and that it did not abuse its discretion, we affirm.

Brittani's parents are Todd Houston and Stacey Duncan, who is the daughter of Deborah Frank. Todd and Stacey dated from November 1992 to October 1993,[3] and Stacey became pregnant during that time. Brittani was born on August 15, 1993. On November 29, 1993, Deborah filed a verified petition for temporary custody of Brittani, naming Stacey as the respondent.[4] On December 6, 1993, Stacey filed an entry of appearance and waiver of notice, admitting that it would be in Brittani's best interests to grant temporary custody to Deborah. On that same date, an agreed order was entered providing that Deborah would have temporary custody of Brittani with Stacey having visitation with Brittani and reserving the issue of child support.

On February 27, 1995, Todd filed a motion to intervene in the case and he and Stacey[5] filed a joint motion for temporary

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[2] Kentucky Revised Statutes.

[3] Todd was 20 years of age and Stacey was 18.

[4] Todd was not joined as a party to the proceedings and Deborah's petition claimed that Todd had denied being Brittani's natural father and had refused to pay child support.

[5] Todd and Stacey were represented by the same attorney, who entered his appearance on their behalf on February 27, 1995.

custody of Brittani.[6] Todd also filed a response to Deborah's verified petition, in which he stated that he was Brittani's natural father and that "he was not given notice of any of the prior proceedings in this case, including the granting of temporary custody . . . by agreed order between [Deborah] and [Stacey]." He also claimed that neither he nor Stacey desired for Deborah to have temporary custody of Brittani. Todd requested joint custody with Stacey, with Todd being the primary residential custodian. The circuit court in an order entered on March 6, 1995, allowed Todd to intervene in the case.

On March 27, 1995, Todd filed a motion to hold Deborah in contempt for refusing to allow him visitation with Brittani.[7] Deborah filed several motions,[8] including a motion requesting psychological evaluations of Todd and Stacey.[9] On April 10, 1995, the circuit court ordered that psychological evaluations

[6] In Todd's motion to intervene, he stated that he was declared Brittani's father by an order entered on February 16, 1995. However, that order is not filed in the record on appeal.

[7] The affidavit stated that during a hearing on February 27, 1995, the circuit court ordered that Todd be allowed visitation with Brittani. However, there is no order to this effect in the record on appeal, and we have not been provided with a videotape of that hearing.

[8] Most of these motions were never addressed by the circuit court.

[9] Deborah also filed a response objecting to Todd's visitation request on the grounds that Todd had a criminal case pending in Jefferson District Court and that increased visitation should be denied until the psychological evaluations could be completed.

be performed on Deborah, Todd, and Brittani.[10] Todd filed a motion for his parents to have visitation with Brittani, and the circuit court ordered said visitation on May 1, 1995.[11] On May 8, 1995, the circuit court entered an order pursuant to Deborah's motion that Jefferson County public schools and DeSales High School, a private Catholic school, release Todd's school records. On June 17, 1995, the circuit court entered an order that all of Todd's anger control records be provided.

On July 20, 1995, an agreed order[12] was entered between Deborah and Todd. The order stipulated that Deborah and Todd would share joint custody of Brittani, with Todd having "primary physical possession" of Brittani. Each party was to have "custody" of Brittani 50 percent of the time and Stacey was allowed visitation. No child support was to be paid by any of the parties. On June 5, 1996, Stacey filed a motion to

[10] A motion filed by Deborah requesting the production of the medical and juvenile records of Todd was granted by the circuit court in two separate orders, each dated May 1, 1995.

[11] Danny and Joyce Houston, Todd's parents, were allowed visitation with Brittani every other weekend from 6:00 p.m. on Saturday until 6:00 p.m. on Sunday. This visitation order was modified by orders entered on May 9, 1995, changing the time of the Houstons' visitation to 11:00 a.m. Saturday until 11 a.m. on Sunday. Todd resided with his parents during this time and continued to do so until his marriage in September 2000. Todd was granted visitation with Brittani every week on Monday and Wednesday from 7:30 a.m. until 6:00 p.m. and on Father's Day. Stacey was granted visitation with Brittani from 11:00 a.m. until 6:00 p.m. on Mother's Day.

