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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000619-ME

LEAH ILES — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA R. BRAMLAGE, JUDGE
ACTION NO. 09-J-00534

BRANDON SALISBURY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Leah Iles appeals the order of the Boone Circuit Court modifying the prior agreed parenting order in regards to visitation time with her minor child, naming the child's father, Brandon Salisbury, the primary residential custodian, modifying child support, and addressing multiple contempt motions. For the following reasons, we affirm.

I. Procedural and Factual Background

Iles and Salisbury briefly dated and were never married. Their minor child, A.J., was born in 2009. Shortly thereafter, Salisbury filed an action to establish paternity. The two parties entered into an Agreement Regarding Parenting Responsibilities of a Minor, in which the parties agreed to joint legal custody of A.J. with both parties designated residential custodians. They also agreed that parenting time would be split evenly; Iles had A.J. every Monday and Tuesday overnight, and on alternate weekends from Friday until Sunday; and Salisbury had custody of A.J. every Wednesday and Thursday overnight and the alternate weekends. This agreement set forth additional stipulations, such as: the health coverage of A.J., child support payments to Iles, an agreement not to expose A.J. to tobacco smoke, and an agreement to mediate all disputes arising under this agreement before bringing an action in the court.

The parties communicated amicably and frequently about A.J. and maintained the visitation schedule as set forth. Both parties dated other partners and each were eventually married. At this time, communication between the parties became more strained.

After repeated attempts to discuss A.J.'s education and activities, or to have mediation, and citing concerns about the stability and safety of Iles's home, Salisbury entered a Motion for Orders in the Boone Circuit Court asking: 1) to be named the sole residential parent of A.J.; 2) to have A.J.'s last name changed from Iles to Salisbury; 3) to have A.J. attend school in his school district; 4) to order

amendments to the agreed order concerning unnecessary trips to the Emergency Room; and 5) to hold Iles in contempt for failing to isolate the child from tobacco smoke and failing to follow the mediation clause. Following Salisbury's motion, Iles filed a Motion to Modify Child Support, then motions to hold Salisbury in contempt, to reconsider Salisbury's motion for A.J. to attend school in his district, and in opposition of his motion for a custody/parenting evaluation.

Iles has a history of depression and related mental illness, and continues to struggle with her mental health. Salisbury filed a subpoena to gain access to Iles's medical records for consideration in the determination of primary residential custodian. Iles filed motions to quash this discovery request as well as an emergency protective order. In addition to these numerous motions regarding her medical records, Iles also filed another motion to modify child support and a motion for attorney's fees.

After a hearing, the trial court entered its Findings of Fact and Conclusions of Law as well as its final order (hereinafter "March 24 Order"). The court ordered that: 1) the child's name be changed from "Iles" to "Iles-Salisbury;" 2) that Salisbury be the primary residential custodian; 3) that Iles pay Salisbury $159.20 per month in child support, after imputing income to her; and 4) that A.J. attend school in Salisbury's district. The trial court also found Iles in contempt for allowing the child to be in the presence of tobacco smoke in the home and for failing to abide with the mediation agreement before involving the court. The trial court overruled Iles's Motions for Contempt and for Attorney's Fees and Costs.

Iles's appeal followed. Any necessary additional facts will be discussed with the relevant argument.

II. Standard of Review

Child custody awards are reviewed for abuse of discretion. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). "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." *Id*. (citation omitted). "[S]ubstantial evidence is [e]vidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (internal quotations and citations omitted). Therefore, "'[m]ere 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." *Id.*

III. Arguments

Iles makes six arguments on appeal. She argues that the trial court erred by: 1) naming Salisbury the primary residential custodian and significantly restricting her visitation with the minor child; 2) changing the minor child's last name; 3) denying her motion to quash Salisbury's subpoena seeking her medical records from St. Elizabeth hospital; 4) denying her Motion for Modification of

Child Support; 5) finding her in contempt, and in not finding Salisbury in contempt; and 6) by not awarding her attorney's fees.

A. Change of Primary Residential Custodian

First, Iles argues that the trial court erred by changing the previous arrangement of joint residential custody and naming Salisbury the primary residential custodian. She argues that when a party desires to modify visitation rights already granted, the court may not do so without a showing that the child would be seriously endangered by visitation. *See Hornback v. Hornback,* 636 S.W.2d 24, 26 (Ky. App. 1982). She contends that the trial court focused solely on her mental health, and made no showing that the minor child was seriously endangered. We disagree.

