

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001658-ME

KIMBERLY PERKINS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 13-CI-03353

TYRONE CORNELIUS PERKINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Kimberly Perkins appeals from the portion of the findings of fact, conclusions of law, and decree of dissolution of marriage allocating the bulk of timesharing outside the school year to Tyrone Cornelius Perkins and requiring Kimberly to bear the cost of the transportation expenses for timesharing by Tyrone.

Tyrone and Kimberly are the parents of Nyla, born in 2005. They married in 2006. During their marriage they resided in Aberdeen, Mississippi, with Kimberly's older daughter and part of the time with Tyrone's older daughter. Tyrone has always resided in Aberdeen and his extended family resides nearby. Kimberly was originally from Chattanooga, Tennessee, where her mother and extended family continue to reside.

On September 21, 2012, Kimberly and her two children moved from the marital residence into an apartment in Columbus, Mississippi, and until December, Tyrone had visitation with Nyla and Kimberly's older daughter every other weekend. In December 2012, Kimberly told Tyrone she was going to see her mother in Chattanooga, but instead moved to Lexington, Kentucky, into the residence of her childhood friend and new romantic partner. Kimberly did not inform Tyrone of the move, but kept her cell phone number the same. Tyrone occasionally spoke with Nyla on the phone. Several months after Kimberly left, Tyrone was informed by Nyla that she was now living in Lexington.

In August 2013, Kimberly filed for dissolution in the Fayette Family Court. Tyrone exercised visitation over the Christmas holiday and summer vacation; the parents met halfway for one visit and alternated driving to pick up Nyla for other visits. During the pendency of the dissolution action, Kimberly had another daughter with her new partner.

Both Tyrone and Kimberly sought custody and to be named as the residential parent for Nyla. By the time the final dissolution hearing was held,

Nyla had lived in Lexington for almost two years and was doing well in that environment.

At the final dissolution hearing held on August 11, 2014, the family court orally granted joint custody but determined it was appropriate for Kimberly to serve as the primary residential parent during the school year. The family court found sending then nine-year-old Nyla to live in Mississippi after the extended period she lived in Lexington would not be in her best interest. However, the family court stated it was important to keep Tyrone involved with Nyla's life and found it was in Nyla's best interest to spend the maximum time possible with both parents.

Tyrone argued he should be awarded substantial timesharing over Nyla's school breaks including most of her summer break, because the distance between Mississippi and Kentucky made weekend timesharing unfeasible. He argued Kimberly made a unilateral decision to move to Lexington and, therefore, she should bear most of the burden of driving Nyla to and from timesharing or pay most of the transportation costs.

Kimberly argued it was important for her to spend recreational time with Nyla outside of the school year and asking her to bear the transportation costs would be a tremendous burden. Kimberly testified she did not work, was in nursing school full time with grants, and had childcare costs for her infant.

Kimberly testified she currently lives with her boyfriend and father of her infant, a welder earning \$30 an hour, and he contributes to her support. She

also receives child support for her older daughter and Nyla. Kimberly testified she anticipates completing nursing school in September 2015, and believes she would be able to obtain employment after graduation.

Tyrone testified he works forty hours a week for \$11.20 an hour, is paying the guideline support amount for Nyla and supports his older daughter when she lives with him every other week.

The family court established an initial schedule for visitation awarding Tyrone substantial timesharing during school breaks and the option for Tyrone to see Nyla any weekend he is able. Tyrone testified he had to drive 459 miles one way to see Nyla, which the family court estimated cost \$100 in gas. The family court found Kimberly created this distance by moving to Lexington for her current relationship. The family court ordered that Tyrone be responsible for all transportation to and from timesharing in Mississippi, explaining the car trips with Nyla would create a good opportunity for bonding. The family court ordered Kimberly to pay \$100 for each one-way trip Tyrone made to visit Nyla noting when Tyrone visits Nyla for a weekend in Lexington, he will be responsible for hotel costs.

The family court's written findings of fact, conclusions of law, and decree of dissolution of marriage, entered on September 19, 2014, contained the following relevant finding of fact:

34. With regards to Nyla Perkins, the Court finds that it is in the best interests that joint custody be awarded to the parties and that Nyla will live and attend

school in Lexington with her mother, and that Tyrone shall receive substantial timesharing in conjunction with Nyla's school schedule.

