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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000083-ME

ELIZABETH BLANCHE FORTENBERRY — APPELLANT

v.

APPEAL FROM CALLOWAY FAMILY COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 07-CI-00557

CORY MICHAEL READ — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Elizabeth Blanche Fortenberry has appealed from the Calloway Family Court's October 1, 2010, order modifying timesharing and designating her former husband, Cory Michael Read,[1] as the primary residential parent of their minor daughter. Having carefully considered the record and the parties' arguments in their briefs, we affirm the family court's judgment.

[1] While the body of the notice of appeal lists Reed as the appellee's last name, the record establishes that the correct spelling is Read, which we shall use in this opinion.

Elizabeth and Cory were married in Murray, Calloway County, Kentucky on October 16, 2004. One child, a daughter named Morgan Read (the child), was born of the marriage on March 26, 2005. The parties separated on March 31, 2007, following Elizabeth's return from active duty in Iraq, and Cory filed a petition for dissolution on December 26, 2007. Cory requested that he and Elizabeth be awarded joint custody of the child, that he be named the primary residential parent, and that Elizabeth be ordered to pay child support. He also requested an equitable division of marital property and debt, as well as the restoration of non-marital property. At the time he filed the petition, Cory was a full-time student at Murray State University and worked part-time for the university as a stockroom employee. Elizabeth was unemployed. In January, Cory filed with the court a letter he received from Elizabeth indicating that she disagreed with the custody requested and disputed the date of separation, claiming that they separated in June 2006 before she was deployed overseas. She also indicated that she intended to hire an attorney.

In September 2008, the parties reached an agreement as set forth in the Marital Settlement Agreement. The necessary proof to support the petition for dissolution was filed with the court via Cory's deposition upon written questions. In the deposition, Cory indicated that Elizabeth had moved to Irvington, Kentucky and was employed by the National Guard earning $1,300.00 per month. The family court adopted the parties' agreement in its findings of fact, conclusions of law, and decree of dissolution entered September 24, 2008. Pursuant to the terms

of the agreement, the parties were awarded joint, shared custody of the child, and she was to spend approximately six months per year with each parent pursuant to a schedule set forth in the agreement. They also agreed that neither party would be required to pay child support but that they would split the child's school and daycare expenses. The agreement provided that the custody and visitation schedule was to be reviewed once the child was ready to enter kindergarten.

On August 11, 2010, Elizabeth filed a motion to modify the timesharing schedule, set child support, and for reimbursement of expenses. By this time, the child was ready to enter kindergarten, so that by the terms of the agreement the matter was ripe for review. In her motion, Elizabeth indicated that Cory had relocated to South Carolina. Furthermore, she stated that the parties had not abided by the terms of their agreement, as the child had spent the majority of her time with Elizabeth. Because both she and Cory worked and attended school, and they resided a great distance from one another, Elizabeth requested that she be named the child's primary residential parent and that Cory be permitted visitation in accordance with the guidelines for long distance situations. She stated that she was the fit and proper person to have primary care of the child. If granted, Elizabeth requested child support. Finally, Elizabeth requested reimbursement for the child's school and daycare expenses pursuant to their agreement. Elizabeth attached an affidavit in support of the motion.

In response, Cory first moved to continue the hearing on the motion. He stated that he was enrolled in a doctorate program at the University of South

Carolina in Columbia, South Carolina. Cory had enrolled the child in school in Columbia, but Elizabeth had refused to return the child to him at the end of her summer visitation period when he went to pick her up in Kentucky. Pursuant to the terms of their agreement, Cory was supposed to get the child back the day before school started, which was scheduled to begin on August 18, 2010. Cory also filed a motion for a rule related to Elizabeth's refusal to give the child back to him, but that motion was later withdrawn when Elizabeth turned the child over to Cory during the evening of August 18, 2010. As grounds for his motion to continue the hearing, Cory indicated that he had served interrogatories and requests for production of documents on Elizabeth seeking information regarding her history of mental problems, medical background, and her having placed other children up for adoption. The court continued the hearing until September 29, 2010.

The day of the hearing, Cory filed a response to Elizabeth's motion as well as a counter-motion requesting to be named the primary residential parent. In his filing, Cory began with the statement that Elizabeth had been more tuned in to her own needs than the child's needs over the last three years. She had lived apart from the child for extended periods, although Elizabeth was primarily responsible for raising and supporting the child while he was completing classes at Murray State and during his first semester at USC. Cory stated that the child had lived primarily with him from June 2006 to October 2007 while Elizabeth was on active duty in Iraq and Kuwait as well as upon her return when she lived with other

people and sought treatment for her mental health problems. The child had also been in his primary care since January 2010. For his counter-motion, Cory stated that the child was established in his household and had been in his primary custody for an overwhelming period of time, other than while he was in school. Therefore, Cory requested that he be named the primary residential parent.

