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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001638-ME

ERIN HARTLAGE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION EIGHT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 01-FC-005787

JOHN DINNING APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND LAMBERT, JUDGES; AND SHAKE,[1] SENIOR JUDGE.

COMBS, JUDGE: Erin Hartlage appeals from an order of the Jefferson Family Court that denied her motion to modify her time-sharing arrangement with

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

her former husband; they share joint custody of their minor daughter. Finding no error, we affirm.

The parties were married on July 23, 1994, and they are the parents of one minor child, a daughter, born on August 30, 1995. They separated in August 1997; they were later divorced by a decree of dissolution of marriage entered by Indiana's Warrick Superior Court on March 17, 1999. At that time, Erin was awarded custody of their daughter, and John was to have weekend visitation. Without advising John, Erin moved to Louisville with their daughter.

In April 2000, John filed a petition in the Warrick Superior Court to modify custody. In June 2000, the court awarded John sole custody of his daughter.

In August 2001, Erin filed a motion in the Jefferson Family Court to modify custody. John and the child resided in Owensboro, but the Jefferson Family Court assumed jurisdiction over the parties. While the litigation was pending, the family court granted Erin brief, weekly, supervised visitation. On January 23, 2004, the family court denied Erin's motion. In its judgment, the court observed as follows:

> Mother engages in conduct consistently and repeatedly in an attempt to alienate [the child's] affection for her father. Any advantages which might result by a change of environment are far outweighed by the harm it could cause. [The child] has made an excellent adjustment to the home, school and community in Owensboro. Father, stepmother and [the child] have a very good, healthy and happy relationship. It is in the best interests of [the child] that sole custody remain with father.

Findings of Fact, Conclusions of Law and Judgment at 5. Erin continued to enjoy visitation with the child, and she eventually abandoned her appeal to this court.

On July 16, 2007, Erin filed another motion for modification of custody. In November, the parties reached a mediated agreement with respect to visitation. With the aid of Dr. Rhonda Mancini, a psychologist, the parties agreed to implement a time-sharing schedule that comported with the child's best interest.

In August 2008, Erin filed another motion to modify the parties' custody arrangement. She sought an order declaring the parties to be joint custodians and the adoption of a revised time-sharing schedule devised by Dr. Mancini. Based upon Dr. Mancini's advice to him, John did not oppose the motion; September 2008, the court granted Erin's motion for joint custody.

In July 2009, Erin filed another motion to modify the time-sharing arrangement. She contended that a change in the child's primary residence was in the child's best interest. Citing a report prepared by Dr. Mancini, Erin argued that the child's academic interests would be best supported by attending high school in Louisville. John responded with a motion to modify custody.

In August 2009, with orientation activities scheduled and extracurricular groups forming for the upcoming school year, the family court ordered the child to be enrolled in school in Owensboro. A guardian *ad litem* was appointed, and the litigation continued.

On May 19, 2010, the court heard testimony from the parties and others -- including the daughter, who was by then nearly fifteen years of age. On May 25,

2010, the guardian *ad litem* filed her report and recommendations, noting that the child had resided with her father in Owensboro for the previous eight years. She indicated that the child was "comfortable in her current home and routine and . . . prefers to remain in her current home." The guardian *ad litem* also reported the child's complaints about her regular appointments with Dr. Mancini since they cut into her school day and interfered with her lessons. The guardian *ad litem* advised the court that "[the child] would like to discontinue seeing Dr. Mancini." Finally, the guardian *ad litem* concluded as follows:

> While I am hesitant in my recommendation, the Court should give due consideration to a change in the parenting schedule to allow [the child] to spend the majority of the school year in her mother's care and the majority of the three day [sic] holidays, Fall, Spring, and Summer breaks in her father's care. I am sympathetic to [the child's] desire to remain in her present environment, but I am concerned that [the child] will not reach her full academic potential and this may have a long term effect on [the child's] future.

Guardian *Ad Litem* Recommendations at 7. John took exception to the guardian's recommendation since it was based solely on academic grounds. Referring to documentary evidence of the child's rigorous course load and good marks in the Owensboro public schools, he indicated that the recommendations of the guardian *ad litem* were unreliable and unwarranted.

Following the May 9 hearing, a summer time-sharing schedule devised by Dr. Mancini was implemented by the parties. On July 22, 2010, John filed a motion requesting that the child be returned to Owensboro in accordance

with the parties' written agreement. Finding that Erin had violated the recommended time-sharing schedule, the family court ordered that the child be returned to Owensboro to remain there pending further orders of the court.

On August 6, 2010, the family court entered (1) findings of fact, (2) conclusions of law, (3) an order denying Erin's motion for a modification of parenting time to permit the child's move to Louisville, and (4) an order denying John's motion for a modification of custody. The court's decision was based upon a number of factors, including its assessment that Erin might attempt to alienate the child's affection for her father if she were designated the primary residential custodian. The court observed as follows:

> The Court does not find that it would be in [the child's] best interest to reside during the school year with [Erin]. The evidence indicates the opposite and if the modification sought by [Erin] were granted, the Court believes that [Erin] have (sic) the power to severely limit, if not sever, the affections of the child toward [John].
>
> Thus the Court concludes that it is in the best interest of [the child] to remain in Owensboro and continue to attend her current high school. She is integrated into the Owensboro community, has numerous friends and deserves to attend high school without worrying about being removed. The parenting schedule shall be modified to minimize the need for contact between the parties and to allow [the child] to have individual counseling closer to her home in Owensboro.

