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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001441-ME

JAMIE N. WHITT — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 06-CI-00227

DAREN M. WHITT — APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, STUMBO, AND THOMPSON, JUDGES.

COMBS, JUDGE: Jamie Whitt appeals the order of the Greenup Circuit Court which granted Daren Whitt's motion to relocate with the parties' minor child. After our review, we affirm in part, vacate in part, and remand.

One minor child, Evan, was born to Daren and Jamie during their marriage. A decree of dissolution was entered on January 3, 2007. They were awarded joint custody and equal timesharing. On October 18, 2012, Daren filed a motion seeking sole custody and sole authority for making medical decisions pertaining to Evan. A hearing was held on December 11, 2012. The court denied the motion for sole custody, but it granted Daren the sole authority to make medical decisions. The equal timesharing arrangement was left undisturbed.

A few months later, Daren obtained employment in South Carolina. Consequently, on April 25, 2013, Daren filed a motion to relocate with Evan. The court held a hearing on June 17, 2013. On June 27, it entered an order granting Daren's motion and outlining a new visitation schedule, including mandatory supervision during Jamie's visitation time. Jamie filed a motion to alter, amend, or vacate the order, which the court denied on July 17, 2013. This appeal followed.

Family courts have broad discretion in matters regarding the evidence presented to them. *Jones v. Hammond*, 329 S.W.3d 331, 334 (Ky. App. 2010). Our standard of review is governed by Kentucky Rule[s] of Civil Procedure (CR) 52.01. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (the rule applies to child custody cases); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980) (CR 52.01 applies to domestic cases). It provides that in actions without juries, the trial court's findings of facts should not be reversed unless they were clearly erroneous. Clear error occurs only when substantial evidence is lacking in the record to support the trial court's findings. *M.P.S. v. Cabinet for Human Resources*, 979

S.W.2d 114, 116 (Ky. App. 1998). We may only disturb a trial court's decision if it abused its discretion. *Young v. Holmes*, 295 S.W.3d 144, 146 (Ky. App. 2009).

Issues of relocation and timesharing are controlled by Kentucky Revised Statute[s] (KRS) 403.320. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). The section of the statute relevant to this case allows a court to:

> modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

KRS 403.320(3). The factors in KRS 403.270(2) provide guidance in determining the child's best interest, but the analysis is "fact-driven rather than law-driven, because the legal standard is whether the relocation is in the best interests of the child[.]" *Anderson v. Johnson*, 350 S.W.3d 453, 455 (Ky. 2011).

The factors set forth in KRS 403.270(2) are intended for initial custody determinations. Nonetheless, it is appropriate to refer to them. The statute directs the court to consider "all relevant factors," including a list of specific issues:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;
> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;
> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(h) The intent of the parent or parents in placing the child with a de facto custodian; and
(i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

The list is neither exhaustive nor exclusive, and in this case, few of the factors are relevant. No *de facto* custodian is involved or at issue. Neither party argues as to the wishes of the child. Therefore, only subsections (c), (d), and (e) are relevant.

Jamie contends that the family court failed to consider whether the relocation was in Evan's best interest. Her argument primarily focuses on the impact of relocation on Evan because of the change of his surroundings. She is concerned that he will regress without his extended family. However, this contention overlooks the findings of the family court.

The family court primarily relied on (e) from the list of statutory factors – the mental and physical health of all individuals involved. Evan is a special needs child. He has been diagnosed with ADHD and several developmental delay issues. He attends special education classes and multiple types of therapy. Evan's pediatrician has prescribed medication for him, and he wears prescription glasses.

In its order, the court found that Jamie would not administer Evan's medicine properly; would not require him to wear glasses; and would not see that Evan attended all of his therapy sessions. It partially relied on its findings in the earlier proceeding which granted Daren sole authority for medical decisions. We

have viewed both hearings; much of the testimony from the medical decision hearing was repeated in the relocation hearing. After our observation, we are persuaded that the evidence presented supports the family court's decision.