The family court held an evidentiary hearing on September 29, 2010, where both parties were able to testify and call other witnesses.

Elizabeth testified that she was on active duty in Iraq from September 2006 until late February 2007, when she came home on leave and stayed. She and Cory ended their relationship upon her return, and she moved to the Ft. Knox area where she would be more likely to find a job so that she could take care of the child. At the time of the hearing, she lived in a three-bedroom house in Elizabethtown with her fiancé, Jason Kennedy, where the child had her own bedroom. Because Jason had a full-time job, Elizabeth was able to take classes and be home when the child was out of school. Elizabeth had enrolled the child in kindergarten that fall at St. James, where she had attended preschool.

Elizabeth testified that out of the previous twenty-six months, she had been primarily caring for the child for twenty months. The child had been in Elizabeth's care from June 2008, prior to the settlement agreement, and she continued to live with her until January 2010. During this time, the child did not spend much time with Cory. In November 2009, Elizabeth told Cory that she wanted to alter the custody arrangement, which prompted Cory to take the child

back with him to South Carolina. While she was with Cory, Elizabeth called her almost every night and sent letters. She also arranged to see the child one time per month. Elizabeth testified that Cory lived in a one-bedroom apartment and that while with Cory, the child slept on a twin mattress in his bedroom. The child came back to live with Elizabeth for summer break in June 2010, and she returned to Cory's home on August 18, 2010.

Elizabeth testified to her belief that the child was better off living with her. She had been in the area for a long time and planned to stay there. The child was enrolled in a good school, had a good home life, and Elizabeth was able to spend a lot of time with her. Due to Elizabeth's class schedule, the child would not have to spend time in daycare. Elizabeth also testified that she had a good support system in Elizabethtown, including twenty to twenty-five people in a life group at the church she attended with Jason. The child played softball on a team coached by one of the life group members. Elizabeth testified that she and the child had a good relationship and that they would go on walks, go to the park, and go to various museums.

Elizabeth also testified about personal issues she had to work through upon her return from Iraq in late February 2007. She said that she and Cory had broken up before she left and that she had taken a leave from her military service so that she could deal with those problems. She admitted to being depressed when she returned and had to be hospitalized one night after she drank too much alcohol. She also sought treatment for her depression while she was in a facility. Elizabeth

went on to testify that she had not had any issues since that time and was continuing to get better. She also testified that she had given birth to two children after returning from active duty, both of whom she placed up for adoption. The first was born in 2007 and was the result of a relationship she had in Iraq that had ended, and the second, born in May 2009, was from a nonconsensual encounter. Elizabeth decided that it was in both children's best interest that they be placed for adoption.

On cross-examination, Elizabeth testified in more detail about her return from Iraq, and she admitted that upon her return she spent one day with the child before leaving to visit friends in another state. She admitted that she was hospitalized for an overdose of vodka and Tylenol PM and sought treatment for depression at Four Rivers in Mayfield and later at Lincoln Trail. Following her two week stay at Lincoln Trail, she went to Camp Abernathy in Indiana and was released in early June. Elizabeth then went to the Ft. Knox area. She indicated that her depression arose as a result of her marriage problems, but stated that she had encountered no real problems since the marriage ended and that presently she had no physical or mental problems. Finally, Elizabeth testified that she earned $1,000.00 per month from the military.

Cory testified that he was in graduate school at USC in Columbia, South Carolina, where he was working on his doctorate degree in organic chemistry. He received a stipend of $21,000.00 to $24,000.00 per year from the university. Cory grew up in the Murray area where his family lives, and he hoped

to return as a professor at Murray State once he completed his doctorate degree. He testified that he was the primary parent for the child when Elizabeth left for active duty in 2006. Cory also testified about Elizabeth's history of mental health issues. Regarding the child, Cory stated that she had a lot of friends in the area and was always happy to go to school. He also described the activities they did together, including visiting the children's museum.