Order at 20. This appeal followed.

On June 6, 2011, this court ordered Erin to show cause why her appeal should not be dismissed because her timely post-trial motion appeared to remain

still pending before the Jefferson Family Court. Erin responded and showed good cause. She provided this court with a copy of the family court's order, entered September 2, 2010, disposing of her post-trial motion. The notice of appeal became effective as of that date. Kentucky Rule[s] of Civil Procedure (CR) 73.02(1)(e)(i). We shall address the merits of her appeal.

Erin contends that the family court clearly erred in its findings of fact and decision not to modify the parties' time-sharing arrangement. We disagree.

In *Pennington v. Marcum*, 266 S.W.3d 759 (Ky.2008), the Supreme Court of Kentucky held that a motion seeking to change the primary residential custodian was a motion to modify time-sharing and not a motion to modify custody. Therefore, a motion to modify time-sharing is brought under the provisions of Kentucky Revised Statute[s] (KRS) 403.320(3), which permits modification where it "would serve the best interests of the child."

On appeal, we are guided by well established standards for evaluating a family court's decision relating to child custody and time-sharing. We must be deferential to the family court, which is in the best position to evaluate the testimony and to weigh the evidence. An appellate court must not substitute its judgment for that of the family court. Instead, we may only consider whether the family court appears to have properly exercised its sound discretion. *Pennington*, 266 S.W.3d at 769. For purposes of review, findings of fact are clearly erroneous only where they appear to be manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754 (Ky.2008).

Having carefully reviewed the voluminous record in this matter, we cannot conclude that the family court erred by failing to consider the weight of the evidence. On the contrary, it carefully evaluated the evidence and concluded that it was not in the child's best interest to modify the parties' time-sharing arrangement and to designate Erin as the primary residential custodian. At the modification hearing, the court appeared attentive to the parties and to the other witnesses. The court conducted a sensitive interview of the child *in camera* and reviewed the thoughtful report submitted by the guardian *ad litem*. The court's findings of fact were not unreasonable or unfair, and it properly applied the relevant law.

However, Erin argues that the family court erred by relying on "ancient information which was outside of the statutory scope of what is in the best interest if the child." Brief at 7. She contends that evidence indicating that she had had a propensity to alienate the child's affections in the past was contradicted by other evidence presented at trial. Erin also reminds this Court that the guardian *ad litem* supported her request for a change in the parties' time-sharing arrangement.

Erin emphasizes that the parties are "living completely different lives" from what had existed previously and that she now has a "solid, happy home environment with a supportive husband. . . ." Brief at 14. She criticizes the failure of the family court to accept the testimony of Dr. Mancini that indicated that the child would have no problems adjusting to a new school environment in Louisville. She argues persuasively as follows:

> the mere fact that the minor child would have to leave the family and friends she is used to seeing on a frequent basis if she was relocated to Louisville is not enough of a reason to determine that the relocation would not be in the best interests of the child.

Id. at 15.

Despite these contentions, Erin acknowledges that a court is not obligated to adopt the recommendations or opinions offered by psychologists or guardians *ad litem.* It is noteworthy (as observed by the family court) that the recommendation of the guardian *ad litem* in this case was lukewarm and guarded. In her own words, Dr. Mancini began her report with a *caveat*: "While I am hesitant in my recommendation …." The opinions of Dr. Mancini were undermined by her own demeanor as well as by the child's reluctance to meet with her. Erin also acknowledges that the family court did not abuse its discretion in this case by considering the entire record in this matter, a record that spanned more than a decade. The family court's findings reflect that they were derived from a thorough review of the entire body of evidence presented in this matter. It is also clear that the court carefully considered the specific concerns and earnest wishes of the bright, mature, young woman at the center of this controversy.

Finally, Erin asserts that the family court erred by relying on information obtained post-trial that related to her failure to return the child to Owensboro for band camp at the end of summer 2010. Erin contends that it was unreasonable and unfair for the court to rely on John's allegation against her without holding an

evidentiary hearing to determine the facts and circumstances surrounding her alleged violation of the parties' timesharing arrangement.

In a twenty-two page order, the family court did include a brief reference to Erin's failure, post-trial, to deliver the child to Owensboro in accordance with the parties' written time-sharing arrangement. However, this reference appears to have been a recognition that the parties' ability to communicate had disintegrated and that Erin continues to have trouble appreciating the value of the child's relationship with John. There was no dispute that Erin had indeed failed to abide by the express terms of the parties' time-sharing arrangement (post-trial) and that a court order was necessary to motivate her to return the child to Owensboro. The family court's reference to this incident was neither unreasonable nor unfair.

We affirm the order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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