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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000799-ME
AND
NO. 2009-CA-000992-ME

CAROL P. WORRILL, AKA CAROL P. PURDY, NKA CAROL P. BIOX — APPELLANT/CROSS-APPELLEE

APPEAL & CROSS-APPEAL FROM HARDIN FAMILY COURT
v. HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 05-CI-02053

CHARLES C. WORRILL — APPELLEE/CROSS-APPELLANT

AND NO. 2009-CA-000993-ME

CAROL P. WORRILL (NOW PURDY) — APPELLANT

APPEAL FROM HARDIN FAMILY COURT
v. HONORABLE MATTHEW B. HALL, JUDGE
ACTION NO. 05-CI-02053

CHARLES C. WORRILL — APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING IN PART

** ** ** ** **

BEFORE: NICKELL AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Carol Worrill appeals from a Hardin Family Court order which denied the relocation of her children and modified timesharing orders by designating Charles Worrill as the children's primary residential custodian. Carol contends that the trial court's denial of her motion to relocate was not based upon substantial evidence. Carol also argues that the trial court erred by naming Charles as the primary residential parent in light of his future military deployment and by awarding Charles child support. In his cross-appeal, Charles argues that the trial court erred by refusing to enter an order denying Carol's request to move out of state.

We have carefully reviewed the record and considered the arguments of both parties. Although Carol raises valid concerns regarding the practical effects of the trial court's order, we find that a substantial factual basis existed for the court's decision to modify the previous timesharing orders. However, we conclude that the trial court improperly awarded child support and thus vacate the child support provisions of the order.

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

The divorce of Carol and Charles was entered by the Hardin County Family Court on March 9, 2006. At the time of the divorce, Carol practiced as a family physician in Hardin County and Charles served the United States Army as a Lieutenant Colonel. The decree of dissolution incorporated the parties' separation agreement whereby Carol and Charles were awarded, "joint care, custody, and control of the parties' four minor children, with [Carol] being the primary physical custodian."

In December 2008, Carol moved to modify the timesharing orders and to relocate the children to Virginia where she had received part-time employment as a family practice physician. In response, Charles moved to be designated as the children's primary residential custodian. The court issued a hearing date of April 15, 2009. On March 18, 2009, Charles once again moved the court to designate him as the children's primary residential custodian. The motion was accompanied by an affidavit alleging that Carol did not consult him about decisions involving the children.

At the April 15th hearing, the trial court heard the motion filed by Carol as well as the two motions filed by Charles. Much of the testimony focused on the children's daily habits, community involvement, and special needs that were currently being met in the community. The court also heard testimony about Carol's career path. Charles claimed that Carol's wish to relocate to Virginia was not because of a career necessity but rather a desire to exclude him from the lives of their children.

Prior to practicing medicine in the private sector, Carol also served as a Major in the Army. After practicing medicine in the military, Carol was honorably discharged in 2000. For four years she practiced part-time as a family physician in Hardin County. In 2005, Carol opened the Elizabethtown Family Care Clinic. The clinic closed in March 2008, and Carol began working for urgent care centers and covering for family physicians when needed. Charles claimed Carol did not need to relocate to Virginia to find suitable employment because a full-time position was open at Ireland Army Hospital which had an annual salary between $140,000 and $170,000.[2]

The trial court also heard testimony concerning Charles's parenting abilities, work schedule, and the demands of his position. Charles's former commanding officer, Colonel Quintas, testified that Charles was scheduled to be deployed to Iraq for a six-month tour. However, the tour could be shortened or extended. Colonel Quintas also testified that Charles had flexibility in his work hours due to his command position.

Following the hearing, the trial court issued findings of facts, conclusions of law, and orders, which provided in part,

> [T]he relocation of the children is NOT in their best interest. The children are best served in remaining in their current schools, neighborhoods, church activities and in care with their current counselor/therapist. It is not in the children's best interest to relocate with [Carol] to Virginia, to a school system which is new, a neighborhood which is new, a church which is new in

[2] No evidence was presented to indicate that Carol ever applied for the position or that she was offered the position.

> order for [Carol] to rid herself from [Charles] and to obtain part time employment, when suitable full time employment (which will not significantly hamper her parenting) is available here. Clearly it is not in the children's best interest to be uprooted from their home and schools, inter alia, for [Carol] to pursue a mediocre job opportunity and for [Carol's] personal comfort.
>
> In the order, the trial court also stated,
>
> It should be noted that her current husband was her officer manager when [Charles] was deployed to Iraq. [Carol] and her current husband were involved in an affair in front of the children while [Charles] was deployed. [Carol] filed for divorce and her then paramour, (now husband) moved in with her and the children. The Court takes judicial notice that the paramour (now husband), was divorcing his wife at the same time that the divorce herein was proceeding.