"[A]ny post-decree determination made by the court is a modification, either of custody or timesharing/visitation. If a change in custody is sought, KRS[1] 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so." *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008).

> Modification of the visitation schedule does not alter the sole nature of the custody. While there is no statute that specifically addresses modification of timesharing in a joint custody setting, it is reasonable to infer that modifying it does not alter the nature of joint custody. Also, since the nature of the custody does not change, the trial court is not bound by the statutory requirements that must be met for a change of custody, but can modify timesharing based on the best interests of the child as is done in modifying visitation.

[1] Kentucky Revised Statutes.

Id. at 768. KRS 403.320(3) states "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" This provision applies the best interests of the child standard, and does not require a showing of serious endangerment. *See Hornback*, 636 S.W.2d at 26 (holding that a denial of visitation requires proof that a child's welfare would be seriously endangered, whereas a modification of visitation requires proof of a child's best interest).

While the terms timesharing and visitation are often used interchangeably, visitation is only applicable in the context of sole custody. *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). With joint custody, both parents possess the rights and responsibilities associated with parenting, and are expected to participate equally in raising the child. *Id*. at 764. Because each parent is a legal custodian, only timesharing applies, not visitation. *Id*. at 765. A subset of joint custody, called shared custody, exists when both parents have legal custody, subject to some limitations laid out by agreement or court order. *Id*. at 764. Shared custody can often be distinguished from joint custody by inflexible timesharing. *Id*. This situation exists in the present case.

In *Drury v. Drury*, 32 S.W.3d 521, 524 (Ky. App. 2000), this court applied the "reasonable visitation" standard set forth in KRS 403.320(1) to evaluate timesharing orders in shared custody cases. "Reasonable visitation" is decided based upon the circumstances of each parent and child, with the best interests of the child in mind. *Id*. at 524-25. The trial court has considerable

discretion in determining which living arrangements will best serve the interests of the child. *Id.* at 525. A timesharing schedule should ideally be designed to allow both parents as much involvement in their child's life as possible. *Id*. at 524. As with visitation, a finding of serious endangerment is not required for a timesharing arrangement modification.

In this case, Salisbury is not asking for a change in custody, but rather to be designated the primary residential custodian, with the alternating weekend timesharing to remain the same. Neither party seeks to change the joint custody arrangement currently in place. The trial court heard copious testimony and made detailed findings as to the child's best interests in naming the father the primary residential custodian. The court cited the following findings of fact, among others, to support the change: Salisbury has a more stable home address and occupancy whereas Iles has moved more than five times and has a revolving occupancy; Salisbury makes a consistent income whereas Iles barely works part-time due to her agoraphobia; Iles has a history of mental illness, requiring frequent hospitalization and medications, which leaves her groggy or disoriented; and Salisbury has been the primary parent to take the child to doctor's appointments and extracurricular activities. Although this new schedule will reduce the time Iles has with A.J., it does not unreasonably restrict her time. The trial court did not err in applying the "best interests" standard, nor did the court err in finding that it was in the child's best interests to name Salisbury the primary residential custodian.

B. Changing the Minor Child's Last Name

Second, Iles argues that the trial court erred in changing the minor child's last name from "Iles" to "Iles-Salisbury." She contends that the parties had agreed to use the last name "Iles" since A.J. was born, Salisbury has never objected until now, and changing her last name may be confusing to A.J.

"Both parents . . . may have the name of a child under the age of eighteen (18) changed by the District Court, or if the Family Court or Circuit Court has a case before it involving the family, the Family Court of a county with a Family Court[.]" KRS 401.020. "However, if one (1) parent refuses or is unavailable to execute the petition, proper notice of filing the petition shall be served in accordance with the Rules of Civil Procedure. *Id.* "[W]hen a surname is modified to a hyphenated surname that includes the father's surname[,] such a modification is a name change." *Leadingham ex rel. Smith v. Smith*, 56 S.W.3d 420, 427 (Ky. App. 2001). As with custody matters, "in dealing with a change of name the issue should be determined by a preponderance of the evidence rather than by requiring clear and convincing evidence." *Likins v. Logsdon,* 793 S.W.2d 118, 122 (1990). The best interest of the child standard is applied to name changes. *Id*.

