

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000282-ME

RANDALL GONSALVES, JR.

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 07-CI-01079

TAMSEN LEIGH GONSALVES (NOW DISSELKAMP)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, THOMPSON AND VANMETER, JUDGES.

THOMPSON, JUDGE: Randall Gonsalves, Jr. appeals from the findings of fact, conclusions of law and order of the Hardin Family Court decreasing his parenting time with his minor child and denying his motion for shared custody and to rotate parenting time on a weekly basis. He alleges the family court's decision was not

based on substantial evidence, the family court applied an erroneous standard, and the family court's findings of fact are inconsistent with its order.

We affirm. The family court properly applied the best interest of the child standard and its decision was based on substantial evidence. We further conclude there is no inconsistency in the family court's findings of fact conclusions of law and order.

Randall and Tamsen Leigh Gonsalves (now Disselkamp) married in 2005 and have one child born on March 22, 2007. The parties divorced on June 11, 2008. A mediated settlement agreement was incorporated into the dissolution decree in which the parties agreed to joint custody of their child with Tamsen designated as the primary residential custodian. Pursuant to the agreement, Randall was awarded graduated parenting time as the child aged resulting in Randall having parenting time every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and every other Thursday from 4:30 to 8:00 p.m. Holidays were alternated and, beginning in the summer of 2009, Randall was entitled to an additional three weeks with the child. The parties agreed to reserve the issue of additional visitation until the child turned seven.

The peace reached between the parties would soon prove illusory and, over the years leading to the present controversy, the parties filed various contempt motions against the other and, after issues regarding parenting time modification arose, the parties agreed to modify Randall's parenting time. At issue in this appeal is the modification of an April 21, 2011, order entered upon agreement of

the parties. Pursuant to the 2011 order, Randall was awarded parenting time every other weekend, one day every other week, alternating spring and fall breaks, three weeks during the summer, and alternating holidays. Additionally, consistent with the Hardin County Local Rules and, at the core of this appeal, Randall was given eight weeks of parenting time upon proper notice to Tamsen with the understanding that Randall would be responsible for the child's attendance at school.

On March 5, 2013, Tamsen filed a motion to modify Randall's parenting time to eliminate the eight weeks of parenting time during the school year. Randall objected and filed a motion to modify his parenting time to alternate on a week to week basis.

Prior to the scheduled hearing on the parties' motion, the deposition of Aja Harrison, the child's therapist, was taken and filed in the record. She had been seeing the child since April of 2013, and testified he had an inability to focus and to process and translate his feelings. She further testified that the child has had difficulty adjusting to the current visitation schedule and demonstrated disruptive behavior. Harrison testified that she does not believe the child's visits with Randall during the school year poses any type of danger to the child but has caused adjustment problems. She indicated Randall's involvement with the counseling sessions could reduce the child's adjustment issues.

At the hearing, Tamsen testified that the child has had difficulty adjusting to going back and forth between the parties' residences. She further

testified the child has demonstrated aggression and tiredness. Certified school records were admitted, some of which noted the child having difficulty concentrating and behavioral problems.

The child's teacher from the prior year testified that the child had difficulty concentrating at school and sometimes appeared tired. She indicated the child has an Individual Education Plan designed toward improving his focus in the classroom and attention to task.

Randall testified that Tamsen has impeded the exercise of his visitation, particularly during a period when he resided in Texas, and he had been forced to seek court intervention upon his return to Kentucky. In addition to describing the uncooperative nature of the parties' parenting of their child, he testified Tamsen had not kept him informed of the child's doctor's appointments or that his son was in therapy. To support his motion to modify parenting time, Randall testified he believed the child's best interest would be served if he was the primary residential custodian because he would keep Tamsen informed of issues involving the child and could provide additional structure.

Cindy Owens testified she had been a child care provider for the child for approximately four years. She believed both parents to be good parents and had no more difficulty with the child when he was with one parent versus the other. She had not observed the child being reluctant to leave her facility with either parent. A care provider at the child's school noted the child's behavior had improved since the prior school year and he appeared to love both parents.

A former teacher of the child testified that he exhibited behavioral problems while in her kindergarten class. She informed both parents of his behaviors by letter. She recalled a conversation with Tamsen in which she expressed her opinion that it would be difficult for any child to adjust to alternating between parents.