The trial court designated Charles the children's primary residential custodian and ordered the children to remain in the same schools, to continue counseling, and to move into Charles's home. The trial court awarded timesharing to Carol pursuant to the Hardin County Family Court local rules. In addition, the trial court awarded Charles child support based upon an imputed income amount of $140,000. This appeal follows.

First, Carol claims that the trial court's decision to modify the timesharing arrangement and refusal to allow her to relocate the children to Virginia was not based upon substantial evidence. The Kentucky Supreme Court addressed the issue of relocation in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). The Court explained,

> [W]hen a final custody decree has been entered . . . and a relocation motion arises, any post-decree determination made by the court is a modification, either of custody or timesharing/visitation. If a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 applies directly or may be construed to do so.

Id. at 765. Neither Carol nor Charles filed a motion to modify custody. Instead, both parties filed motions to modify timesharing. Therefore, KRS 403.320 requires courts to question whether relocation is in the best interest of the children.

Our review indicates that court heard a plethora of evidence that indicated the children were firmly rooted in their schools, involved in the community, and were excelling in their current environment. The trial court's order indicates that these factors were the basis for its decision. Therefore, we find that the trial court had an ample factual basis for its decision and did not abuse its discretion.

Carol also claims that the trial court erred by taking judicial notice of court records concerning her motion for an emergency protective order and by taking judicial notice of the pre-marital relationship between Carol and her current husband.[3]

In 2007, Carol filed a petition for an emergency protective order (EPO) against Charles. The trial court stated that its review of the court records indicated that the petition was obviously based upon false allegations. The court

[3] In his brief Charles argued that judicial notice of the court records was appropriate. However, Charles claimed that the trial court erred by failing to consider additional court records. We find no need to address this claim in light of our decision.

further stated the records proved that Carol was trying to keep the children away from Charles.

Carol argues that trial court erred by taking judicial notice of the court records because they involved disputed facts and different judges. Trial courts may take judicial notice of court records of the same court when the records concern the same parties and the same issues. *Maynard v. Allen*, 276 Ky. 485, 124 S.W.2d 765, 767 (1939). However, judicial notice is inappropriate under the Kentucky Rules of Evidence (KRE) when the facts are subject to reasonable dispute. KRE 201.

Although Carol's petition for an EPO was heard by a different judge, the petition involved the same parties, the same court (the Hardin Family Court), and issues of family discord that related to custody and divorce. Therefore, we decline to find error in the trial court's notice of these records.

Conversely, we conclude that the trial court's decision to take judicial notice of Carol's extramarital affair was erroneous. Based upon our review, it is unclear how the trial court arrived at the information it possessed concerning Carol's extramarital affair and the marital status of her paramour. We find that affair was irrelevant to the issues for the trial. If the affair had any reflection of Carol's character or parenting ability, those issues should have been questioned during the initial custody proceedings. Although this information is clearly inappropriate for consideration, we find the error to be harmless in light of the total testimony in this case.

Next, Carol claims that the court erred by designating Charles as the children's primary residential parent even though he is scheduled for deployment. Although Charles will be deployed to Iraq, testimony indicated that he has a flexible work schedule when he is home. Certainly we are troubled by the fact that Charles will be deployed, leaving the children without a parent present at home. However, it is not our position to determine whether naming Charles as the primary residential parent was in the children's best interest. We must only examine whether a sufficient basis existed for the court's decision.

Finally, Carol claims that the trial court erred by awarding child support and imputing income. We agree. Our review of the record indicates that the trial court awarded child support *sua sponte*. A change in residential parenting does not demand a change in child support obligations. Instead, child support may only be modified following a motion for modification. KRS 403.213. *Price v. Price*, 912 S.W.2d 44, 46 (Ky. 1995). Therefore, we vacate the award of child support.

In his cross-appeal, Charles claims that the trial court should have issued an order prohibiting Carol from moving out of state even though the court's order named Charles the children's primary residential custodian. Charles claims that Carol's residence is bound by the parties' settlement agreement which was incorporated into the decree of dissolution and provides that Carol must live in the Hardin County area. However, the agreement also provides that Carol is the primary residential custodian of the children, a designation modified by the order

on which both parties appeal. We find that the proposed order would create an impermissible restraint on Carol's right to travel and/or migrate under the Kentucky Constitution. Ky. Const. § 24; *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Therefore, we find no error in the court's refusal.

Accordingly, we affirm the Hardin Family Court order in its entirety except as to the award of child support which we vacate.

NICKELL, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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