Iles was given notice of the proposed name change and afforded her statutory right to a hearing to oppose any proposed name change. *See* KRS 401.020. In this case, Iles and Salisbury were never married, and Iles has since remarried, occasionally using her married name. Salisbury was named the primary residential custodian, and A.J. is now old enough to attend kindergarten in her

father's district. Based on these facts, and the fact that it is in the child's best interest to primarily reside with Salisbury, the trial court found that it is in A.J.'s best interest to have a last name that reflects both Iles's and Salisbury's names. Furthermore, adding a hyphenated surname does not exclude Iles from the name of her child, but rather includes both parents for the benefit of the child. Therefore, we believe the trial court acted appropriately by granting the name change.

C. Iles's Medical Records

Third, Iles argues that the trial court erred in denying her motion to quash Salisbury's subpoena seeking her medical records, as well as her motion for an emergency protective order to prevent Salisbury from accessing those records. Iles has a history of mental illness, as does her mother, who also resides in the home. After the birth of A.J. in 2009, Iles developed post-partum depression, for which she was successfully treated. In 2012, following the birth of her second child with her husband, Iles again suffered from post-partum depression and was again successfully treated. As the trial court noted, she currently suffers from major depression and panic disorder with agoraphobia, taking up to six different medications, some of which leave her groggy or disoriented. As a result of the agoraphobia, she only works a part-time schedule, and "does not do well in crowds."

In 2014, Iles voluntarily admitted herself to St. Elizabeth Medical Center for a severe depressive episode. She did not inform Salisbury of the cause or duration of her hospitalization so that the timesharing schedule could be

adjusted. Salisbury concedes that his wife, a nurse at St. Elizabeth, did improperly access Iles's medical records. A HIPAA complaint was filed, and she has been disciplined for the breach. Prior to the March 24 order, Salisbury served a subpoena to gain access to Iles's medical records. Iles filed an emergency motion for a protective order, which was denied by the trial court, and Iles was ordered to release her medical records for her hospitalization, but with a qualified protective order in place.

Iles argues that Salisbury has "unclean hands" in seeking her medical records, since his wife unlawfully accessed Iles's medical records prior to the subpoena, and allegedly gave Salisbury the information contained within. She contends that under the unclean hands doctrine of equity, Salisbury cannot come before the court seeking to benefit from his fraudulent, illegal, or unconscionable conduct. Salisbury counters that this doctrine does not apply in this custodial context.

Although Iles properly states this doctrine, the "unclean hands" analysis is irrelevant to the best interests analysis required of the court in evaluating custody and timesharing. Despite Salisbury's wife illegally accessing Iles's records, Salisbury properly filed for a subpoena from the court before seeking to access any of these records or use them in these proceedings.

KRS 430.270(2) states, in relevant part, that "[t]he court shall determine custody 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: . . . [t]he mental and physical health of all individuals involved." Iles's mental health history is surely a part of the court's consideration when determining A.J.'s best interests for primary residential custodian. Additionally, Salisbury did not use any alleged improper access to Iles's records as the basis for his subpoena to view her records; he had independent knowledge of her mental health issues, and used the proper discovery procedures of the court. As held by the trial court, he properly followed 45 CFR[2] 164.512(e) in giving notice to Iles regarding his intent to subpoena her medical records, and she filed an objection, which was overruled. As such, Salisbury may reasonably request Iles's records as relevant to her hospitalization and treatment from September 11-16, 2014, in a manner consistent with the qualified protective order. The trial court did not err in granting the conditional subpoena to compel Iles's medical records for the relevant hospital stay.

D. Modification of Child Support

Fourth, Iles argues that the trial court erred by denying her motion for modification of child support from June 23, 2014, through March 20, 2015. Pursuant to the parties' Agreement Regarding Parenting Responsibilities of Minor, Salisbury paid Iles $25 a week for child support, which was based upon his income of $953 per month while he was attending school. Since he has now completed school, Salisbury's income is currently around $5,000 a month. Iles filed a motion to modify child support based on this change in circumstance, as well as two

[2] Code of Federal Regulations.

additional amended motions to modify. She argues that she is entitled to that difference in support from June 23, 2014, when she filed her motion, through March 20, 2015, when the court issued its order. KRS 403.213(1).

In its March 24 order, the court changed the amount of child support owed by each parent. Pursuant to that order, Iles must now pay Salisbury $159.20 per month for child support. This amount was calculated based on the imputation of minimum wage to Iles, pursuant to KRS 403.212(2)(d), which states

> [i]f a parent is voluntarily underemployed, child support shall be calculated based on a determination of potential income . . . Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community.