[12] Hon. John W. Potter signed the order.

establish definite visitation.[13] She claimed that neither Todd nor Deborah was allowing her "appropriate" visitation with Brittani and she requested overnight visitation. Deborah filed a motion for a psychological evaluation of Stacey, which was granted by order entered on June 18, 1996. The circuit court referred this case to the Jefferson County Domestic Relations Commissioner on June 11, 1996, with a handwritten request to "expedite" the matter. A hearing was held before the Commissioner on June 27, 1996. His report was filed on July 10, 1996, and the family court followed the recommendations and entered an order on July 12, 1996. The order did not allow Stacey overnight visitation, but granted her specific visitation with Brittani.

In an order dated December 11, 2000, this case was transferred to the new family division of the Jefferson Circuit Court. On December 12, 2000, Todd filed a motion requesting that the family court enter an order setting forth specific visitation with Brittani for Deborah and him.[14] On December 20, 2000, the family court, by separate orders, set Todd's Christmas visitation with Brittani and ordered the parties to complete a

[13] Stacey hired a new attorney, who entered his appearance for her on the same date.

[14] By this time, according to a letter of record from Stacey's former attorney, Stacey's whereabouts and address were unknown and she was not considered for visitation.

mediation session regarding the remainder of Todd's visitation requests.[15] The mediation outcome filed on March 9, 2001, noted that the parties reached full agreement regarding the visitation issue.

On July 11, 2001, Deborah filed a motion for additional visitation with Brittani. In her affidavit, Deborah stated that Todd's wife, Melissa Houston, and his mother, Joyce, had contacted Child Protective Services (CPS) and made allegations of child abuse against Deborah's husband, Bud Frank. Deborah claimed that her attorney advised her not to have any contact with Brittani until the CPS complaint was resolved. Deborah also claimed that due to the complaint she missed her regular visitation with Brittani and since the complaint was dismissed due to lack of evidence, she was entitled to make up the missed visitation. Again, the family court ordered the parties to attend mediation to resolve the issues. An agreement was reached between the parties and filed on July 24, 2001.

On June 12, 2003, Todd filed a motion and affidavit to modify custody. Todd stated in his affidavit that it would be in Brittani's best interests for her to permanently reside with him, with Deborah having some visitation. The family court

[15] On February 7, 2001, Deborah filed a motion to schedule a mediation date and the family court entered an order on February 15, 2001, establishing that mediation had been scheduled and reserved Deborah's oral request for attorney's fees, pending the outcome of mediation and a written motion and affidavit being filed by Deborah.

entered a mediation order on July 2, 2003. A handwritten, partial mediation agreement[16] between the parties was entered on July 31, 2003; however, the agreement did not address the change of custody issue. Since the custody issue had not been resolved through mediation, Todd renewed his motion to modify custody and a hearing was held before the family court on October 22, 2003.

At the hearing, Todd offered testimony from Janice Haddaway, a child therapist who saw Brittani eight to ten times prior to trial, his mother, his wife, and himself. Through their testimony, it was established that Todd was a caring father; however, he worked third shift at his employment and did not see Brittani much during the week.[17] There was also testimony that Brittani was a nervous child who suffered from an adjustment disorder, anxiety, and depression. It was further established through their testimony that there were ongoing disputes between Deborah and Todd and his wife.

Deborah presented testimony from her husband and herself. Both testified that Brittani was a very quiet child, that she was happy living with them, that Deborah worked until 6:30 p.m. on weeknights, and that Bud took Brittani to school

[16] The parties agreed to communicate by e-mail.

[17] On weekdays Todd saw Brittani for approximately 45 minutes in the morning before she went to school; for approximately 30 minutes after she got home from school; and spoke with her by phone around 7:30 p.m. on his break. He spent much more time with her on the weekends she was with him and all his vacation time, 17 days a year, was spent with her.

and picked her up from school. Deborah's testimony confirmed that there had been constant disputes between the parties. When asked by both her counsel and Todd's counsel, Deborah testified that she would be happy to have Brittani reside in her home full-time.

The family court entered an opinion and order on February 12, 2004,[18] in which it determined that there was a need for a primary residential custodian of Brittani. The family court found that based on the evidence presented that it would be in Brittani's best interests for Deborah and Todd to retain joint custody, but for Deborah to serve as the primary residential custodian. This appeal followed.[19]

In reviewing a child custody award, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous.[20] A finding of fact is clearly erroneous if it is not supported by

[18] On November 10, 2003, the family court entered an order that Deborah and Todd must communicate with each other prior to addressing any issues about Brittani.