On cross-examination, Cory admitted that Elizabeth resumed her visits with the child in 2007 and that Elizabeth's mental issues had arisen prior to the signing of their settlement agreement. He also admitted that the child slept on a twin mattress in his bedroom. Regarding the custody arrangement set forth in the settlement agreement, Cory stated that they never really followed the six-month time split due to his graduate school studies. Elizabeth had been the child's primary caregiver and financial supporter from the time they signed the settlement agreement through January 2010. Cory had the child for the spring semester, and then she returned to Elizabeth for the next three months leading up to the current litigation.

Barbara Baumgardner testified by telephone. Ms. Baumgardner is a teacher at St. Peter's, a Catholic school in Columbia, South Carolina, where Cory had enrolled the child in kindergarten. Ms. Baumgardner had previously had the child in her class. She testified that the child was energetic, loved to play, was not shy, and was above average. She met Cory when he volunteered for a field trip the previous school year. She stated that Cory compared well with the other parents

and that the child was always prepared and ready for school with her lunchbox and backpack.

Michael Chance, Cory's co-worker from USC, testified as to Cory's interaction with the child. They lived in the same apartment complex in Columbia and visited after work. Mr. Chance stated that Cory treated the child very well and was a loving, providing parent. He also mentioned that Cory was involved with reading to the child.

Finally, Elizabeth's fiancé, Jason Kennedy, testified. He works full-time for the Kentucky National Guard, and he and Elizabeth live in a house he purchased in Elizabethtown. He and Elizabeth met in early 2008 at Ft. Knox. Jason considers the child to be a part of his life, and he spent time reading books to her and taking her to school while she lived with them. He also testified about his church's Oasis Life Group and stated that they would take the child to functions the life group held where she would interact and play with other children her age.

On October 1, 2010, the family court entered its findings of fact, conclusions of law and judgment. The court first determined that due to the distance between the parties' residences and the child having reached school age, it was appropriate to modify the current timesharing arrangement in order to serve the child's best interest. While it found that either parent could be appropriately designated as the residential parent, the family court concluded that designating Cory as the residential parent was in her best interest. The family court stated that Cory "has historically been more stable emotionally and is believed to be focused

on completing his plan to build a better and more secure life for both [the child] and himself." The court also stated that the evidence supports the conclusion that Cory makes the child "his first priority while she is in his care." Based upon its findings and conclusions, the court ordered that the parties were to retain joint custody, designated Cory as the child's residential parent, and designated Elizabeth as the non-residential parent. The court also awarded Elizabeth visitation in accordance with the standard schedule for long distances. Finally, the court ordered Elizabeth to pay Cory $193.05 per month in child support effective October 1, 2010.

Elizabeth filed a motion for a new trial, to alter, amend or vacate the judgment, or to amend the findings of fact and conclusions of law. She requested that she be named the primary residential parent and that the family court correct errors in the ruling. In an order entered December 9, 2010, the family court amended the original order to correct some spelling errors and to omit an incorrect date, but otherwise denied Elizabeth's motion. This appeal now follows.

In her brief, Elizabeth contends that several of the family court's findings of fact were not supported by substantial evidence and that its conclusions of law were arbitrary as a result. On the other hand, Cory argues that the family court's findings were not clearly erroneous and that its decision should not be disturbed.

The standard of review in the area of child custody and visitation is well settled in this Commonwealth. The party seeking modification of custody or

visitation/timesharing has the burden of filing a motion before the court, and the decision to modify is within "the sound discretion of the trial court." *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). KRS 403.320(3) provides for the modification of visitation and is applicable in cases where a party seeks modification of timesharing, as in this case. The statute provides that a "court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" *See also Pennington*, 266 S.W.3d at 769 ("Since 'serious endangerment' or 'best interests' is not defined, it is left to the sound discretion of the trial court whether the party opposing relocation has met his burden on either a modification of custody or visitation/timesharing."). Regarding the best interests standard, "any factual findings are reviewed under the clearly erroneous standard; any decisions based upon said facts are reviewed under an abuse of discretion standard." *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009).

Elizabeth's first argument addresses whether the family court's findings of fact are clearly erroneous. In conjunction with this argument, Elizabeth also contends that the family court's factual findings were incomplete and should have been amended to conform to the undisputed facts presented at the hearing.

An appellate court may set aside a lower court's findings made pursuant to Kentucky Rules of Civil Procedure (CR) 52.01 "only if those findings are clearly erroneous." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). To determine

whether findings of fact are clearly erroneous, we must decide whether the findings are supported by substantial evidence:

> "[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." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[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. at 354 (footnotes omitted).

