RENDERED: MARCH 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001268-ME

BRANDI C. SHEPHERD
(F/K/A DOUGLAS) APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 09-CI-01118

SCOTT LANE DOUGLAS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, MOORE, AND VANMETER, JUDGES.

MOORE, JUDGE: Brandi Shepherd (f/k/a Douglas) appeals the Madison Circuit Court's denial of her motion to modify the timesharing schedule with the parties' minor child and the parties' settlement agreement to allow her to enroll the child in Rockcastle County Schools and subsequent denial of her motion to alter, amend, or vacate. After reviewing the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Brandi and Scott Douglas were married, and the parties had one daughter. The parties entered into a divorce settlement agreement, which was entered on February 2, 2010, and incorporated into their divorce decree dated April 7, 2010. The agreement provides that the parties have joint custody of their daughter. Further, the parties agreed that their daughter, although she was only three-and-a-half years old at the time they entered the agreement, "will remain enrolled in the Madison County School system unless extraordinary circumstances arise at which time the parties may readdress the issue." The parties' daughter was not enrolled in school at the time they entered into the agreement. The parties also agreed to a visitation schedule where each had visitation with the daughter for two to three days at a time with the parties exchanging every Sunday, Tuesday, and Friday evening.

On April 6, 2011, Brandi filed a motion requesting that the court modify the parties' timesharing schedule to allow for a more "standardized" visitation schedule. Brandi also requested that the family court amend the parties' settlement agreement to permit her to enroll the daughter in the Rockcastle County Schools. In support, Brandi indicated she had remarried and moved to Rockcastle County. She provided documentation that the Rockcastle County Schools were ranked higher than the Madison County Schools. Additionally, Brandi intended to quit her job to be a stay-at-home mother, which would enable her to be at home with their daughter and to transport her to and from school. Brandi contended that

her move and ability to stay at home with her daughter constituted an "extraordinary circumstance" as contemplated in the parties' settlement agreement.

At the hearing, the parties' arguments focused upon whether Brandi resided in Rockcastle County prior to the entry of the parties' settlement agreement and divorce decree. The premise of this testimony was that if Brandi had moved prior to entering into the parties' settlement agreement, her move did not constitute an extraordinary circumstance as required for the parties' to revisit the daughter's school arrangements. Brandi contends that she resided in Madison County at all times prior to the entry of the parties' settlement agreement and divorce decree. Brandi testified that she did not become engaged to her current husband until July 2010 and that she did not change her address, *i.e.* the address on her insurance policy and driver's license, from Madison County to Rockcastle County until September 2010 and February 2011, respectively. Brandi further contends that she was not aware that at the time the parties agreed to enroll their daughter in Madison County Schools she would later become engaged, re-marry, and move to Rockcastle County.

The evidence of record shows that Brandi changed her telephone number to the Rockcastle County area code approximately one-and-a-half to two years prior to the hearing, which would have been prior to the parties' entering into the settlement agreement. Similarly, Scott testified that Brandi was living in Rockcastle County with her new boyfriend within three or four weeks of the parties' separation and that the parties had exchanged their daughter for visitation

at Brandi's residence in Rockcastle County. Scott also produced a pre-school application form dated June 22, 2010, in which Brandi provided a Rockcastle County address as their daughter's home address. He also indicated that Brandi had retained counsel whose office was located in Rockcastle County to represent her in the parties' divorce proceeding.

With respect to Brandi's request for a modification of the visitation schedule, Brandi indicated that exchanging their daughter so frequently was difficult for their daughter. She was concerned as to how this would impact their daughter when she started school, and stated that her request was based upon their daughter's needs "moving forward." She also believed that it would be in the daughter's best interest to be with her during the week because she would be at home with her, as opposed to being with Scott's mother while Scott was working.

The family court denied Brandi's motion concluding that, while it was difficult to ascertain exactly where Brandi resided during the parties' separation and prior to their entering into the separation agreement, Brandi at least reasonably anticipated that she would be moving to Rockcastle County. The family court also determined that it was significant that the parties entered into an agreement regarding where the child should attend school prior to the child being old enough to attend school, and thus reasoned that Brandi had considered her future plans when entering into the agreement. Accordingly, the family court determined that because Brandi reasonably anticipated that there would be a change in circumstances, her moving to Rockcastle County and quitting her job to become a

stay-at-home mother did not constitute an extraordinary circumstance as required by the parties' settlement agreement prior to modifying the parties' choice of school district.