[19] Todd filed his notice of appeal in this case on March 4, 2004. His pre-hearing statement was due on March 24, 2004, but not received until March 25, 2004, and this Court issued a letter that the statement was filed late. Todd then filed a motion for additional time on April 2, 2004, and tendered with it his pre-hearing statement. There was no response filed by Deborah and on April 14, 2004, this Court granted Todd's motion for additional time. On May 19, 2004, this Court determined there was no need for a pre-hearing conference and ordered that Todd's brief was due on July 28, 2004. His brief was filed on August 16, 2004.

[20] Kentucky Rules of Civil Procedure (CR) 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

substantial evidence. Substantial evidence is evidence sufficient to induce conviction in the mind of a reasonable person.[21] Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court.[22] If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion.[23] Abuse of discretion implies that the family court's decision is unreasonable or unfair.[24] Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion.[25]

Todd asserts that as Brittani's natural father, he has a superior right to her custody. However, the family court found that Deborah, as a joint custodian of Brittani under the agreed order of July 20, 1995, had the same custodial rights as

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[21] Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003).

[22] Reichle, 719 S.W.2d at 444.

[23] Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982); Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2000).

[24] Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

[25] Sherfey, 74 S.W.3d at 782-83.

Todd.[26] It is important to note that Todd failed to move the family court for a factual finding that Deborah did not have equal standing to pursue custody. This failure is fatal to Todd's argument that he has a superior right to custody.[27] While normally a natural parent has a superior right to a child,[28] that right can be waived. The family court's finding that Todd waived his superior right by entering into an agreed order with Deborah in which they shared joint custody of Brittani is supported by clear and convincing evidence.[29]

In Vinson,[30] the Supreme Court of Kentucky discussed the rights of a non-parent pursuing custody of a child:

> When a non-parent does not meet the statutory standard of de facto custodian, the non-parent pursuing custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian; or (2) that the parent has waived

[26] Kentucky Civil Rule (CR) 52.04; see Vinson v. Sorrell, 136 S.W.3d 465, 471 (Ky 2004); and Jones v. Jones, 577 S.W.2d 43, 46 (Ky.App. 1979).

[27] Cherry 634 S.W.2d at 423.

[28] See Davis v. Collingsworth, 771 S.W.2d 329, 330 (Ky. 1989).

[29] The family court stated in its February 12, 2004, order:

> [Todd] has apparently lost sight of the fact that, pursuant to their Agreed Order granting them equal time with the child, [Deborah] has been placed on the same level as a parent with regard to the child and, as pointed out above, a significant change in circumstances must occur for the Court to consider modification of this relationship between grandmother and the child.

[30] 136 S.W.3d at 468.

> his or her superior right to custody by clear and convincing evidence [footnotes omitted] [emphasis original].

Just as any other constitutional right can be waived, a parent through an intentional or voluntary relinquishment of his superior right to custody can waive that right.[31] "Waiver requires that there must be some statement or action that unequivocally waives the right to superior custody."[32] In this case, once the agreed order was entered establishing Todd and Deborah as joint custodians of Brittani, Deborah assumed the role of a custodial parent.[33] Deborah is not a de facto custodian of Brittani under KRS 403.270, but she is a de jure custodian because she was granted custody under a court order. Also, it was not necessary for the family court to find that Todd was an unfit parent, because pursuant to Vinson, the family

[31] Greathouse v. Shreve, 891 S.W.2d 387, 390 (Ky. 1995).

[32] Diaz v. Morales, 51 S.W.3d 451, 454 (Ky.App. 2001).

[33] Todd argues that a parent does not lose his/her superior right to custody just because "a child is left in the care of a non-parent for a considerable length of time." The custody situation in this case far exceeds this as evidenced by the family court's order. A person can contract away their superior right to custody of his child. Boatright v. Walker, 715 S.W.2d 237 (Ky.App. 1986). There is no indication that the July 20, 1995, agreed order was temporary in nature and thus it was sufficient evidence to prove waiver of the superior right to custody. See James v. James, 457 S.W.2d 263 (Ky. 1970). Todd argues that the agreed order "constituted a vast improvement with respect to his parental rights" and thus does not constitute proof of a waiver on his part. However, what Todd fails to acknowledge is that he already had the superior right as Brittani's biological father and the agreed order did not give him rights, but only minimized his rights as he agreed to share them with Deborah. Todd could have argued his superior right to Brittani and questioned Deborah's standing prior to signing the agreed order; however, he failed to do so.

court could find either a waiver of the superior right or that the natural parent was unfit.