Jamie's own testimony verified and indeed reinforced the findings. At both hearings, she testified that in her opinion, Evan did not need medication. She adamantly declared that Evan did not need to wear his prescription glasses at all times. She also acknowledged that she had missed appointments with the pediatrician and with therapists. Jamie did not demonstrate that she had made any effort to make sure that Evan had his necessary medication or the therapy that he needs. She stated that she had missed at least one therapy appointment because she assumed that therapy had been discontinued. Her testimony was consistent that she had relied on her own assumptions regarding doctor and therapist directives. Jamie did not indicate that she consulted with Evan's doctor, therapists, or teachers in order to discuss his needs and progress on a regular basis.

On the other hand, Evan's teachers and therapists testified that Daren routinely contacted them concerning Evan's progress and needs. He complied with all directives. Daren had arranged for Evan's school to administer his medicine, and he provided an extra pair of glasses to be kept at school for the days that Evan went to school from Jamie's home. Jamie is correct that Evan would be away from his family in Greenup County. However, in South Carolina, Evan would live with his father and three half-siblings. Accordingly, we are unable to conclude that the family court abused its discretion regarding the relocation.

Jamie also contends that the family court failed to make sufficient findings. We agree with her argument only with respect to supervised visitation, and we remand for additional findings of facts on that issue alone.

CR 52.01 requires the family court to make findings because custody determinations are matters conducted without a jury. The Supreme Court has held that in custody matters, the findings must be in writing.

> CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention.

Anderson v. Johnson, 350 S.W.3d 453, 458 (Ky. 2011). In a subsequent opinion, Justice Venters elaborated on the Court's reasoning as follows:

> We again state with emphasis that compliance with CR 52.01 and the applicable sections of KRS Chapter 403 *requires written findings*, and admonish trial courts that it is their duty to comply with the directive of this Court to include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions. Consideration of matters affecting the welfare and future of children are among the most important duties undertaken by the courts of this Commonwealth. In compliance with these duties, it is imperative that the trial courts make the requisite findings of fact and conclusions of law to support their orders. (Emphasis added.)

Keifer v. Keifer, 354 S.W.3d 123, 125-26 (Ky. 2011). In *Keifer*, the family court failed to make any findings at all. Although it provided detailed oral findings, it

committed only its resulting conclusions to writing without the supporting findings. *Id*. at 124-25.

As noted above, in its determination regarding the relocation, the family court detailed the testimony presented at the hearing regarding the situations of the parties. It specifically stated the reasons that it believed Jamie would not act in Evan's best interest. It recognized Evan's special needs and provided examples of Jamie's failure to accommodate them. Additionally, the court referenced its previous findings. The findings as to relocation were sufficient to support the family court's decision regarding relocation.

However, we agree with Jamie that the court abused its discretion when it restricted her visitation without requisite findings. KRS 403.320 allows a trial court to restrict a parent's visitation *if* "it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(3). "Restricted visitation" is that which affords a parent "less than reasonable visitation." *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995). In this case, there are two aspects to the visitation order – proportionality and the supervision requirement.

Logistically, the proportional timesharing had to be modified in a manner reflecting the reality that one parent would lose time with Evan. They had shared equal time, which is simply not feasible due to the distance between South Carolina and Greenup County, Kentucky. The court awarded Jamie visitation one weekend per month, all school holidays, two weeks during Christmas vacation, and

six weeks during summer vacation. Considering the distance between the two locations, the amount of visitation is reasonable -- possibly even generous.

However, the court failed to make requisite findings regarding the order that Jamie's visitation be supervised. We believe that a requirement of supervised visitation for weeks at a time by its very nature imposes a considerable burden upon Jamie. The family court's order only referenced Evan's best interest. But it did not analyze whether Evan would be seriously endangered by unsupervised visitation with Jamie. Additionally, supervision had not been required prior to the relocation order, and the family court offered no grounds or rationale for the restriction. Thus, the family court must make the statutory findings of the risk of serious endangerment prior to ordering the restriction on visitation.

Accordingly, we affirm the Greenup Circuit Court pertaining to its relocation order. However, we remand for further findings regarding the requirement of supervised visitation.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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