We have carefully reviewed the evidentiary hearing held in this case along with the documentary record. As set forth below, while we agree that some of the factual findings were perhaps lacking in some respects, we disagree with Elizabeth's argument that several of the family court's findings were not supported by substantial evidence of record for purposes of its ultimate conclusion. In other words, these were not material issues of fact pertinent to the family court's ultimate legal conclusion to name Cory as the residential parent.

First, Elizabeth contends that the family court incorrectly found in its sixth finding that the child had spent approximately 60% of her life with both parents and the other 40% solely with Cory prior to September 24, 2008, the date on which the family court entered the initial decree. While the dates are rather

imprecise, Elizabeth's calculation of a 71%/29% split is more accurate. Her calculation took into account her resumption of visits with the child in mid-2007 following her return from active duty in Iraq and subsequent treatment. However, this finding had little, if any, bearing on the family court's decision as it was not mentioned again. Therefore, this finding is not clearly erroneous.

Second, Elizabeth contends that the family court's ninth finding failed to address the undisputed facts concerning the reasons for her decision to leave her employment and the length of time she had known her fiancé. She also argues that the family court erroneously downplayed her support system, especially in light of its findings related to Cory's support system. While we do agree with Elizabeth that the finding stating that she had known her fiancé for one year was incorrect based upon Jason's testimony that he met Elizabeth in early 2008, as before, this finding does not appear to have any bearing on the ultimate decision. Therefore, we decline to disturb the family court's findings in this paragraph, noting that it is within the province of the court, as the fact-finder, to judge and weigh the evidence presented by the parties.

Third, Elizabeth disputes the family court's additional finding in its conclusions of law regarding each parent's visits or calls during the time the other parent was caring for the child. The family court noted that "both parties testified to a lack of visitation or even calls to check on their child's general well being by the other parent while [the child] was in their individual care[.]" We disagree with

Elizabeth on this issue because the record does reflect testimony to this effect, and, again, it is within the province of the fact-finder to weigh the testimony.

In conjunction with this finding, the court concluded that Cory made the child "his first priority while she is in his care." Elizabeth argues that there was no evidence presented at the hearing to support the finding that Cory makes the child any more of a priority than Elizabeth does, whether the child was in his care or not. However, the family court did not state or conclude that Elizabeth did not also provide the child with the same priority while in her care; rather, the court clearly stated that either parent could appropriately be named as the residential parent. Accordingly, we do not find this statement to be clearly erroneous.

The two findings upon which the family court appeared to base its ruling, Cory's emotional stability and his focus on completing his education to provide for his and the child's future security, are not specifically argued as being unsupported by substantial evidence. Therefore, we hold that the family court's findings of fact were not clearly erroneous.

Because we have determined that there was a sufficient evidentiary basis for the pertinent factual findings, we shall next consider whether the family court abused its discretion in modifying the timesharing arrangement and in designating Cory as the residential parent. There is no dispute that the family court did not abuse its discretion in deciding to modify timesharing; the sole issue raised below and on appeal concerns the family court's decision to designate Cory as the residential parent.

Elizabeth contends that the family court abused its discretion in failing to name her as the residential parent, but instead finding it in the best interest of the child to name Cory as the residential parent. She argues that the family court arbitrarily relied upon her history of emotional problems, which she stated had been resolved by the time she and Cory entered into their original agreement in 2008. Elizabeth also argues that the family court improperly relied upon Cory's speculative, future plans, rather than relying upon changes she had already brought about in her own life. These changes included the child's living arrangements with her and Elizabeth's decision to continue her education, which permitted her to be at home when the child was out of school. She also points to Cory's voluntary decision to leave the child in her care while he was pursuing his degree after they had entered into the agreement. In his brief, Cory argued that the family court properly considered all of the factors and did not abuse its discretion in the designation of the residential parent.

Based upon the evidence of record, we cannot conclude that the family court abused its discretion in naming Cory as the residential parent. Clearly, the family court had a difficult decision to make, and by its own statement, either parent could appropriately have been designated as the residential parent. However, due to the distances between their residences and the fact that the child was ready to enter kindergarten, the family court had to name one. While it certainly would have been reasonable for another court to rule in a different manner for the reasons Elizabeth argued, the family court had to consider

Elizabeth's history of mental and emotional problems as well as her ability to provide for the child on a long term basis in light of Cory's career plan. Therefore, we cannot hold that the family court abused its considerable discretion in deciding that the child's best interests would be served by naming Cory as the residential parent.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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