The court imputed wages to Iles consistent with her current hourly wage, but at the full-time rate of 40 hours per week instead of the 10-17 hours she chooses to work.

Though Salisbury's increase in salary does constitute a change in circumstances, Salisbury was also named as the primary residential custodian of A.J. Furthermore, Salisbury's motion to be named the primary residential custodian preceded Iles's motion for modified child support obligations, which affects her entitlement to arrearage from the date of her motion. Although the trial court does not explicitly state whether this change in support owed and by whom was due to an increase in Salisbury's salary or that he became the primary residential custodian, the trial court did carefully consider the change in primary residential custodian, the salaries of both parties, the daycare expenses, medical

expenses, and health insurance expenses in its March 24 order, and in its child support calculation worksheet. Accordingly, the trial court did not abuse its discretion in changing the amount of support owed by Iles, nor does either party owe arrearage.

E. Contempt

Fifth, Iles argues the trial court erred in finding her in contempt of the Agreement Regarding Parenting Responsibilities of a Minor. The trial court found her in contempt for allowing A.J. to be in the presence of tobacco smoke within the structure of the home, as well as for failing to abide by the mediation clause of the agreement.

Due to financial concerns, Iles currently lives with her husband, other child, and multiple other family members. Both Iles and her husband, as well as her mother and mother-in-law smoke tobacco, but Iles maintains that she and her husband do not smoke inside the home around A.J., although both grandmothers smoke in their bedrooms. Based on Iles's own testimony that her mother and mother-in-law smoke inside the home, as well as Salisbury's observations of A.J. smelling of cigarette smoke and having respiratory signs of exposure to cigarette smoke, Iles clearly violated the provision of the parenting agreement to protect A.J. from exposure to tobacco smoke. Therefore, we agree with the trial court that she is in contempt of the parenting agreement regarding tobacco smoke.

Additionally, the trial court found that Salisbury "attempted on numerous occasions to contact [Iles] regarding mediation and she failed to respond

or failed to attend mediation." In addition to not responding to any attempt to mediate, Iles has continually filed motions with the court before seeking to mediate. Thus the trial court did not err in finding Iles in contempt of the mediation clause of the agreement.

As for her second contention about contempt, Iles argues that the trial court erred in overruling her motion to find Salisbury in contempt. She argues, among other causes, that: Salisbury violated their agreement by unilaterally enrolling A.J. in the Goddard School, a private childcare facility, during his parenting time without offering her the right of first refusal to care for the child during that time; by unilaterally enrolling A.J. in extracurricular activities, which Iles either could not attend or were during her parenting time; and by not updating her on doctor's appointments or school progress reports. Iles maintains that the extracurricular activities interfere with her time with A.J, and that she should have been consulted about providing childcare for A.J. before Salisbury enrolled her in a private daycare. However, as reflected by the record, Salisbury pays the cost of the Goddard School at his own expense, and A.J. has been attending the daycare for nearly four years. The record shows that Salisbury attempted on many occasions to communicate with Iles regarding daycare and extracurricular activities, but Iles failed or refused to respond. The trial court found that Iles had acquiesced to A.J. attending the Goddard School as well as to her participation in extracurricular activities, since A.J. has been participating in these activities for a substantial

period of time, and Iles knew of the enrollment. We agree. The trial court did not abuse its discretion in denying Iles's motions for contempt.

F. Attorney's Fee

Lastly, Iles argues the trial court erred denying her attorney's fees. She contends that she makes substantially less in wages than Salisbury, and should not be disadvantaged in proceedings regarding her child due merely to financial hardship. Salisbury counters that the trial court did not err, especially since Iles's refusal to mediate per the parenting agreement resulted in additional litigation and costs. While KRS 403.220 does permit the court to order attorney's fees, "[t]he amount of an award of attorney's fees is committed to the sound discretion of the trial court with good reason. That court is in the best position to observe conduct and tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct." *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). The trial court considered the conduct and financial resources of both parties, and, as discussed above, found Iles in contempt for failure to first mediate, which resulted in additional expenses. The trial court did not abuse its discretion in not awarding Iles attorney's fees.

IV. Conclusion

For the forgoing reasons, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Teresa Cunningham
Florence, Kentucky

BRIEF FOR APPELLEE:

Rene Heinrich
Newport, Kentucky