In Scheer v. Zeigler,[34] this Court held that the criteria for modification of a joint custody award is the same as for modification of a sole custody award. Thus, for there to be modification of joint custody, as in all custody cases, the party seeking modification must first meet the threshold requirements for modification contained in KRS 403.340.

In this case, the family court properly set forth the statutes for modification of custody.[35] For a proposed modification occurring more than two years[36] after entry of the custody decree, KRS 403.340(3) and (4) set forth the requirements which must be met in order for the family court to modify a prior custody award.[37] The family court properly noted

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[34] 21 S.W.3d 807 (Ky.App. 2000).

[35] Todd next argues to this Court that KRS 403.340 should not apply to custody awards between a parent and a non-parent, but cites no authority to support this argument. As we noted, Todd waived this superior right to custody of Brittani by clear and convincing evidence, e.g., the agreed order dated July 20, 1995. The agreed order is clear that the party's had joint custody of Brittani. "Joint custody modification falls exclusively within the purview of KRS 405.340 and .350 . . . ." Fenwick v. Fenwick, 114 S.W.3d at 784. Therefore, we find no merit to this argument.

[36] Todd's motion for modification was filed almost 8 years after the agreed order was entered on July 20, 1995.

[37] KRS 403.340(3) and (4) provide as follows:

> (3) If a court of this state has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify 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. When determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:

(a) Whether the custodian agrees to the modification;

(b) Whether the child has been integrated into the family of the petitioner with consent of the custodian;

(c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;

(d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;

(e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and

(f) Whether the custodian has placed the child with a de facto custodian.

(4) In determining whether a child's present environment may endanger seriously his physical, mental, moral, or emotional health, the court shall consider all relevant factors, including, but not limited to:

(a) The interaction and interrelationship of the child with his parent or parents, his de facto custodian, his siblings, and any other person who may significantly affect the child's best interests;

(b) The mental and physical health of all individuals involved;

(c) Repeated or substantial failure, without good cause as specified in KRS 403.240, or either parent to observe visitation, child support or other provisions of the decree which affect the child, except that modification of custody orders shall not be made solely on the basis of failure to comply with visitation or child support provisions, or on the basis

that in determining the best interests of the child, it is to apply KRS 403.270(2).[38]

Todd acknowledges that pursuant to the statutes a modification of custody was appropriate. In fact, by filing his motion, Todd sought a modification so he could become the sole custodian. Todd further conceded this need for modification in his brief to this Court when he stated:

> The family court correctly found that there had been a significant change in circumstance, warranting modification. More

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> of which parent is more likely to allow visitation or pay child support;
>
> (d) If domestic violence and abuse, as defined in KRS 403.720, is found by the court to exist, the extent to which the domestic violence and abuse has affected the child and the child's relationship to both parents.

[38] KRS 403.270(2) states, in pertinent part, as follows:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> (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;

> specifically, the Court found the parties' relationship was strained and that they found it difficult to communication [sic] and cooperate with respect to Brittani. The child was upset about this growing discord and was, consequently, seeing a therapist [citations omitted].[39]

Thus, Todd does not argue before this Court that the family court did not make sufficient findings regarding the need for modification, but rather that the family court erred in awarding custody primarily to Deborah, rather than to him.

The family court stated:

> [T]he Court concludes that it would be in the best interest of Brittani for one party to have primary residence, as well as final decision[-]making authority for her. The evidence as presented indicates the grandmother is best suited to take on the role of primary residential parent. Father had proven to be a very caring and loving father. However, his time with the child is limited. The Court must remind the parties that the decision it is making is designed to promote the best interest of the child. The child cannot thrive in an environment in which everyone she loves is constantly fighting and where she is placed squarely in the middle. The solution for the Court is to put the child in one primary residence, with one primary custodian who, in the event of disagreement, can make a decision

[39] The family court found that both parties exhibited behaviors, including the constant bickering over Brittani's medical care, which led to Brittani's "nervous stomach" and the change in her behavior to a more quiet and reserved child. The family court further made findings regarding its interview with Brittani, and while it attempted to keep her feelings private, the family court stated its interview with Brittani was "very revealing." The family court found "the child did confirm for the court that there is a great amount of discord between the parties, and that it is her wish for the fighting to just stop." The family court concluded a change had to be made to stop the fighting between the parties and the effect that it had on Brittani.

