

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001782-MR

LAURA ELIZABETH DUFFY

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 13-CI-01100

RYAN JOHN DUFFY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: The issue to be decided is whether the Fayette Circuit Court abused its discretion when it denied Appellant Laura Duffy's pre-decree request to relocate with the parties' minor children from Lexington, Kentucky, to Berea, Ohio. Finding no abuse, we affirm.

Laura and Appellee Ryan Duffy's relationship began as a work-place romance. While employed by a company operated by Laura's family, Laura and Ryan took notice of one another at company events and conferences. However, Laura's workplace was in Ohio while Ryan worked in Lexington. Laura eventually relocated to Lexington to be with Ryan. The pair married in 2005, and they had two sons: Jack Duffy, born in 2006, and Ian Duffy, born in 2011. Ryan is also the father of one other minor child, Eric Duffy, born of a prior relationship. By all accounts, Eric was an integrated member of the family. Eric spent every weekend at the Duffy house, and is close to Jack and Ian. Laura testified she got to know Eric early in her relationship with Ryan, and her affection for Eric is true and deep.

Ryan and Laura separated on March 3, 2013. Nine days later, Laura petitioned the court to dissolve the marriage. Commendably, the parties soon negotiated a property-settlement agreement by which they would share joint custody of Jack and Ian, including a summer and holiday time-sharing schedule. They reserved the issue of school-related timesharing, among other things, for subsequent court determination.

A final dissolution hearing was held on July 29, 2013. Laura's requests for maintenance and to relocate the children were the only issues presented for adjudication. The family court heard testimony and received evidence from Laura and Ryan, along with several other witnesses, including: Cheryl Justice, Laura's mother; John Justice, Laura's father; two of Jack's pre-

school teachers; Mike Duffy, Ryan's father; and Suzanne Lewis, Ryan's mother. Laura painted Ryan as a lazy, absentee father who lacked all interest in his children. Ryan's testimony, in large part, countered the harshest portions of Laura's testimony.

Laura described the parties' marriage as a partnership revolving around their household: Laura's function was to raise the children and support the inner workings of the family, while Ryan's function was to financially provide for the family. However, Laura felt cheated by what she alleged was Ryan's lack of interest in her pregnancy, the children, and their family. She testified that, while pregnant, Ryan only occasionally accompanied her to doctor's appointments, did not ease the rigor of pregnancy by, for example, rubbing her feet and back, and did not pore over baby-name books with her. Laura testified Ryan's disinterest extended to her second pregnancy as well. Ryan countered that Laura often acted irrational while pregnant and believed every bad thing she read; when Ryan would tell Laura she was acting irrationally, conflict would occur.

After Jack's birth, Ryan and Laura initially shared the parenting responsibilities. Ryan changed his sleep schedule to accommodate Jack and Laura, helped with feedings and diapers, attended doctors' appointments, and, upon returning home from work, would take Jack for thirty minutes to an hour to give Laura a break. Because Laura stayed home with Jack for almost a year, she admitted she took on most of the household chores – including caring for Jack – while Ryan continued to work full-time. However, when Laura went back to work

she testified she continued to shoulder most, if not all, of the parenting duties. She stated she took Jack to the majority of his doctor appointments, arranged child care, and transported Jack to and from daycare, all without Ryan's assistance.

Ryan testified that the parties had agreed that Laura would be the first to take off work for appointments since his job was the couple's primary support. Ryan stated that Laura was neurotic and took Jack to the doctor unnecessarily. He explained that Laura read all the baby books and believed every word; if a milestone was not reached on schedule, Laura took Jack to the doctor. Despite this, Ryan testified he would assist Laura with doctor appointments and daycare pickup when she had a conflict. Ryan also stated that, while he did not often attend Jack's doctor appointments, Laura would call him after each appointment to keep him informed.

Jack's education began at an early age. He attended preschool when he was three-years and four-years old, and then kindergarten prior to the parties' separation. Laura's involvement in Jack's education and activities can only be described as substantial. She volunteered at Jack's schools, took the kids to and from school, attended all parent-teacher conferences, and attended all of Jack's activities and programs. Jack's teachers testified they rarely saw Ryan, and Laura testified that Ryan only went to Jack's school a total of five times in the entire three-year period ending after kindergarten. Laura also assisted Jack and Eric with their evening homework before Ryan returned home from work, and volunteered in Eric's classroom on occasion. Ryan attended the first parent-teacher conference

each school year, and attended a few school events, including the “Donuts with Dad” program and Jack’s preschool graduation ceremony. Rarely did Ryan take Jack to or pick Jack up from school.