The family court also concluded that it was not in the daughter's best interest to modify the current visitation schedule. It observed that the parties, when evaluating their daughter's interests just over a year ago, both believed that this was in her best interest to use the current visitation schedule. Although the family court acknowledged that the schedule was likely very hard on both parents, it did not believe that it was in the best interest of their daughter to "change what [the daughter has] going on." Brandi subsequently filed a motion to alter, amend, or vacate, or, in the alternative, for the family court to make additional findings of fact and conclusions of law. The family court denied the motion, again noting that Brandi had at least contemplated that she would move, or the possibility that she would move, to Rockcastle County prior to entering into the parties' settlement agreement. This appeal followed.

II. STANDARD OF REVIEW

We cannot set aside the factual findings made by the family court unless they are clearly erroneous. CR[1] 52.01. "[F]indings of fact are clearly erroneous only if they are against the manifest weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008) (citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967)). On review, the test is whether the family court's findings were

[1] Kentucky Rule of Civil Procedure.

clearly erroneous, or whether the family court abused its discretion. *Id*. (citing *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974)).

III. ANALYSIS

On appeal, Brandi argues that there was insufficient evidence to support the family court's finding that no extraordinary circumstance existed to justify modifying the parties' agreement that they would enroll their daughter in the Madison County Schools. We disagree.

Kentucky Revised Statute (KRS) 403.180(1) & (2) provide that parties to a divorce may enter into a settlement agreement with respect to any subject matter and that the agreement will subsequently be binding upon the court, with the exception of matters regarding child support, visitation, and custody. *Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. App. 1997).

In this case, the parties agreed that their daughter would be enrolled in the Madison County Schools and that only in the event of an extraordinary circumstance would the parties contemplate moving her to another school district. Accordingly, the family court addressed the issue within the context of whether an extraordinary circumstance existed to justify modification of the parties' agreement.

After hearing all of the evidence, the family court concluded that Brandi had reason to anticipate that she would relocate to Rockcastle County. Accordingly, the family court concluded that any event that could be reasonably anticipated at the time the parties' entered the agreement did not amount to an

extraordinary circumstance which would justify modification of that agreement. In light of the testimony elicited at the hearing, the family court's findings were not contrary to the manifest weight of the evidence.

Likewise there is no error in the family court's determination that Brandi becoming a stay-at-home mother was not an extraordinary circumstance. Her argument simply demonstrates that Brandi will be available to transport her daughter to and from school, regardless of which school she attends.

Turning to Brandi's next argument, Brandi contends that the family court failed to apply the best interest standard when denying her request for modification of the visitation schedule. She further asserts that modification of the visitation schedule is in the child's best interest because it would decrease the number of times she would be exchanged. Just as she argued in support of modifying the parties' agreement with respect to their daughter's school arrangements, Brandi believes a modification of the visitation schedule would be in the child's best interest because she would be available to transport her to and from school, as well as to respond in the event of an emergency.

Although the parties disagree as to what standard should be applied, we review a court's determination regarding modification of visitation for an abuse of discretion. *Pennington v. Marcum*, 266 S.W.3d 759, 761 (Ky. 2008). KRS 403.320(3) provides that a modification of visitation should be granted only when it is in the best interest of the child. *See also Humphrey*, 326 S.W.3d 460, 464 (Ky. App. 2010). It is the burden of the party seeking the modification to prove that it is

in the child's best interest to modify the current visitation schedule. *McNeeley v. McNeeley*, 45 S.W.3d 876, 878 (Ky. App. 2001).

Here, the family court determined that a change in the current visitation schedule was not in the best interest of the child. The court noted that the parties developed the current visitation schedule just over a year ago in the belief that it was in their daughter's best interest. Consequently, even where the schedule presents difficulties for the parties, the family court determined that it was in the best interest of the child to maintain her current schedule. Moreover, Brandi presented no evidence that the child was experiencing any difficulties because of the current visitation schedule, or that the child's interests would be better served with an alternate schedule. Accordingly, Brandi did not meet her burden. Consequently, the family court did not abuse its discretion in denying a modification of the current schedule. We hereby affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Baechtold
Richmond, Kentucky

BRIEF FOR APPELLEE:

Jimmy Dale Williams
Richmond, Kentucky