> regarding the major aspects of the child's life. Brittani should never go without proper medical treatment, etc. simply because two people whom she loves and whom [sic] love her can not, or will not, agree [emphasis added].[40]

Todd argues that it was error for the family court to name Deborah as Brittani's primary residential custodian, because she had not filed a motion for modification. However, once Todd filed his motion, the family court was required to determine whether change of custody was proper and what custodial arrangement was in the best interests of Brittani. At the custody modification hearing, Deborah was questioned by counsel for both parties regarding her desire to have custody of Brittani. Todd did not object to this testimony coming into evidence. Further, the family court judge plainly explained to the parties at the hearing that it would determine with whom Brittani would live. The family court judge interviewed Brittani in his chambers, but the interview was viewed in the courtroom by counsel for both parties. No objection was made to the family court judge's interview of Brittani. In the family court judge's discussion with Brittani, both parties were considered as custodians, but there was no objection made by

[40] The family court had previously stated:

> The issue surrounding the flu shot is a perfect example of such. Neither party took any steps contrary to what the other wished or recommended; rather, they simply could not reach an agreement, not knowing who should take the responsibility for making the final decision.

Todd at that time. After the interview, the family court judge again spoke to the parties and their counsel. The judge made it clear that he was making a decision as to whom Brittani would live with, but no objection was made by Todd.

Todd argues that with the exception of finding that he had "limited" time to spend with Brittani, the family court did not provide any basis for modification of custody in favor of Deborah. However, Todd failed to file a motion under CR 52.04 asking the family court to make more specific findings as to its choice for primary residential custodian for Brittani. CR 52.01 provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specifically . . . ." CR 52.04 provides:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Obviously, factual findings in support of the family court's determination of primary residential custodian are essential to its judgment. Todd did not at any time move the family court to make more specific findings to support its custody modification award. Although Todd claims the findings should have been more detailed, he argues that he was not

required to ask the family court for more specific findings under CR 52.02 or CR 52.04 because the family court's decision was not silent on this issue. He cites no law to support this argument, which we determine to be without merit.

In Crum v. Commonwealth,[41] the parent argued that the family court failed to state "specifically" its findings to justify termination of his parental rights. This Court stated "[n]evertheless, Crum had the opportunity and the right to make a request for more specific findings and elected not to do so. Accordingly, any alleged error is waived on appeal" [citations omitted]. Likewise, in the case before us, Todd did not properly preserve this issue for appellate review.[42]

Todd further argues that even though the family court stated otherwise, "it cannot even be said that the parties have joint legal custody, which by definition, precludes one party from being declared a primary custodian." The family court stated as follows:

> Upon a review of the evidence as a whole presented, the Court believes that a significant change has occurred which warrants the need for a modification. However, the Court does not believe that the situation before it rises to the level of

[41] 928 S.W.2d 355 (Ky.App. 1996). See also Cherry, 634 S.W.2d at 425 (stating that "[t]he failure, if there was a failure, on the part of the trial judge to make adequate findings of fact was not brought to his attention as required by CR 52.02 or CR 52.04; consequently it is waived").

[42] Vinson, 136 S.W.3d at 471.

> requiring a full change of custody, rather, merely a designation of primary residential custodian.
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> . . .
>
> Based upon that analysis, the Court concludes that it would be in the best interest of Brittani for one party to have primary residence, as well as final decision[-]making authority for her. The evidence as presented indicates that grandmother is best suited to take on the role of primary residential parent. Father has proven to be a very caring and loving father. However, his time with the child is limited.
>
> . . .
>
> Therefore, grandmother shall be awarded primary residence and physical possession of the child. Moreover, in the event of a disagreement, grandmother shall have final decision[-]making authority. Father shall be entitled to liberal parenting time with the child.
>
> . . .
>
> IT IS HEREBY ORDERED that physical possession and primary residence of the child, Brittani Nicole Duncan, shall be modified. Petitioner, Deborah Frank, shall be awarded primary residence and physical possession of the child, as well as final decision[-]making authority in the event of disagreement. Parenting time for the Intervening Respondent, Todd Houston, shall be as set forth above.