In Laura’s view, Ryan showed no interest in the children’s lives. Laura testified she frequently planned weekend activities for the family, but Ryan often refused to participate. She described Ryan as a homebody, content to watch television in his pajamas, play video games, and stay all day in bed. Laura further declared that Ryan never planned activities for the children, never spent time with the boys alone, and never took them on an overnight trip prior to the parties’ separation. Laura testified, and Ryan did not dispute, that she almost single-handedly managed the household, cooking, cleaning, shopping for clothes and groceries, helping with homework, and generally caring for the kids. In addition, Laura also coached Jack’s soccer, baseball, and basketball teams. Laura described herself as the children’s primary – if not only – parent. Cheryl Justice supported Laura’s testimony, describing Ryan as an inactive, non-participating father.

Ryan refuted Laura’s assertion that he is an uninvolved, disinterested parent. Ryan testified, and Laura conceded, that he worked very hard and often long hours throughout the marriage. Upon returning home from work each evening, Ryan stated he spent an hour or more interacting with the boys before assisting in the bedtime routine. Ryan also explained that he would read with Jack, help with any outstanding household chores, and mind the children on the weekends so Laura could run errands or visit the hairdresser. Ryan testified he

attended all of Jack's sporting events, unless prevented by work or conflicts with Eric's soccer games, and frequently participated in family outings. He flatly denied lounging in bed all day. Ryan admitted Laura arranged almost all the family events, but testified he was happy to let her do so because he trusted her judgment and desired to keep the peace; if he agreed with Laura, an argument would be avoided.

Suzanne Lewis and Mike Duffy corroborated Ryan's testimony. Mike testified Ryan spent every moment he could with the boys. Suzanne stated Ryan is a wonderful father and that the children flock to him and hang on his legs when he comes home from work.

Relocation haunted the parties' marriage from the very beginning. Ryan testified that he made crystal clear to Laura, both before and during the marriage, that under no circumstance would he move before Eric became of age. Despite his unwavering stance, Ryan stated that Laura would often say how unhappy she was in Kentucky and how she wanted to return to Ohio to be near her family. Ryan testified to his belief that Laura concocted the entire separation action to accomplish her end goal of relocation.

Laura and her witnesses questioned Ryan's character and mental state. Laura testified Ryan regularly abused alcohol and smoked marijuana before and during the marriage. She would confront Ryan about his substance abuse issues and he would promise to stop; however, according to Laura, his promises never lasted long. Laura stated she caught Ryan smoking marijuana in the garage when

Jack was 20 months old, and that two or three times during the marriage she had to have a conversation with Ryan about his incessant drinking. In Laura's view, Ryan was more interested in drinking alcohol and playing video games than spending time with his family.

Ryan admitted that, before the marriage, he smoked marijuana and drank alcohol to relax. He also admitted to having one drink on Sunday evenings and, on rare occasion, smoking marijuana during the marriage. He denied having a drug or alcohol problem, and testified he no longer drinks or smokes marijuana.

Laura testified that Ryan is an aggressive person who often gets physical with the children. She related two examples: Ryan once twisted Jack's arm and another time pushed Jack. Laura also stated that Ryan recently head-butted fifteen-year-old Eric when Eric exhibited aggressive behavior toward Ryan. This episode resulted in a domestic-violence petition and criminal charges, all of which were eventually dismissed. John Justice presented hearsay testimony that while he never saw Ryan aggressive with the children, he heard Mike Duffy say that Ryan is too aggressive with the children and needed to tone it down.

Ryan admitted to the altercation with Eric, but denied hurting him and denied he was too aggressive with the children. Ryan explained that he and Laura share opposing discipline philosophies. He believes in corporal punishment. Laura does not.

Ryan and his witnesses described Laura as controlling in nature. Ryan testified that Laura controls everything and must have everything her way.

Mike testified Laura ran the house and it was “her way or the highway.” Similarly, Suzanne described Laura as a taker with a controlling personality. In contrast, Ryan described himself as non-confrontational. Mike’s testimony corroborated this. Laura also admitted she rarely fought with Ryan and that Ryan rarely disagreed with her decisions.

By order entered August 6, 2013, the family court denied Laura’s relocation request, finding it was in the children’s best interest to enjoy the regular care and support of both parents. The parties then agreed to a mutually-beneficial timesharing schedule. The Decree of Dissolution, which incorporated the parties’ separation agreement and timesharing schedule, was subsequently entered and Laura appealed.

Laura contends the family court abused its discretion when it: denied her request to relocate with the children; failed to adequately consider Ryan’s alcohol and drug issues, along with his inability to establish and maintain relationships; and failed to properly consider the factors set forth in Kentucky Revised Statute (KRS) 403.270(2)(f). We do not agree.

