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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002448-MR

DENA A. WHITED (FORMERLY MONTGOMERY) APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 02-CI-01447

BRADLEY B. MONTGOMERY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM[1] SENIOR JUDGE.

STUMBO, JUDGE: Dena A. Whited (formerly Montgomery) appeals from an order of the Franklin Circuit Court addressing various post-dissolution matters. She argues that the trial court erred in failing to modify child support, and improperly denied her motion to amend a timesharing arrangement. Dena also argues that she was denied due process of law and equal protection afforded her under the United States Constitution and Kentucky Constitution because she was denied the same relief given other litigants in

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

prior and unrelated proceedings rendered in Franklin Circuit Court. For the reasons contained herein, we affirm the order on appeal.

Dena A. Gates Whited and Bradley B. Montgomery ("Brad") were married on July 17, 1993, in Madison County, Kentucky. The marriage produced one child, Caitlyn B. Montgomery ("Brie") who was born in 2000. On October 29, 2002, Dena filed a petition for dissolution of marriage in Franklin Circuit Court.

In September, 2003, Dena and Brad executed a Separation and Property Settlement Agreement which addressed various issues including child custody and support. The agreement was approved by the circuit court and adopted by reference in the court's Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage rendered on October 2, 2003.

Pursuant to the Separation and Property Settlement Agreement, Dena and Brad shared joint legal custody of Brie and managed Brie's residency under a "timesharing" arrangement. That agreement stated that each parent "would have parenting time" with Brie for three days in one week followed by four days the next week, with each parent having two weekends per month. The agreement also provided that both parties would live in Frankfort, Kentucky. Finally, the agreement stated that after the marital residence was sold, Brad would pay $250 in child support per month until Brie reached the age of 18 or finished high school, whichever was later.

On August 15, 2006, Dena filed a motion to modify the timesharing arrangement because Brie was beginning the first grade in school, and because Brad had

not relocated to Frankfort as provided for under the Separation and Property Settlement Agreement. Specifically, Dena sought to provide care for Brie during the school week, with Brad taking care of Brie from Friday after school until Sunday evening. The motion also asked the court to designate Dena as the provider of Brie's primary physical residence; an order that Brie could spend time with Dena on weekends when Brie's "siblings"[2] would be at Dena's house; and an order increasing Brad's child support obligation based in part on Dena's income reduction resulting from her discharge from military employment.

After taking proof, the Franklin Circuit Court rendered an order on October 9, 2006, which forms the basis of the instant appeal. The court sustained Dena's motion to modify the timesharing arrangement, ordering that Brie would reside with Dena "during the week" with Brad taking care of Brie from Friday after school to Sunday evening. The court denied Dena's request that she have Brie on the weekends when Brie's siblings would be present at Dena's residence, and denied the request to designate her as the parent to provide Brie's primary physical residence. The court also denied Dena's motion to modify Brad's child support obligation. This appeal followed.

Dena now argues that the Franklin Circuit Court erred in failing to modify Brad's child support obligation. She notes that though the Separation and Property Settlement Agreement provided for the parties' equal care of Brie (i.e., each parent to have three days one week followed by four days the next week), since August of 2005

[2]Dena does not indicate who these "siblings" are. Brad states that they are the children of Dena's new husband's first marriage.

Dena has been providing for Brie's care five days per week throughout the school year. Dena also notes that a disabling personal injury caused her to lose her military employment, resulting in a diminution in income from $3,825 per month to $1,638 per month. At the same time, Dena claims that Brad's income "substantially increased" from $4,883 per month at the time of dissolution to an amount which she does not disclose. She claims that these facts evidence - in the language of KRS 403.213(1) - a "material change in circumstances that is substantial and continuing". In sum, she maintains that the trial court committed reversible error in failing to increase Brad's child support obligation.

In a related argument, Dena also claims that the circuit court abused its discretion in failing to allow her to take care of Brie on weekends when Brie's siblings are present at the home of Dena and her current husband. As a basis for this argument, she again claims that Brad has violated the Separation and Property Settlement Agreement by failing to move to Frankfort, which results in Brie being out of town with Brad on weekends and unable to be with school friends, attends school events, etc. The corpus of this argument is that Brad's failure to move to Frankfort should result in Dena having Brie on occasional weekends to facilitate Brie's interaction with friends and extended family and to promote her proper upbringing.

Lastly, Dena argues that the order on appeal deprived her of due process of law and equal protection. As a basis for this argument, she notes that within a period of 15 months prior to her hearing, the Franklin Family Court considered the same issues of

law in other cases but rendered different results. She claims to be "aggrieved that she has not been treated in a similar fashion to the other similar litigants before the Franklin Family Court" and "is entitled to the same benefits and privileges that other parties have received from the Court in such close proximity to her case." In sum, she maintains that the court's failure to render a similar result in the matter at bar constitutes a deprivation of the aforementioned constitutional rights.

In response, Brad contends that he did not unilaterally alter the terms of the Separation and Property Settlement Agreement by failing to move to Frankfort and by allowing Brie to spend five days per week with Dena. Rather, he maintains that the arrangement of Brie staying with Dena during the school week, with Brad getting Brie on the weekends, was by mutual consent and undertaken for Brie's best interest. He contends that he was at all times willing to modify the custodial arrangement in any way to best suit Brie's needs, including assuming primary custody of Brie and having her attend school in Berea, Kentucky, where he lives. He argues that there is no factual or legal basis either for reversing the circuit court's order as to timesharing, nor for amending the child support obligation to which both parties had previously agreed.

