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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001845-ME

ANNE HOLBROOK (NOW HUDSON) APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 00-CI-00134

BRIAN SCOTT HOLBROOK APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Anne Holbrook (now Hudson) appeals from an order of the Morgan Circuit Court naming Brian Scott Holbrook as the primary residential parent of the parties' child. In doing so, the court modified the parties' previous timesharing arrangement, under which Appellant was the child's primary residential parent. Appellant contends that the trial court erred in modifying

[1] Senior Judge Joseph E. Lambert 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.

timesharing in this manner, but after reviewing the record we conclude that the trial court did not abuse its discretion. Therefore, we affirm.

Facts and Procedural History

The parties were married for a little more than three years before Appellee filed for divorce in May 2000. The divorce was finalized in February 2001, and the parties were granted joint custody of their minor son. Appellant was designated as the child's primary residential parent, and Appellee was granted visitation every other weekend and on such other occasions as could be agreed upon by the parties.

On March 30, 2010, Appellee filed a motion asking to be named the "Primary Custodian" of the parties' son.[2] Attached to the motion were affidavits from Appellee, his wife, and his sister-in-law setting forth a number of concerns the three had about Appellant, her boyfriend, and the pair's allegedly negative conduct towards the child. At the time the motion was filed, Appellant and the child were living in Breathitt County and Appellee still lived in Morgan County. A hearing on the motion was held on June 21, 2010 and July 7, 2010.

Following the hearing, the Guardian Ad Litem (GAL) assigned to represent the child filed a report in which he recommended that Appellee be named as the child's primary residential parent. The GAL noted that his recommendation was driven by two factors: (1) the child's consistent story that Jason Wallace,

[2] While the motion was arguably styled as one seeking a modification of custody, the record reflects that Appellee was actually seeking a modification of the parties' timesharing arrangement and that the circuit court treated his motion as such. Consequently, we proceed with this same understanding.

Appellant's boyfriend, had drawn his fist back on a recent occasion and threatened to harm the child, and (2) the child's "alarming" rate of absences from school, many of which were unexcused. The GAL noted that while the child's school attendance had gradually improved and his grades had remained satisfactory, his poor attendance rate rose to the level of truancy.

The GAL's report further recommended that if the court determined that no timesharing modification was needed, Jason Wallace should not be allowed to remain in Appellant's home. The GAL further suggested that in this scenario, the court should order additional visitation between the child and Appellee and that Appellee be allowed to purchase a phone for the child that would allow unlimited and unconditional communication between the two. This had apparently been an issue.

On September 17, 2010, the circuit court entered findings of fact, conclusions of law and an order modifying the parties' timesharing arrangement and designating Appellee as the child's primary residential parent. The court's decision was motivated by a number of factors, including the incident referenced above in which Jason Wallace had threatened to hit the child. The court noted that following the incident, the child was "alarmed" and "did not want to return to his mother's home." The court also indicated that the testimony of Appellant and Wallace regarding the matter was "evasive and lacking in credibility" and that they "were less than truthful" with the court. The court ultimately concluded that the

child's relationship with Wallace was "strained, at best" and that the child should not be left unsupervised with Wallace.

The circuit court further noted that the child was "bright and mature" and loved both parents but that he was "struggling with feelings that he is caught in the middle." The court also noted that "[a]ll the testimony indicates that he does not have discipline problems while in the home of his father. He is not confrontational while in his father's home, nor while visiting with family and friends of his father's family. There have generally been no complaints about or regarding his behavior." The court further indicated that the child had a large family support system in Morgan County as well as a number of friends in that county. The court then noted that the child had had "discipline problems while with his mother" and that she had placed him in counseling with three different counselors – a fact of which Appellee was apparently unaware for some time. When Appellee learned about the counseling, he requested to become involved, but his request was refused. The circuit court's findings of fact further indicated that the child's school record reflected "significant absences from school" while he had been living with Appellant.

Based on these findings, the circuit court concluded that modification of the parties' timesharing arrangement was required. Consequently, Appellee was named the child's primary residential parent. The parties' joint custody arrangement remained the same. This appeal followed.

Analysis

On appeal, Appellant alleges that the circuit court's findings of fact and decision to modify timesharing were clearly erroneous and that the court erred by denying her motion for a custodial evaluation. We address each allegation of error in turn.

KRS 403.320 allows a timesharing arrangement to be modified at any time upon a showing that a change would be within a child's best interests. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008); *Humphrey v. Humphrey*, 326 S.W.3d 460, 464 (Ky. App. 2010); KRS 403.320(3).[3] The standards for evaluating a circuit court's modification of a timesharing arrangement (or any other decision relating to child custody) on appeal are well-established.

> 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. 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. Abuse of discretion implies that the family court's decision is unreasonable or unfair. 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.

Coffman v. Rankin, 260 S.W.3d 767, 770 (Ky. 2008), *quoting B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005); *see also* CR 52.01; *Pennington*, 266 S.W.3d

[3] The circuit court's order incorrectly referenced KRS 403.340, which addresses a modification of custody, instead of KRS 403.320, which addresses a mere modification of a timesharing arrangement. However, since the court did not modify custody and otherwise utilized the appropriate legal standards for modifying timesharing in reaching its decision, this error does not merit further mention.

at 769 (holding that "modification of visitation/timesharing must be decided in the sound discretion of the trial court."). For purposes of our review, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). If no such error or abuse of discretion occurred, the fact that this Court might have decided the case differently is irrelevant. *See Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974).

