RENDERED: OCTOBER 12, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-1888-MR

ROBERT FRALEY — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI GOSSETT, JUDGE
ACTION NO. 01-CI-27

REBECCA FRALEY (NOW MAGGARD) — APPELLEE

AND: NO. 2006-CA-2195-MR

REBECCA MAGGARD — CROSS-APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI GOSSETT, JUDGE
ACTION NO. 01-CI-27

ROBERT FRALEY — CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD AND MOORE, JUDGES; GUIDUGLI[1], SENIOR JUDGE

GUIDUGLI, SENIOR JUDGE: This is a domestic relations case in which Appellant, Robert Fraley ("Robert"), and Cross-Appellant, Rebecca Maggard ("Rebecca"), individually appeal various provisions of the Carter Circuit Court's August 31, 2006 order pertaining to a minor child. We affirm.

This case comes to us for a third time.[2] The procedural and factual history were set out in the first and second unpublished appeals and need not be repeated here. The facts essential to this appeal are as follows: on or about July 11, 2006, Robert filed a multi-part Motion asking, among other things, for custody of the parties' minor daughter, Shelby; additional visitation time; authority to seek medical treatment for Shelby; recalculation of child support; disclosure of Rebecca's address and phone number; and a requirement that Rebecca notify him as to when and where Shelby would be, if being taken out of town for more than 24 hours. On August 31, 2006, the court entered an Order overruling the motions for custody and additional visitation time and sustaining the motions to provide medical treatment[3]; require disclosure of Rebecca's address and phone

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[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

[2] *See* 2003-CA-1364 (2004 WL 2260295) and 2003-CA-1137 (2006 WL 891199).

[3] Robert's permission to seek medical care for Shelby came with the condition that he was only to take her to her established pediatrician.

number; and require notification of 24-hour out-of-town trips. On September 6, 2006, Robert filed an appeal with this court. On September 11, 2006, Rebecca filed a motion with the Circuit Court to alter, amend or vacate certain portions of the August 31, 2006 Order. On September 22, 2006, Rebecca's motion was overruled. On October 18, 2006, Rebecca filed an appeal to this court.

In his appeal, Robert argues several Circuit Court errors. They are: 1) failure to consider his motion for custody; 2) failing to provide additional visitation time; 3) the condition that he may only take Shelby to her current doctor; and 4) failure to recalculate child support. We shall consider each of these allegations in turn.

A custody award shall not be disturbed unless it constitutes an abuse of discretion. *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky.App. 2005).

> "'Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.'... The exercise of discretion must be legally sound."

Id. (quoting *Sherfey v.* Sherfey, 74 S.W.3d 777, 783 (Ky.App.,2002) (quoting *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994)). Although there are issues other than custody present, we have determined that the abuse of discretion standard applies across the board to the case at hand.

KRS 403.350 states:

> A party seeking a temporary custody order or modification of a custody decree *shall submit together with his moving papers an affidavit* setting forth facts supporting the requested order or modification and shall give notice, together with a

> copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits....*The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits*, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

(Emphasis added). Robert failed to submit an affidavit with his motion. Although he alleges reasons for the custody change within his motion, they do not an affidavit make. He is in no way exempt from the KRS 403.350 requirement. Therefore, we find no abuse of discretion. In fact, the Circuit Court adhered exactly to what the law required.

Previously we ordered that the Circuit Court grant Robert additional timesharing with Shelby.[4] We believe Robert's argument regarding failure to carry out that order to be disingenuous.

We take note that Robert, in his brief, declares that he cares for Shelby over 42% of the time. We also note that Rebecca failed to file a brief when we rendered our last opinion in this matter. Given the circumstances, the 58/42 split appears to be nearing a better apportionment of timeshare. If Robert believed our prior opinions to imply that we wished to reduce Rebecca's timesharing to a marginal amount, he was mistaken.

The Circuit Court has previously declared that it could not render a new order regarding timesharing because Rebecca was seeking discretionary review of our last order. An Order denying discretionary review was rendered on October 16, 2006, over a month after Robert had already appealed to this court for the third time. It doesn't appear as though the Circuit Court has had the luxury of considering a complete record in

[4]*See* 2003-CA-1364 (2004 WL 2260295) and 2003-CA-1137 (2206 WL 891199).

several years. Additionally, it does not appear as though there has been an opportunity for the dust to settle and the Circuit Court to comply before Robert has filed this appeal. We can only assume, that given the opportunity to do so, the Circuit Court will make a ruling consistent with our past orders regarding additional timesharing for Robert.

In its August 31, 2006 Order, the Circuit Court granted Robert the right to take Shelby to the doctor with the condition that he only take her to her established pediatrician. Robert maintains that he should be allowed to take Shelby to *any* doctor, when and if the need arises. Rebecca, in her cross-appeal also addresses this portion of the Order and argues that Robert should not be able to take Shelby to the doctor at all. We will address both arguments at once.

KRS 403.330(1) states:

> Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may *determine* the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

(Emphasis added.) The statute makes clear that any determinations regarding the child's health care are left to the discretion of the custodial parent. Therefore, any determinations regarding Shelby's health care, including choice of doctor, are to be left to the sole discretion of Rebecca. However, we do not believe that 'determine' also means to 'transport' or 'provide'. The statute does not deny Robert the ability to transport Shelby to the doctor should she need it, only the ability to choose whom that doctor is. It would

baffle us to believe that the legislature intended only one parent capable of rendering a child medical attention should she need it. The ability to transport Shelby to the doctor lies with both parents. We recognize, in cases such as this, when parents have placed their children into the middle of their personal conflicts, that such a reading would allow the custodial parent the ability to schedule doctor's appointments in a manner to interfere with the non-custodian's timesharing. We do not believe this to be the legislature's intent.