We have closely examined the written arguments, the record and the law, and find no error in the order on appeal. On the child support issue, KRS 403.213(1) states that "[t]he provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and

continuing." While an obligor parent is required to pay at least the minimum amount of support under the guidelines, the court may deviate from the guidelines at its discretion. *Rainwater v. Williams*, 930 S.W.2d 405 (Ky.App.1996).

In the matter at bar, the $250 per month child support obligation was not based on the statutory guidelines. Rather, that amount was reached by agreement of the parties and incorporated into the Separation and Property Settlement Agreement. While the parties' finances, custodial agreement, etc. have not been static since the decree of dissolution was rendered, we cannot go so far as to conclude that the circuit court abused its discretion in finding (albeit implicitly) that there was no substantial and continuing material change in circumstances sufficient to justify a change in the child support obligation to which both parties had agreed. "[A] party who is able to show a 15% discrepancy between the amount of support being paid at the time the motion is filed and the amount due pursuant to the guidelines is entitled to a rebuttable presumption that a material change in circumstances has occurred." *Tilley v. Tilley*, 947 S.W.2d 63 (Ky. App.1997). While Dena indicates that her income has decreased since the divorce and that Brad's income has "substantially increased", she does not reveal exactly how much Brad's income has allegedly increased. There is also evidence in the record that the changes in Brie's timesharing arrangement - which in part formed the basis for Dena's argument that the support amount should be changed - was in large part consensual.

As long as the statutory requirements are met, the modification of child support rests with the sound discretion of the trial court. *Van Meter v. Smith*, 14 S.W.3d

569 (Ky.App. 2000). Such a ruling will not be disturbed unless it is arbitrary, unreasonable, unfair or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449 (Ky.App. 2001). We find no basis for disturbing the circuit court's ruling on this issue, and accordingly find no error.

We also find no error with the circuit court's denial of Dena's motion to have time with Brie on weekends. Dena bases this argument on her assertion that Brad improperly failed to move to Frankfort, thus requiring Brie to be away from Frankfort on the weekends in order to have time with Brad. Dena contends that this arrangement is not in Brie's best interest because it deprives her of time on the weekends with her mother, step-father and other siblings and makes her different than her classmates. In sum, she contends that the order on this issue constitutes an abuse of discretion.

The circuit court made no finding as to whether Brad breached the terms of the Separation and Property Settlement Agreement by failing to move to Frankfort, and we find no evidence in the record that Dena requested such a finding. Brad also cites to testimony in the record that shows Dena asked him not to move to Frankfort, and that Dena and her current husband have themselves discussed moving to other locations including Northern Kentucky and Richmond.

Irrespective of this, we have no basis for altering the order on appeal as it relates to this issue. Dena and Brad were granted joint custody of Brie, with neither party designated as the primary custodian. Dena's motion sought to alter the parties' physical

custody of Brie. In *Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003), the Kentucky Supreme Court stated,

> In awarding joint custody, the court must determine, based on the child's best interest, how the parents will share physical custody of the child. And, we would again note that an award of joint custody does not require an equal division of time with each parent; rather, it means that physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent under the circumstances. If the parents continue to reside in close proximity to each other post-dissolution, meaningful time-sharing should not be a problem. However, if one or both parents relocate some distance from each other, *e.g.,* 50 miles or more, the distance itself complicates the arrangement, and the parties or the trial court, again focusing upon the child's best interest, will need to devise a time-sharing schedule-*e.g.,* one incorporating telephone or e-mail access, and longer periods of time-sharing-that will assure frequent, continuing, and meaningful contact with both parents to the greatest extent possible under the circumstances. We recognize that in most cases the frequency of physical time-sharing will necessarily decrease as the distance between the parents increases.

Id. at 778.

Since *Fenwick* characterizes the award of physical custody as an issue subsumed in the award of joint custody, Dena's motion to be designated as the parent to provide Brie's primary physical residence constitutes a motion to modify custody. *Id.* The standard for reviewing child custody issues is whether the ruling was clearly erroneous or constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974) ("In reviewing the decision, the test is not whether we would have decided differently but whether the findings of the trial judge were clearly erroneous or he abused

his discretion."). Dena was awarded physical custody of Brie for five days each week, with Brad entitled to physical custody for two days each week. While each party may very well prefer to have physical custody of Brie for every day of the week, the sad fact remains that the consequences of divorce are often less than optimal. There is nothing in the record or the law upon which we may conclude that the award of physical custody constitutes an abuse of discretion, and accordingly find no error.

Dena's final argument is that she was denied due process of law and equal protection because the outcome of her proceeding was dissimilar to that of other prior - and unrelated - dissolution actions in Franklin Circuit Court. This argument must fail for at least two reasons. First, there can be little doubt but that the facts and circumstances underlying the cases to which Dena cites are distinguishable from the facts at bar. Second, and more important, there is but one exception to the rule that unpublished opinions may not be cited or used as authority in any other case in any court of the Commonwealth. CR 76.28(4). The unpublished opinion cited to by Dena does not meet this exception (i.e., unpublished Kentucky appellate opinions rendered after January 1, 2003, cited in appeals where no published opinion adequately addresses the issues). As such, we find no error on this issue.

For the foregoing reasons, we affirm the order of the Franklin Circuit Court.

MOORE, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, CONCURS IN RESULT ONLY.

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