Upon our review of the record, we cannot say that the circuit court clearly erred in its findings of fact or otherwise abused its discretion in modifying the parties' custodial timesharing arrangement. At the modification hearing, the court heard testimony from the parties and a plethora of witnesses. Moreover, the child was interviewed by the judge *in camera* on two occasions, and the judge also had the benefit of a report from the child's GAL in which modification was recommended. After the hearing, the circuit court rendered thorough findings of fact and conclusions of law that formed a sufficient basis for the court to make the determination that it did. While reasonable minds may differ as to the proper outcome, we cannot say that the circuit court's decision was unreasonable or unfair. Furthermore, the decision was not clearly erroneous and the law was properly applied.

In an effort to avoid this conclusion, Appellant argues that the circuit court ignored substantial evidence contrary to its findings. She primarily seems to

take issue with the fact that the court failed to include certain facts in its findings that she believes are beneficial to her position. However, as the trier of fact the circuit court had "the right to believe the evidence presented by one litigant in preference to another. … The trier of fact may believe any witness in whole or in part." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996) (Internal citations omitted). Moreover, if Appellant perceived a need for additional findings of fact, the burden of requesting such fell upon her. See CR 52.02; CR 52.04; *Cherry*, 634 S.W.2d at 425.

Appellant takes issue with the court's finding that the child had had "significant absences from school" while he was residing with her, arguing that it is unsupported by the record. Appellant argues that the child had been doing well in school and had had no behavior problems there, but this fact does not render the court's finding erroneous. School records reflect that during the 2005-2006 school year, the child had 27 absences, of which only six were excused. During the 2006-2007 school year, the child had 27 absences, seven of which were unexcused. During the 2007-2008 school year, the child had 17 absences, 12 of which were unexcused. During the 2009-2010 school year, the absences lessened to nine, with only three of those being unexcused. The foregoing supports the circuit court's finding. Moreover, the child's GAL expressed a particular concern about the child's excessive absences from school in recommending modification.

Appellant also asserts that the issues between Wallace and the child were not as serious as the circuit court's findings of fact made it appear. However,

there was certainly evidence presented at the hearing that justified the court's – and the GAL's – concerns about Wallace. The child indicated that Wallace had drawn his fist back on him and that there were occasions on which Wallace pounded on the walls and yelled at him. Moreover, Appellee testified that on one occasion, according to the child, Wallace had told the child to get out of the house and then pushed him out the door, locking it behind him. Wallace denied this incident had occurred, testifying that he had instead told the child to go outside and wait because he was supposed to spend the night with a family friend. However, the friend in question testified that she arrived on the scene only after being called by the child and that she asked the child to spend the night with her. Appellant notes that Wallace had "never touched this child in anger" or threatened to harm him but the weight to be given to her testimony on the matter was within the purview of the court. Indeed, the court was presented with a considerable amount of conflicting evidence regarding the child's relationship with Wallace. Under these circumstances, it fell to the court to determine what evidence to believe, and we are not in the position to second-guess that determination. Appellant also argues that the circuit court failed to give proper consideration to the "best interest" factors set forth in KRS 403.270(2) and certain facts that would support her position in that regard, but we disagree with this contention.

Appellant also argues that this Court's opinion in *Wilcher v. Wilcher*, 566 S.W.2d 173 (Ky. App. 1978) required the circuit court to presume that she was entitled to continue in her role as the child's primary residential parent. *Wilcher*

provides that KRS 403.340 "creates a presumption that the present custodian is entitled to continue as the child's custodian." *Id.* at 175. However, *Wilcher* addressed only motions to modify *custody* pursuant to KRS 403.340 – not efforts to modify a timesharing arrangement, which are governed by KRS 403.320. Moreover, Wilcher addressed KRS 403.340 prior to the amendment of the statute in 2001. The standards for custody modification are not as strict in the amended version of the statute; therefore, *Wilcher*'s continued authority may be uncertain. In any event, *Wilcher* does not create a presumption that a primary residential parent should remain in that role, and we decline to create such a presumption in this case.

Appellant finally argues that the circuit court erred by denying her motion for a custodial evaluation. Appellant filed a motion on July 1, 2010 for such an evaluation to be performed by a licensed psychologist appointed by the court. However, the motion was denied primarily because Appellee's motion for modification had been pending for some time and because Appellant's motion for an evaluation had been filed after the modification hearing had commenced. On appeal, Appellant argues only that the evaluation "would have been objective and useful to the guardian ad litem and the Court and should have been permitted."

In making a custody determination, a trial court "may seek" the advice of outside professional personnel. KRS 403.290(2). KRS 403.300(1) provides: "In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court *may order* an investigation and report

concerning custodial arrangements for the child. The investigation and report may be made by the friend of the court or such other agency as the court may select." (Emphasis added). Thus, the matter of ordering a custodial evaluation rests within the discretion of the court and the denial of such is reviewed for an abuse of that discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Under the circumstances, we see no indication that the circuit court abused its discretion by denying Appellant's motion for a custodial evaluation. As noted by the court, Appellant's motion was filed after the first day of the modification hearing, and the granting of such would have required a postponing of the remainder of the hearing. As school was set to begin in a few weeks and where the child would be attending school was at issue, the court did not err by declining to delay the matter any further. Thus, no reversible error occurred in this regard.

Conclusion

For the foregoing reasons, the decision of the Morgan Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dawn R. Watts
Jackson, Kentucky

BRIEF FOR APPELLEE:

Gordon B. Long
Salyersville, Kentucky