We wish to make clear that we do not believe, nor does it appear that the Circuit Court believes, that this restriction on Robert denies him the ability to take Shelby to an emergency room in the event of an emergency. We recognize that emergencies are special situations which require split-second decisions and may not allow time for the notification and approval of the custodial parent. This does not mean, however, that Robert may abuse this distinction by declaring 'emergencies' in an attempt to take Shelby whenever and wherever he wishes. If an occasion arises where Shelby is in need of another doctor, a specialist for example, then Rebecca will make the decision as to whom that person shall be. For these reasons, we believe Circuit Court's ruling on this issue to be appropriate.

Robert's final argument is regarding the recalculation of child support.

> The trial court could take into consideration the period of time the children reside with each parent in fixing support, and could deviate from the guidelines for reasons advanced by the appellant, if convinced their application would be unjust.

Downey v. Rogers, 847 S.W.2d 63, 65 (Ky.App. 1993).

> Kentucky trial courts have been given broad discretion in considering a parent's assets and setting correspondingly appropriate child support. A reviewing court should defer to the lower court's discretion in child support matters whenever possible. As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this court will not disturb the trial court's ruling in this regard. However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Downing v. Downing, 45 S.W.3d 449, 454 (Ky. App. 2001). The Carter Circuit Court has not refused to address the issue of child support, it has merely passed it. Once again, the trial court was faced with a situation where the extensive litigation between these parties has gotten ahead of itself and not permitted the dust to settle. There is no reason for us to believe that the Circuit Court does not intend to readdress Robert's motion for reconsideration of child support after the finality of the timesharing schedule is determined, granted of course that he re-notices it. We note, however, that the fact that Robert may be entitled to a reduction based on his timesharing schedule does not relieve him from the requirements of KRS 403.213(2) that the child support change must be at least a 15% change. Furthermore, if the lower court decides not to change the current child support, it is within the court's discretion to do so. While we have held that a court *may* consider the amount of timesharing, we have never held that it *must*. In the absence of an abuse of the circuit court's discretion, it is not an issue for our consideration.

In her appeal, Rebecca argues several Circuit Court errors. They are: 1) ruling on motions without sufficient evidence; 2) considering motions previously

overruled; 3) allowing Robert to seek medical treatment for Shelby; 4) requiring her to disclose her address and phone number; and 5) requiring her to inform Robert of the details of 24-hour out-of-town trips with Shelby. Except for the issue regarding medical treatment, which has already been addressed above, we will address each of these issues in turn.

In regards to her claim that the Circuit Court ruled on motions without sufficient evidence, Rebecca relies on KRS 403.330. Specifically, her claim relates only to the medical treatment issue. While KRS 403.330 does require a hearing in order to change who determines the health care of the child, that is not the situation here. As previously discussed, the Circuit Court did not give Robert the ability to make determinations regarding Shelby's health care, only the ability to transport her to and from her doctor. It is for this distinction that Rebecca's argument fails.

Rebecca also claims that Robert's motions should not have been entertained by the court because they were issues previously decided. Because the issue and circumstances surrounding child care and a child's well-being are of paramount importance and can change so frequently and without notice, we refuse to apply the theory of *res judicata* to an issue regarding child care, custody or timesharing. It is long recognized that the issues of child custody and care may be reexamined as the court sees fit. In the case at hand, the Circuit Court determined that it was in Shelby's best interest that her father, who cares for her 42% of the time, be able to take her to the doctor. We see no abuse by the lower court in making this determination. Children's needs are ever-

changing. To declare that child related issues may not be reexamined would risk placing a child into a state of limbo, where a prior holding could take precedence over her best interest.

Rebecca argues that Robert should not be privy to her address and phone number because of safety reasons. In support of her argument, she cites to a Domestic Violence Order (“DVO”) entered on her behalf. Rebecca's argument is without merit. The DVO to which she cites has been expired for years. If she is truly in fear of her safety because of Robert, this is not the appropriate venue to seek relief. She should file for a new DVO in an effort to protect herself. The fact that her previous DVO was never renewed and that she has failed to obtain one since gives little, if any, weight to her claim that he presently presents a danger to her. The Circuit Court is well acquainted with the case at hand. We do not believe it would have made such a finding without taking Rebecca's claims into consideration.

The issue of whether or not one parent should be required to inform the other if, when, and where they are taking a child out of town is again one with no legal standard. While we can find no authority granting Robert a right to this information, Rebecca has failed to provide us with an argument that convinces us the Circuit Court abused its discretion in mandating this information, especially taking into account that Robert was previously ordered to provide the same information to Rebecca. Making such a requirement reciprocal seems well within the discretion of the Circuit Court. Therefore, we defer to the Family Court's decision on this issue and affirm.

While the courts recognize an inability of parents to often get along, it is no excuse for parties to bicker and abuse the court system in an effort to anger or undermine the other. This court takes note that the briefs of both parties were less than successful in determining proper law because they were more concerned with mud-slinging and stone-throwing than developing relevant legal arguments. This court also takes notice that the difficult nature in which these parties deal with each other has lasted over six years now. As this minor child continues to grow, we can only hope that her parents will grow up and recognize that their inability to communicate and cooperatively parent can only negatively affect their child. These parties have a long road ahead of them, well beyond emancipation. It is our hope that these parties will cease their immature behavior and, in the best interest of their child, attempt to resolve matters amicably and without the constant use of the courts. For the foregoing reasons, the August 31, 2006 order of the Carter Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLANT:

MaLenda S. Haynes
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