Finally, Randall's current wife testified she and Randall have a good relationship with the child. She testified the child is happy and they provide a structured environment.

At the conclusion of the hearing, the family court took the matter under submission. On January 6, 2014, it entered an order based on the child's best interest and denied Randall's motion to modify parenting time. The family court found shared custody as requested by Randall was not in the child's best interest noting the distance between the parties' residences would render such an arrangement impractical and problematic. The family court granted Tamsen's motion to decrease parenting time for the 2014/2015 school year. Specifically, the family court stated the eight weeks of parenting time Randall "would normally receive [pursuant to the Hardin County local rules] shall be reduced to 4 weeks for the school year of 2014/2015 effective from the date this Order is entered." The remaining parenting time provisions of the April 21, 2011, agreed order remained unchanged.

Randall's initial contention is that because the family court reduced his parenting time to an amount less than provided by the local rules, the family court

was required to apply a serious endangerment standard and erred when it applied the best interest standard. He relies on KRS 403.320(3), which provides:

The court may 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.

Randall argues the reduction of his eight weeks of parenting time was a restriction rather than a modification of parenting time.

We note that the motions filed by the parties seek a modification of parenting time rather than custody. Pursuant to *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), the family court's determination was properly made under KRS 403.320(3). Although the statute uses the term visitation rather than timesharing or parenting time, it is applicable. *Id.* at 765. The dispute is whether the reduction of the eight weeks of parenting time granted to Randall in the April 2011 agreed order is a modification to which the best interest standard was properly applied or a restriction of parenting time to which the more onerous standard of serious endangerment to the child should have been applied.

The flaw in Randall's argument is he erroneously assumes a reduction in parenting time is synonymous with a restriction of parenting time.

"As used in the statute, the term 'restrict' means to provide the non-custodial parent with something less than 'reasonable visitation.'" *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky.App. 1995). Therefore, even if parenting time is reduced, it

is nevertheless a modification and not a restriction if it provides reasonable parenting time and is permissible when modification would serve the child's best interest. *Id.* at 531.

Contrary to

Randall's suggestion, reasonable parenting time is resolved based on the circumstances of each parent and the child. It is not to be determined by any set formula, including the standard parenting time schedule adopted by the local rules of a judicial district. This is precisely the teaching of the Court in *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000), where the Court cautioned that while the terms of a standard visitation schedule is an option when considering such matters, "the trial court should not make any presumption in favor of a standard visitation schedule." Regardless of local rules, it remains within the discretion of the family court to determine reasonable parenting time considering the best interest of the child. *Id.* Under the established standard of review, this Court "will only reverse a trial court's determinations as to [parenting time] if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case. *Id.*

The family court found the child's school records indicated he has behavioral problems and Harrison testified the child was having difficulty adjusting to the parenting time as ordered. Consistent with Harrison's testimony, the family court heard testimony that the child has difficulty focusing in the classroom and demonstrates disruptive behavior.

The family court also found that Randall's request to modify parenting time to alternate weekly between the parties unworkable. It noted that although both parties reside in Hardin County, there is a significant distance between their residences. The evidence showed that Randall's residence is on the opposite side of the county where the child's school is located rendering parenting time on a week to week basis during the school year problematic.

Based on the evidence, we cannot say the family court abused its discretion. The parenting time schedule permits reasonable parenting time to Randall while permitting the parties' relatively young child to remain in the home where he primarily resides during the 2014/2015 school year to address his present behavioral issues. The limitation of the order to the current school year is indicative of the modifiable nature of the order as the circumstances of the parties and the child change.

Before concluding, it is necessary to address Randall's assertion that the family court's findings of fact and order is inconsistent because it expressly states that he is entitled to four weeks parenting time for the 2014/2015 school year but then concludes that he "shall receive parenting times consistent with the Hardin County local rules," excluding the provision that "allows for 8 one week periods during the year for the school year of 2014/2015 effective upon entry of this Order." As even Tamsen concedes, the family court clearly stated in its findings that Randall is to receive four weeks throughout the school year. The family court unequivocally stated Randall's parenting time "shall be reduced to 4 weeks for the

school year of 2014/2015 effective from the date this Order is entered.” We find nothing in the family court’s order inconsistent with that directive requiring remand. Under the family court’s order, Randall is entitled to four weeks parenting time for the school year 2014/2015.

Based on the foregoing, the findings of fact, conclusions of law and order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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