As the Supreme Court of Kentucky noted in Fenwick,[43] the term "primary residential custodian" is not defined in the

[43] 114 S.W.3d at 779.

Kentucky statutes. However, that term is generally used to refer to the party with whom the child will primarily reside. In a joint custody situation such as this, the custodian is awarded "'visitation,'" "'time-sharing,'" or "'parenting time'" with the child.[44] The Supreme Court further noted that a "designation of primary residential custodian normally confers on the party "(1) the primary role in minor day-to-day decisions concerning the child; (2) the responsibility for providing a residence," and "(3) the normal routine care and control of the child."[45] Joint custody does not require an equal division of time,[46] or equal assignment of decision-making authority concerning the child.[47] The parties and the courts are free to vest great authority in one custodian even under a joint custody arrangement. While, the essential nature of joint custody is the custodians sharing decision-making authority,[48] the parties will often agree, or the court will designate, that one of the custodians will act as the "primary residential custodian."[49]

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[44] Fenwick, 114 S.W.3d at 779 (citing Drury v. Drury, 32 S.W.3d 521, 523 (Ky.App. 2000)).

[45] Id.

[46] Squires v. Squires, 854 S.W.2d 765 (Ky. 1993).

[47] Fenwick v. Fenwick, 114 S.W.3d 767, 778 (Ky. 2003).

[48] Fenwick, 114 S.W.3d at 767.

[49] Todd cites Aton v. Aton, 911 S.W.2d 612 (Ky.App. 1995), to support his argument that the definition of joint custody precludes one party from being declared a primary custodian. However, this portion of Aton has been abrogated. See Fenwick, 114 S.W.3d at 773.

Under the family court's current order in this case, Deborah would assume the primary role in the minor day-to-day decisions concerning Brittani, she would be primarily responsible for providing a residence for Brittani, and she would assume Brittani's normal routine care and control, while Todd's rights include specific visitation times, "liberal parenting time with the child," the right to give Deborah input on decisions affecting Brittani, and the right to access information concerning Brittani in regard to her health, her education, and other matters reserved for her custodians.[50] The family court's decision in this case was close. There was sufficient evidence to support an award of primary residential custody to either Deborah or Todd. "However, the trial judge held the ultimate power of decision in this case, and under our standard of review we cannot say that his ruling was clearly

[50] Todd was awarded visitation with Brittani as follows:

> [E]very other Thursday, beginning with picking the child up at school at the end of the school day on Thursday afternoon, and shall continue until he returns her to school on Monday morning. In the event a long weekend falls on his visitation weekend, he shall keep the child that Monday and return her to school on Tuesday morning. During the weeks in which he does not have the child for the weekend, he shall be allowed visitation with her to commence at the end of the school day on Wednesday and shall continue overnight with him returning the child to school on Thursday morning. The holiday visitation schedule which the parties have previously entered will remain the same until further Orders of the Court.

erroneous."[51] Further, the family court awarded formal decision making authority to Deborah only in the "event of a disagreement." Todd argues that there were more appropriate ways, e.g., use of a parenting coordinator,[52] for the family court to modify the custody order, rather than stripping him of his right to share in the decision-making regarding Brittani.[53] However, this type of modification is exactly what he asked the family court to do in regard to Deborah's rights with Brittani, when he moved for sole custody of Brittani. While the family court's award comes very near to an award of sole custody, we conclude that the family court's decision properly constituted a modification of the original joint custody arrangement pursuant to the factors set forth in KRS 403.340(3) and (4) and KRS 403.270(2).

For the foregoing reasons, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

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[51] Aton, 911 S.W.2d at 616.

[52] This is a program provided through the family court to provide parents in high conflict an alternative to litigation.

[53] Todd argues in his brief that the family court order does not contain a requirement that Deborah consult with him. We conclude that the language in the order, as conceded by counsel for Deborah at oral argument, requires Deborah to consult with Todd in good faith in making all significant decisions regarding Brittani.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

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