

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000986-ME

ERIK WILSON

APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 15-CI-00111

OLIVIA FINLEY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, TAYLOR, AND THOMPSON, JUDGES.

TAYLOR, JUDGE: Erik Wilson brings this appeal from a June 11, 2015, order of the McCracken Circuit Court, Family Court Division, awarding joint custody to the parties and designating Olivia Finley as the primary residential parent. We affirm.

Erik Wilson and Olivia Finley lived together and were involved in an intimate relationship that produced a child. Their child, a daughter, was born on

August 18, 2010. When the child was approximately one year old, the parties' ended their relationship. Without the necessity of judicial involvement, the parties informally agreed to a time-sharing arrangement for the child. Initially, the child stayed with Olivia from Tuesday through Friday and with Erik from Friday through Monday. Once the child began preschool, she resided primarily with Olivia, and Erik exercised time-sharing on weekends. The parties were able to informally agree on time-sharing and other issues related to the child until February 2015.

On February 13, 2015, Erik filed a petition in the family court for sole custody of the child. The filing of this petition occurred shortly after Olivia was charged with driving under the influence (DUI). Olivia responded and also filed a petition for custody of the child. Therein, Olivia asserted the parties should be awarded joint custody and that she should serve as the primary residential parent with Erik exercising time-sharing.

In March of 2015, before a hearing had been conducted on Erik's petition, he refused to return the child to Olivia following a weekend visit as was customary under the parties' informal agreement. Thereupon, Olivia went to Erik's home to retrieve the child. Erik would not allow Olivia to enter his home, so Olivia illegally entered the home and allegedly assaulted Erik. Erik called the police and subsequently obtained a domestic violence order (DVO) against Olivia.

On June 1, 2015, the family court conducted the hearing on Erik's petition. The parties were present and represented by counsel. Both parties

testified and called other witnesses. By Order entered June 11, 2015, the family court awarded Olivia and Erik joint custody, designated Olivia as the primary residential parent, and granted Erik time-sharing every weekend. This appeal follows.

Erik contends the family court erred by designating Olivia as the primary residential parent. Erik specifically asserts there was not substantial evidence of a probative value to support the family court's decision to designate Olivia as the primary residential parent.

As this was an initial custody determination, the designation of a primary residential parent was governed by the best interests standard of Kentucky Revised Statutes (KRS) 403.270. *Frances v. Frances*, 266 S.W.3d 754 (Ky. 2008); *Chappell v. Chappell*, 312 S.W.3d 364 (Ky. App. 2010).¹ Although KRS 403.270 does not include a definition of "best interests," it does provide a non-exclusive list of relevant factors to be considered in a best interests determination. The relevant factors are as follows:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
- (b) The wishes of the child as to his custodian;
- (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

¹ Had a prior custodial arrangement been ordered by the court, Erik Wilson's motion would have been treated as one to modify timesharing and controlled by the best interests standard set forth in Kentucky Revised Statutes 403.320. See *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008).

- (d) The child's adjustment to his home, school, and community;
- (e) The mental and physical health of all individuals involved;
- (f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

KRS 403.270(2).

Our standard of review upon an initial custody determination and designation of a primary residential parent is clear. The family court's findings of fact will not be disturbed unless clearly erroneous. *Frances*, 266 S.W.3d 754; Kentucky Rules of Civil Proceedings 52.01. Findings of fact are not clearly erroneous if supported by substantial evidence of a probative value. *Frances*, 266 S.W.3d 754. And, the family court is in the best position to resolve issues of conflicting evidence and then determine what is in the child's best interests. *Id.* If the findings of fact are supported by substantial evidence, the family court's decision will not be disturbed absent an abuse of discretion. *Id.*

In its June 11, 2015, Order, the family court summarized the evidence to support its decision to designate Olivia as the primary residential parent:

All the testimony regarding the child leads this Court to find that the child is an exceptional child. She is extremely intelligent and well adjusted to her environment. She is doing exceptionally well in school. The social worker, Rita Jenkins, was present and testified that [Olivia's] home was appropriate and well kept and that the child was a very happy child, well behaved and well adjusted to her home. That being the case, the Court finds that it is in the best interest of the child that the arrangements relating to visitation remain as they are.

June 11, 2015, Order at 2.

From our review of the June 11, 2015, Order, the family court clearly considered the wishes of both parents, the child's relationship with other individuals in both homes, the child's adjustment to her home, the child's adjustment to her school, the mental health of the individuals involved, and the information regarding the incident of domestic violence. The family court found that the child was thriving in her current environment, was performing exceptionally well in school, and was a very happy, well-adjusted child. The family court's decision to designate Olivia as the primary residential parent and award Erik time-sharing every weekend essentially maintained the *status quo ante* as established by the parties' informal time-sharing arrangement. Despite a few isolated incidents of poor decision-making by Olivia, the evidence taken as a whole demonstrates the child was thriving under the parties' previous informal arrangement. Simply stated, the family court considered the factors relevant to the best interests determination as set forth in KRS 403.270(2) and determined that designating Olivia as the primary residential parent was in the child's best interests. And, our standard of review requires that a great deal of deference be given to the family court. *See Frances*, 266 S.W.3d 754. Thus, we cannot say that the family court's findings of fact were clearly erroneous or that it abused its discretion. *Id.* Hence, we conclude the family court did not commit reversible error by designating Olivia as the primary residential parent.

Erik also contends that the family court erroneously denied his motion to supplement the record. Erik specifically asserts that the family court erred by not permitting him to supplement the record with the affidavit of the assistant county attorney. Therein, the county attorney averred that Erik did not initiate or pursue the pending criminal charges against Olivia related to her illegal entry into Erik's home when he failed to return the child following an agreed visit with him. And, Erik contends the family court erroneously denied his request to supplement the record with proof that Olivia's mother was not present at the custody hearing because she was incarcerated. Erik asserted that Olivia's testimony that her mother was absent because she had been injured in a car accident was false.

The record reveals that Erik filed the motion to supplement on June 3, 2015. The family court had conducted the hearing on June 1, 2015, and specifically stated that:

The Court left the record open for the sole purpose of determining the outcome of [Olivia]'s criminal case relating to the assault charges that stemmed from the evidence that [Erik] took out the DVO. The record has been supplemented for that purpose and [Olivia] received probation with no jail time.

Thus, the family court only "left the record open" for evidence concerning the disposition of the pending charges against Olivia and not for any other reason. Erik had ample opportunity to introduce evidence at the hearing on June 1, 2015. Upon the whole, we cannot conclude that the family court abused its discretion by denying Erik's motion to supplement the record.

For the foregoing reasons, the order of the McCracken Circuit Court,
Family Court Division, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO APPELLEE BRIEF.

Mark L. Ashburn
Paducah, Kentucky