“At the outset, it should be noted that the effect of relocation by a parent with the child on custody and visitation must be viewed as either pre- or post-decree.” *Pennington v. Marcum*, 266 S.W.3d 759, 765 (Ky. 2008). Here, relocation was raised at the final dissolution hearing prior to the entry of the decree of dissolution and, in turn, at the final custody and timesharing determination. We are mindful of the parties’ settlement agreement that resolved custody. But that

agreement had not yet been incorporated into a final decree. It was, in our view, akin to a temporary custody order. And timesharing, beyond summers and holidays, certainly remained an outstanding issue. In the absence of a final custody and timesharing order, the family court must evaluate one parent's decision to relocate based on the best interests of the child. *Frances v. Frances*, 266 S.W.3d 754, 756-57 (Ky. 2008); KRS 403.270(2). Factors relevant to this determination include, among other things: the wishes of the parents; the wishes of the child; the interaction of the child with his parents, siblings, and other persons significantly affecting the child; the child's adjustment to his home, school, and community; the mental and physical health of all individuals involved; and information and evidence of domestic violence. KRS 403.270(2)(a)-(f).

“When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion.” *Frances*, 266 S.W.3d at 756. We owe a great deal of deference both to the family court's findings of fact and discretionary decisions. *Id.*; Kentucky Rules of Civil Procedure (CR) 52.01. Accordingly, the family court's factual findings related to the best interests of the children shall not be set aside unless clearly erroneous – that is, if they are manifestly against the weight of the evidence. *Frances*, 266 S.W.3d at 756. When based upon adequately supported factual findings, the trial court's decisions regarding custody and timesharing shall not be disturbed absent an abuse of discretion. *Id.* An abuse of discretion generally “implies arbitrary action or capricious disposition under the

circumstances, at least an unreasonable and unfair decision.” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

Laura argues that the family court failed to adequately consider the factors set forth in KRS 403.270(2)(a). While the statute is not directly referenced in the family court’s order, there is nothing to indicate that the family court bypassed it when making its decision. Many of the family court’s findings relate directly to the factors identified in KRS 403.270(2)(a).

The family court was certainly aware of each parent’s wishes: Laura desired to move with the children to Ohio, and Ryan wanted the children to remain in Kentucky. The children’s tender ages prevented them from making their own wishes known. The family court was particularly mindful of the children’s interactions with their parents, siblings, and other persons. The family court weighed the maternal familial support available in Ohio with the children’s relationship with their half-brother, Eric, with whom they are very close. Jack in particular idolizes Eric. The family court also considered the children’s relationship with their grandparents and with both their parents, noting a move in excess of 300 miles would deny the children constant contact with their father. Despite Laura’s insistence that Ryan is an uninterested parent, the evidence reveals that the children love their father and desire to maintain a relationship with him. Depriving the children of this opportunity disturbed the family court.

The evidence further indicated that the children have lived their entire lives in Kentucky. Their school, daycare, sports teams, and healthcare providers

are here. Further, the head-butting incident was the only evidence of possible domestic violence presented at the hearing. While we certainly do not condone the incident, there is no evidence that the contact resulted in injury or rose to the level of domestic violence as defined in KRS 403.720(1).

Laura also complains that the family court failed to adequately consider Ryan's mental-health concerns, including his drug and alcohol abuse, his inability to control his anger, and his inability to maintain relationships and co-parent. We perceive no failings on the family court's behalf here. There was substantial evidence presented by both sides regarding these issues, much of which the family court related in its written order. Most every point made by Laura was countered by Ryan, and vice versa. We are convinced the family court took the conflicting evidence into consideration when making its decision.

Finally, Laura contends the family court abused its discretion when it ignored the overwhelming evidence produced at the hearing that Ryan was an absentee father. Laura believes Ryan is being rewarded for years of non-involvement, and that she was given no credit by the family court for having been a great mother. We do not perceive either of these assertions to be true. Laura undoubtedly acted – whether voluntary or out of necessity – as the ringmaster of the Duffy household. This fact is hardly disputable. But Ryan hotly contested Laura's contention that he was incapable of caring for his children. The family court astutely recognized the parties' conflicting personalities and parenting styles in making its assessment of the evidence. Neither party is without fault. The

family court was certainly in the superior position to make the necessary judgment calls and to exercise its discretion. And while it is perhaps so that Ryan's manner of parenting was lacking in many ways during the marriage, there is nothing in the record to suggest he is unwilling or unable to suitably care for his children in this post-divorce regime.

In the end, the family court thought it unwise, despite Ryan's shortcomings, to place hundreds of miles between these children and their father. The family court's conclusion that the children's best interests would not be served by allowing Laura to relocate with them to Ohio is certainly reasonable.

Accordingly, we affirm the Fayette Family Court's order denying Laura's request to relocate.

ALL CONCUR.

BRIEF FOR APPELLANT:

Crystal L. Osborne
Lexington, Kentucky

BRIEF FOR APPELLEE:

Denotra Spruill Gunther
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