

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001667-ME

K.A.W.

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA K. ADDINGTON, JUDGE
ACTION NO. 10-CI-00529

J.B.J.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON AND KRAMER, JUDGES.

KRAMER, JUDGE: K.A.W. (Mother) appeals from the Hardin Circuit Court's post-decree order modifying visitation, designating J.B.J. (Father) as the primary residential custodian, and awarding Mother parenting time in accordance with the Hardin County Local Rules. On appeal Mother argues that because Father's written motion to modify parenting time was not filed until after the hearing, she was entitled to a second evidentiary hearing prior to the family court's decision;

that the family court failed to make findings of fact and conclusions of law in accordance with Kentucky Civil Rule (CR) 52.01; and that the family court's order modifying visitation was not supported by substantial evidence. After careful review of the record and Mother's arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on November 1, 2002, and had two children together; the first born shortly before the marriage in July 2002, and the second in September 2005. A third child, born to Mother during a prior relationship, was also a member of the parties' household and supported primarily by the parties. During the marriage, the parties were separated more often than they were together. Finally in March 2010 Mother filed for divorce.

The divorce was acrimonious. Mother alleged Father was harassing and threatening her and sought a restraining order and restrictions on Father's parenting time. Father alleged Mother had a history of psychological issues and that after going through a contentious custody proceeding involving her oldest child, was manipulating the current circumstances to further her interests in the divorce. Mother sought assistance with the Army Family Advocacy Program and began seeing Dr. Prudence Zollinger. Dr. Zollinger wrote a letter to the family court detailing Mother's allegations of threats and harassment, and also assisted in obtaining temporary disability for Mother based on the alleged trauma caused by her relationship with Father. The family court awarded Mother temporary custody and Father limited, supervised temporary parenting time based in part on Dr.

Zollinger's recommendations. Subsequently it came to light that Dr. Zollinger had not considered Mother's prior mental health history when evaluating Mother and that the specific allegations contained in Dr. Zollinger letters and Mother's affidavit were unverified by Dr. Zollinger and unsupported by official records.

A final hearing was held on September 16, 2010, and the family court entered findings of fact and conclusions of law on January 13, 2011. The family court found that both parties were dealing with serious mental and emotional health issues, that both parties were manipulative and controlling in their own manner, and that both had manipulated the children to gain a perceived advantage in the litigation. The family court also found that evidence supported Father's assertions that Mother had prior incidents of mental or emotional issues that required medical attention, and that no nexus between Mother's disability and her relationship with Father existed. However the court found that neither party's issues limited their ability to effectively parent their children or adequately attend to the children's physical needs. The family court awarded the parties joint custody of the children, with neither party being designated the primary residential custodian, and ordered the parties to alternate parenting time on a weekly basis.

Unfortunately the acrimony did not end after entry of the decree. A number of post-decree motions were filed, including Mother's motion to become the sole custodian and to limit Father's parenting time to every other weekend. Mother alleged that Father failed to take the children to some extra-curricular activities and doctor's appointments, left the children home alone during his Army

physical training, allowed the oldest child to play age inappropriate video games, and that living arrangements at Father's house were unsuitable for the children. Mother's motion was heard on May 16, 2014.

Shortly after the hearing began, Father objected to the family court considering a modification of parenting time, arguing that as drafted Mother's motion was insufficient to put the issue before the court and that the hearing should be limited to a modification of custody. The family court reasoned that although the motion may have been ambiguous, when read together with the tendered order, Father had notice that Mother was seeking a modification of both custody and parenting time. Father withdrew his objection after the family court permitted him to make an oral motion to modify parenting time in favor of Father. Before testimony continued the family court explained to both parties that as a result of the hearing, it might award either party sole custody, modify parenting time and designate one party as the primary residential custodian, or retain the *status quo*.

The family court heard testimony from the parties and the oldest child's principal, coach, and cub scout leader. Additionally the family court spoke with both children *in camera*. The sum of the testimony controverted Mother's allegations and raised substantial concern for the emotional well-being of the children when in Mother's custody. On June 9, 2014, the family court entered findings of fact and conclusions of law overruling Mother's motion.¹ But, lacking

¹ In denying Mother's motion to modify custody and parenting time, the family court described Mother as having callous indifference to the emotional well-being of her oldest child because Mother failed to protect the child from repeated, cruel barbs of her current spouse. Mother's current spouse was characterized as having a complete and cold indifference to the safety and

a written motion from Father, the court did not rule on his motion to modify parenting time. On June 18, 2014, Father filed a written motion to modify parenting time, along with a supporting affidavit. Citing testimony from the hearing as described in the family court's order denying Mother's motion, Father's motion sought an award of primary parenting time and parenting time for Mother according to local rule.