It also contained the following relevant conclusions of law and decree:

3. Tyrone and Kimberly Perkins are the natural and legal parents of Nyla Perkins. The parties shall have joint custody, care and control of Nyla. Nyla shall reside with her mother in Lexington, Kentucky and attend school there. Tyrone shall receive visitation as follows:

- a. SUMMER: From the Friday after school lets out for the summer until the Friday before school resumes, Tyrone shall be permitted to visit with Nyla. For one week in the middle of the summer, Nyla shall be returned to her mother and spend one week with her, after which Tyrone's summer visit can resume.
- b. SCHOOL YEAR WEEKENDS: Tyrone may give 30 day notice and visit with Nyla for any weekend during the school year. He may visit with her in Lexington, or in Mississippi, if the circumstances permit.
- c. FALL BREAK: Tyrone shall be permitted to visit with Nyla each Fall Break from the time that school is out until the day before school resumes.
- d. THANKSGIVING BREAK: Tyrone shall be permitted to visit with Nyla from the time school is out for Thanksgiving Break until the Sunday before school resumes.
- e. CHRISTMAS: Tyrone shall be given ten days during the Christmas break to be able to visit with Nyla beginning the Friday after school lets out.

4. Tyrone will notify Kimberly at least 30 days in advance of his desire to exercise any permitted visits so that Kimberly can adjust her plans accordingly.

5. Tyrone shall pick up the child from Kimberly's house for each visit and shall return the child to Kimberly's house upon the conclusion of each visit. For each trip Tyrone makes to see Nyla for a scheduled visit, Kimberly shall pay the sum of \$100.00 in compensation for his gas for each trip he makes between Aberdeen, MS and Lexington, KY. For example, if Tyrone picks up Nyla and takes her back to Mississippi and then returns her, Kimberly will be required to compensate him for \$400.00 for the two round trips. If Tyrone elects to conduct his visit in Lexington, Kimberly will only be responsible for \$200.00 in compensation. Kimberly will have 30 days to compensate Tyrone for each such trip and obligation.

6. Tyrone shall continue to pay \$276.00 a month in child support to Kimberly for the support of Nyla Perkins.

...

10. Kimberly is awarded \$2,000.00 for her share of the marital equity in the 514 Pullen Drive residence. Said amount shall be held in abeyance for 12 months, unless Tyrone elects to pay earlier. Any amounts owed by Kimberly to Tyrone for transportation expenses shall be deducted from this \$2,000.00. If at the end of 12 months there still remains a balance owed to Kimberly, either party may motion the Court to Order that any remaining balance be paid at that time.

Kimberly argues the family court's allocation of timesharing to Tyrone and traveling expenses to Kimberly was unreasonable and an abuse of discretion. We disagree and affirm.

Determining appropriate timesharing is properly the province of the family court after considering the circumstances of the parents and child. *Drury v. Drury*, 32 S.W.3d 521, 526 (Ky.App. 2000). As the reviewing Court of a final custody decree establishing a timesharing schedule, we may only set aside the family court's findings of fact if they are clearly erroneous, as not supported by substantial evidence, or legal conclusions if the family court abused its discretion in applying the law. *Frances v. Frances*, 266 S.W.3d 754, 757 (Ky. 2008). "Thus, mere doubt as to the correctness of a finding will not justify its reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotation marks, brackets, and footnote citations omitted).

Tyrone and Kimberly were awarded the subset of joint custody called "shared custody" in which Kimberly serves as the primary residential parent and Tyrone enjoys timesharing. *Pennington v. Marcum*, 266 S.W.3d 759, 764-65 (Ky. 2008). As part of this arrangement, Tyrone is entitled to reasonable timesharing to be scheduled by the family court. Kentucky Revised Statutes (KRS) 403.320(1).

Kimberly argues weekends, holidays and vacation periods should be equally split between both parents in accordance with model timesharing guidelines. Kimberly argues allocating the Thanksgiving and Christmas holidays¹

¹ In the family court's oral award of timesharing, the family court only indicated ten days of Nyla's Christmas vacation should be spent with Tyrone and this was the court's decision "at least for this year." When timesharing was reduced to writing, it was specified "Tyrone shall be given ten days during the Christmas break to be able to visit with Nyla beginning with the Friday after school lets out." Kimberly emphasizes in her brief this means the first ten days of Nyla's Christmas vacation must be spent with Tyrone and, therefore, because Christmas Eve and

to Tyrone as well as most of the summer time break is not in Nyla's best interest because it deprives Kimberly of quality time with Nyla, prevents Nyla from spending important holiday time with Kimberly's extended family, deprives Nyla of opportunities for building important relationships with peers and participating in summer activities in Lexington with her friends, and may cause resentment towards Tyrone.

