RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002545-ME

CHASTIDY NOEL — APPELLANT

v.

APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE BRUCE PETRIE, JUDGE
ACTION NO. 01-CI-00203

RANDELL NOEL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.[1]

McANULTY, JUDGE: Chastidy Noel and Randell Noel are the divorced parents of a son, Scooter. Initially, they were awarded joint custody of Scooter with equal time-sharing. Later, upon motion by Chastidy to modify this arrangement, the trial court designated Randell as the primary residential

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

custodian. Chastidy appeals on the basis that the trial court should have conducted an evidentiary hearing before determining that Randell was the proper primary residential custodian. Finding no error, we affirm.

Chastidy and Randell were divorced by decree entered March 15, 2002. At that time, the trial court reserved ruling on the custody arrangement of Scooter, whose date of birth is January 29, 1999. Later, a domestic relations commissioner (DRC) heard the matter and recommended that Chastidy and Randell share joint custody and have physical custody of Scooter for equal periods of time.

The trial court adopted the recommendation of the DRC. Under the equal time-sharing arrangement, Randell had physical custody of Scooter Monday through Wednesday of one week and Monday through Thursday the next week. The schedule alternated in that pattern from week to week for about a year and a half.

After Chastidy and Randell divorced, Chastidy moved from Boyle County to Jessamine County. When it came time for Scooter to start pre-school, Chastidy and Randell could not agree on where he would attend school on a daily basis. Because of their inability to agree, Chastidy filed a Motion for Assignment of Periods of Joint Custody. Chastidy set a date of August 7, 2003, for her motion to be heard.

The trial court dealt with Chastidy's motion as a motion to modify custody, although Chastidy characterized her motion as a request for a "necessary change in the periods of time the child spends with each parent which naturally occurs as the child matures and the parents [sic] schedules change." The trial court heard Chastidy's motion, and then it took the case under submission. Later, the trial court directed Chastidy and Randell to submit proposed findings of fact and conclusions of law, as well as a calendar showing the days that Scooter resided with each parent.

About a month after receiving the proposed findings and conclusions, the trial court issued its findings of fact, conclusions of law and an order. In that order, the trial court concluded that the best interests of the child would be served by continuing the parties' joint custody. However, to maintain stability in Scooter's life and ensure that he started his pre-school education, the trial court designated Randell as the primary residential custodian. And the trial court granted Chastidy time-sharing according to the Boyle and Mercer family court guidelines.

The sole issue on appeal is whether the trial court erred in failing to conduct an evidentiary hearing before modifying custody. Chastidy contends that instead of taking the case under submission after hearing her motion at the court's

regularly-scheduled motion hour, the trial court should have afforded her an evidentiary hearing tantamount to a domestic trial.

We conclude that Chastidy's argument is unmeritorious for three reasons. First, Chastidy does not claim on appeal that the trial court's findings in support of its conclusion are erroneous. Second, Chastidy does not point to any evidence that she was not permitted to present due to the way in which the trial court handled this case.

The third reason concerns the record that is before this Court on appeal. Randell argues that at the conclusion of the August 7, 2003, hearing, the trial court asked the parties if they wished to present additional proof. According to Randell, both parties indicated that they had no other evidence to present other than the time-sharing calendars. Randell argues that Chastidy waived the evidentiary hearing that she now claims the trial court should have conducted.

Chastidy did not file a designation of evidence in this case. See CR 75.01 and CR 98. Consequently, the clerk of the Boyle Circuit Court did not include a videotape of the August 7, 2003 hearing as part of the record on appeal. We acknowledge that under CR 75.01 Randell could have had this evidence, which supported his waiver argument, included in the record. Instead, he seems to rely on the rule that as to all

disputed issues of fact, this Court is to assume that all undesignated parts of the record support the judgment of the lower court. See Colonial Life & Acc. Ins. Co. v. Weartz, 636 S.W.2d 891, 893 (Ky.App. 1982); Hamblin v. Johnson, 254 S.W.2d 76, 76 (Ky. 1953). Considering Chastidy's sole argument on appeal and the record before us, we conclude that this is a proper case for the application of the rule.

For the foregoing reasons, the judgment of the Boyle Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Daniel W. James Nicholasville, Kentucky	Kevin L. Nesbitt Danville, Kentucky