On June 30, 2014, the family court ruled on Father's motion and entered findings of fact and conclusions of law. The family court found that the parties have experienced ongoing difficulties, that their disputes will continue and that after interviewing the children *in camera*, it had substantial concerns about the physical safety and emotional well-being of the oldest child during Mother's parenting time. Based on the testimony at the May 16, 2014 hearing, the family court concluded that increasing Father's parenting time was in the children's best interest. The family court sustained Father's motion and awarded him primary parenting time, while Mother was awarded parenting time according to local rule.²

Subsequently, pursuant to CR 59.05, Mother sought to alter, amend or vacate the June 30, 2014 order, or alternatively, for additional findings pursuant to CR 52.04. Mother asserted that ruling on Father's motion to modify parenting

emotional well-being of the children. Testimony of the children indicated that Mother's current spouse frequently peppered the oldest child with pointed remarks designed to undermine the child's relationship with Father, taunting the child that Father, who has always been known to the children as their Father, was not in fact the oldest child's biological father. These barbs were frequent and continued even during the May 16, 2014 hearing as Mother's spouse supervised the children while the parties testified.

² Hardin Family Court Rule 701, as entered April 16, 2009, sets forth the parenting time schedule that shall apply in the absence of an agreement, except for good cause shown.

time without another evidentiary hearing was a manifest error of law. The family court denied Mother's motion to alter, amend or vacate, and concluded that additional findings were unnecessary to support its June 30, 2014 order. Mother appeals from the June 30, 2014 order modifying parenting time and the September 17, 2014 order denying Mother's motions pursuant to CR 59.05 and CR 52.04.

STANDARD OF REVIEW

A family court has considerable discretion to determine the living arrangements which will best serve the interests of the children. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). Although a family court's discretion is not unlimited, it will be reversed only if its conclusion was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citation omitted).

We review questions of law *de novo*, *Revenue Cabinet v. Comcast Cablevision of the South*, 147 S.W.3d 743, 747 (Ky. App. 2003), and factual findings to insure they are not clearly erroneous. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Factual findings are not clearly erroneous if they are supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954, 956 (Ky. 1964). "The test for substantial evidence is whether when taken alone, or in light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999).

ANALYSIS

On appeal Mother contends that she was entitled to a second evidentiary hearing before the family court modified parenting time; that the family court failed to make sufficient findings of fact and conclusions of law; and that the family court's order was not supported by substantial evidence. We disagree.³

As noted, the family court did in fact conduct an oral hearing prior to modifying parenting time, listening to testimony and taking evidence for over three hours, only six weeks prior to entry of the ordering modifying parenting time. During Father's objection to the scope of the hearing, the family court made clear that it would consider a modification of both custody and parenting time depending on the evidence and testimony presented at the hearing, and the hearing continued without further objection from either party. The family court's order modifying parenting time did not rely on new evidence and Mother does not allege that new facts have arisen or that new evidence would be introduced at a second evidentiary hearing. It is plainly apparent that Mother seeks only to re-litigate issues previously presented to the family court.

Pursuant to KRS 403.320(3) parenting time may be modified "whenever modification would serve the best interests of the child." *See Pennington v. Marcum*, 266 S.W.3d 759, 767 (Ky. 2008) (determining that parenting time can be modified upon proper showing that modification is in the best interests of the

³ Mother relies on *Anderson v Johnson*, 350 S.W.3d 453 (Ky. 2011), and *Kiefer v. Kiefer*, 354 S.W.2d 123 (Ky. 2011) to support her argument that she was entitled to a second evidentiary hearing. Both of these cases are distinguishable, and thus do not apply here.

children). And because what constitutes a proper showing of children's best interests as it relates to modifying parenting time is not defined, whether the party seeking modification of parenting time has met their burden is left to the sound discretion of the family court. Here the family court relied on the testimony presented at the hearing in its order modifying parenting time. Having reviewed the record, it is abundantly clear the family court was fully informed at the time it concluded a modification of parenting time was in the children's best interest, and that its ruling was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Similarly the family court's order modifying parenting time was legally sufficient, having made separate findings of fact and conclusions of law. "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 family court's attention."

Anderson v. Johnson, 350 S.W.3d 453, 458 (Ky. 2011). Our Supreme Court has emphatically directed family courts "to include in all orders affecting child custody the requisite findings of fact and conclusions of law supporting its decisions."

Keifer v. Keifer, 354 S.W.3d 123, 125 (Ky. 2011). "[E]specially in family law cases, [the order of the family court] often serves as more than a vehicle for appellate review." *Id.* at 126.

Here, the order stated the ongoing and contentious nature of the parties' relationship, cited testimony that raised concern for the safety and emotional well-being of the children while in Mother's care, and concluded that granting Father's motion to modify parenting time was in the best interests of the children. Thus the family court's order satisfied the requirements of CR 52.01.

Likewise we disagree with Mother's contention that the family court's order modifying parenting time was not supported by substantial evidence. Mother alleges that because the motion to modify parenting time was filed after the hearing, no evidence was taken. Her rationale is misplaced. The family court's reliance on the recent testimony of the parties and their children was well within its discretion. Our review of the record leads us to conclude that the evidence relied upon by the family court had sufficient probative value to induce conviction in the minds of reasonable persons.

CONCLUSION

The record makes clear the family court was fully informed at the time it ordered a modification of parenting time, despite six weeks having lapsed between the date of the hearing and the order modifying parenting time. The family court's order complied with the requirements of CR 52.01, and was supported by substantial evidence of record. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Matthew E. Durham
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