Kentucky courts have repeatedly emphasized in a joint custody arrangement the timesharing schedule "should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances[,]" to be effectuated by allowing "the non-residential parent [to have] the greatest amount of [timesharing] which is reasonable under the circumstances." *Drury*, 32 S.W.3d at 524, 526 (Ky.App. 2000). "[I]t is generally in the best interests of the child and parents to maximize contact with both parents." *Pennington*, 266 S.W.3d at 765. While the family court may consider a standard timesharing schedule, it "should not make any presumption in favor of a standard [timesharing] schedule." *Drury*, 32 S.W.3d at 525.

We will not disturb the family court's finding that it was in Nyla's best interest for Tyrone to receive "substantial timesharing in conjunction with Nyla's

Christmas always fall within the first ten days of the vacation period, this will result in Nyla spending these holidays away from her every year. It is far from clear that the family court intended Kimberly be precluded from celebrating Christmas with Nyla every year. However, Kimberly did not file a motion to alter, amend or vacate this portion of the timesharing award. We note the results of this appeal do not preclude a future change in the allocation of timesharing. Timesharing can be modified at any time if doing so is in the best interest of the child. *Pennington v. Marcum*, 266 S.W.3d 759, 767 (Ky. 2008) (interpreting KRS 403.320).

school schedule.” Because Kimberly is Nyla’s primary residential parent during the school year, she will receive the majority of time with Nyla. Even with Tyrone receiving the majority of summer vacation time, Thanksgiving, ten days during winter break, and any weekend he can arrange, Tyrone will still receive significantly less time with Nyla than Kimberly. While Kimberly disagrees with the family court’s decision as to what timesharing schedule is best for Nyla, the family court acted properly within its discretion in determining a timesharing schedule designed to maximize Nyla’s time with Tyrone was in her best interest. The family court had no obligation to adopt a standard timesharing schedule, especially considering the parents’ distance limited the opportunity for weekday and weekend timesharing.

Kimberly argues allocating the total transportation expenses from Tyrone’s timesharing to her was an abuse of discretion taking into account the economic circumstances of the parties and she should not be penalized for moving to another state after Tyrone told her to leave the marital home and treated her improperly.

We determine the reasoning behind allowing a family court considerable discretion in deciding appropriate timesharing applies equally to its decision as to how to allocate timesharing transportation costs. Under the circumstances presented, the family court did not abuse its discretion in allocating the cost of transportation entirely to Kimberly.

During the final dissolution hearing the family court heard testimony regarding Kimberly’s and Tyrone’s relative financial resources, the time required

for Kimberly to complete her nursing degree, the cause of their separation and the reasons for Kimberly's move. The findings of fact recounted Kimberly's and Tyrone's different versions of why Kimberly left, but did not find either party was at fault or that any abuse took place. The family court did find Kimberly was responsible for moving Nyla out of state and interrupting timesharing, finding Kimberly moved to Lexington because she wanted to pursue a relationship with a childhood friend and did not inform Tyrone about her move.

When a primary residential parent moves out of state with a child before a final custody decree is entered, this may result in the other parent being granted primary residential status based upon the move not being in the child's best interest, considering the child's involvement with the other parent, interaction with extended family and integration into that community. *Frances*, 266 S.W.3d at 757-58. While in this case, Kimberly moved Nyla to Kentucky before filing for dissolution and almost two years before the final custody decree was entered, we determine it was still proper for the family court to consider which parent was responsible for Nyla now residing in a different state from the other and to use appropriate means to ensure the maintenance of adequate timesharing. The family court recognized Kimberly's move places a burden on Tyrone's ability to spend time with Nyla on a regular basis. Transporting Nyla from one parent to the other is costly in terms of time and money. The family court allocated these burdens by making Tyrone responsible for travel time and the cost for hotel charges incurred when visiting Nyla in Lexington, and Kimberly responsible for the cost of

Tyrone's gas. The family court considered Kimberly's current and anticipated future resources. It ordered that for the following twelve months Kimberly would not have to pay the costs of transportation out-of-pocket and would instead pay them as deductions from the \$2,000 owed Kimberly from her marital equity in the marital residence awarded to Tyrone. This arrangement will terminate around the same time Kimberly anticipates completing school and becoming employed.

Under these circumstances, we determine there was no abuse of discretion.

Accordingly, we affirm the Fayette Circuit Court's dissolution decree allocating timesharing and transportation expenses.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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