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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001157-ME

HEATHER MCNEILL APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 05-CI-00680

BRIAN MACKEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Heather McNeill, *pro se,* appeals the June 29, 2015 order of the Hardin Family Court, denying her motion regarding an agreed custody order. Heather objects to the family court's failure to adopt her interpretation of the agreed custody order. After careful review of the record and the legal arguments, we affirm the decision of the trial court.

Heather and Brian Mackey were divorced on June 27, 2005. During the marriage, they had one child, C.E.M., whose date of birth is January 30, 2003. The issue in this matter concerns the parenting time for C.E.M. Initially, in 2005, the parties agreed to joint custody in a separation agreement, which was incorporated into the divorce decree.

In 2009, Heather filed a motion to modify the custody arrangement. She requested that she be named primary residential custodian, be awarded child support, and have the right to enroll the child in private religious school. Brian responded with his own motion including the request that the child remain in public school. The family court denied the motion to enroll the child in private school and set a hearing on the motion to modify custody. Prior to the hearing, the parties settled the dispute during mediation and amended the separation agreement. This agreed order, entered on June 11, 2010, divided the parenting time equally between the parents, and hence, the child spent fifteen days per month with each parent.

Next, in 2013, Heather filed a motion for child support, and Brian filed a motion to be designated primary residential custodian. Before a hearing on the custody motion, they again negotiated an agreed order, which was entered by the family court on November 18, 2014. Heather's counsel drafted the agreement, and Heather and her counsel signed it first.

On May 19, 2015, Heather filed a motion with the family court requesting, among other things, that the family court clarify the meaning of the

word "day," treat Easter as a national holiday and split it between the parties, and enter a mutual restraining order. The issues in this appeal arise from a dispute over the meaning of the word "days" in the agreed custody order concerning the child. The trial court conducted a hearing, and on June 29, 2015, entered an order, which designated Easter as a holiday to be split between the parties and granted the mutual restraining order. However, the family court denied Heather's interpretation of the meaning of "days."

The process for setting up each month's parenting schedule began with Brian marking days of the month, which he was scheduled to work, denoting Heather's every other weekend time, and then counting Heather's twelve days. The parties had agreed to use Brian's work schedule even though at the time of the hearing, he was not working because of an injury.

Brian contended that the parties chose this method based on the time requirements for his occupation as a firefighter. Further, with the prior agreed order, the parties had experienced difficulty attempting to select the days of the month. This new method eliminated conflict over setting the calendar. In the previous agreement, the parties chose their fifteen days of the month and then exchanged calendars. The parties, however, had great difficulty agreeing on the days. Under the auspices of the new method, there is less conflict. Once Brian has set the schedule, he takes a picture of the calendar and sends it to Heather.

In this dispute, the parties disagree as to the meaning "days" in the agreed order. Brian maintains that "12 days" in the order referred literally to 12

days. In addition, Brian highlighted that Heather never argued that school days and/or week days were not one of her twelve days. In fact, she counted these weekdays as “days” herself.

Heather argues that she should receive twelve days **and nights** of parenting time on the weekends under the language of the agreed order. She asserts that the normal meaning of the word “day” applies, and as such, it includes nights. Heather reasons that Friday, Saturday, and Sunday, should not count as three days (based on counting Friday, Saturday, and Sunday each as one day) but that it should be calculated by the hours, which according to her would be 50.5 hours, and not equivalent to three days.

However, in its order denying Heather’s motion, the family court explained that the agreed order delineated the meaning for “days.” In the agreed custody order, the description of Heather’s twelve days does not allow for overnights on all of them. Certain days have constraints, which eliminate the inclusion of the night for those days. The family court concluded that the agreed order defined and applied limitations to the days for Heather’s parenting time. Furthermore, the family court observed that the agreed order was clear about the terms and the conditions for Heather’s parenting time.

The pertinent language in the agreed orders states in paragraph 2:

> The Respondent [Heather] shall be entitled to no less than 12 days of parenting time each month which shall be alternating the weekends from after school on Friday until 6:00 p.m. on Sundays within this commencing on November 7th, 2014. All the weekend visitation shall

> start with the picking up directly after school and return on Sundays at 6:00 p.m. unless the Petitioner [Brian] is on call and the Respondent has not exceeded her 12 days, then the Respondent could keep the child to Monday. This schedule is done so the parties will no longer have to exchange calendars each month.

It is axiomatic that an appellate court reviews questions of law *de novo*. *Western Ky. Coca–Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001). Agreed orders between parties are contracts and the interpretation of contracts is a question of law. Kentucky Revised Statutes (KRS) 403.180(5); *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003).

Before addressing the dispute herein, we observe a few rules of contract interpretation. First, if an ambiguity exists, "the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written." *Id*. (*quoting Whitlow v. Whitlow,* 267 S.W.2d 739, 740 (Ky. 1954). Next, when interpreting contracts, "[i]n the absence of ambiguity a written instrument will be enforced strictly according to its terms." *Id*. (*quoting O'Bryan v. Massey-Ferguson, Inc.*, 413 S.W.2d 891, 893 (Ky. App. 1966)). Finally, a court will interpret the contract's terms by assigning language its ordinary meaning and without resort to extrinsic evidence. *Id*. (*quoting Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (Ky. 2000)). With these principles in mind, we address the agreement herein.

In the case at bar, we agree with the family court's ruling regarding the meaning of the term "days" in the agreed custody order. Implicit in the language that "[a]ll the weekend visitation shall start with the picking up directly after school . . ." is that the "day" begins with afterschool pickup. Significantly, the terms of the November 18, 2014 agreed custody order indicate that days are days. And the language in the agreement never references 24 hours as the measuring stick for "day."

This interpretation of the meaning of "day" in the agreed order is applicable to all of Heather's requests. In particular, she is entitled to twelve days, not twelve overnights; her weekend parenting time is three days, not two days; and finally, the parties will no longer choose the days, since that resulted in conflict, and more importantly, the language of the new order prohibits this method. The agreement explicitly states that it is no longer necessary to exchange calendars each month.

We are also cognizant the November 2014 agreed custody order named Brian as the primary residential custodian. Therefore, the child resides with Brian, and Heather has twelve days (not nights) of parenting time. Brian's status as primary residential custodian also supports that Heather's interpretation of a day as a 24-hour period was not the definition implied in the agreement.

Heather also argued that the specific provisions of the prior custody agreements of 2005 and 2010, in addition to the 2014 agreement, still apply. Again, we disagree with her reasoning. No language recognizing the prior custody

orders is found in the November 2014 order. Additionally, paragraph 5 of the new agreed custody order makes provisions for the treatment of holidays regarding parenting time and references the local rules should there be a need to modify the arrangement in the agreed order.

For these reasons, we affirm the decision of the Hardin Family Court.

NICKELL, JUDGE, CONCURS.

LAMBERT, D., JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, D., JUDGE, DISSENTING**:** After careful consideration, I dissent. The ordinary meaning of "day" is a 24-hour period spanning successive midnights. The disputed agreed order provides Heather with a minimum parenting time of twelve days per month. Heather has their child on alternating weekends "after school on Friday until 6:00 p.m. on Sundays[.]"

The trial court erroneously counted these two twenty-four-hour periods plus the after school time of two and a half hours as three days, apparently because there are three named days of the week involved rather than the common sense understanding that 24 hours equals a "day." I would hold that Heather's alternating weekends consist of two total days of parenting time and not three under the agreed order.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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