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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000882-ME

ROBERT PORTER APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DENISE DEBARRY BROWN, JUDGE
ACTION NO. 12-CI-504296

SARAH J. PORTER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Robert Porter appeals from the Jefferson Family Court's June 2, 2016 order amending its April 25, 2016 order rendering a final judgment on timesharing.

Robert and Sarah Porter were married in 2007 and had triplet girls in 2010. At the end of 2012, Sarah filed a petition for dissolution of marriage. In their marriage settlement agreement, Robert and Sarah agreed to share joint

custody and "[i]n lieu of setting a formal schedule" to "continue working with each other and being flexible with their schedule to accommodate each other and ensure each parent has adequate parenting time with the children." This agreement was incorporated in the October 30, 2014 decree of dissolution of marriage.

On September 15, 2015, Robert filed two motions. In his first motion, he sought to have the family court find Sarah in contempt for "intentionally and willfully preventing [Robert] from exercising his parenting time by unilaterally making parenting time decisions."[1] In his affidavit, he alleged Sarah "refuses to allow me to watch the children while she is at work and I am off work, and instead has her parents babysit on Monday, Wednesday, and Friday. She generally refuses to allow me to have overnights on any night other than Saturday."

In his second motion, Robert requested that Sarah be prohibited from relocating outside of Jefferson County with the children. In his affidavit, he alleged Sarah recently told him she was planning to move with the children.

On October 20, 2015, Robert renewed his motion for contempt and filed a new affidavit detailing problems with the amount of timesharing Sarah was allowing, alleging Sarah was planning on moving to Danville in June 2016 and requesting that the children remain with him in Louisville. He also requested that the parenting schedule be modified to allow him equal parenting time, whether or not the children relocate with Sarah or until the time of such relocation.

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[1] This motion also addressed other issues which are not before us on appeal. Therefore, we omit any discussion of those issues.

Sarah responded by filing a motion on November 3, 2015, requesting the children be allowed to relocate with her to Danville and the court set Robert's timesharing at twice a week for two hours and every other weekend from 10 a.m. on Saturday to 6 p.m. on Sunday. In her affidavit, Sarah alleged she was the primary caregiver for the children, Robert provided very limited care for the children until they were three years old and his lack of time with the children resulted from his unwillingness and lack of capacity to adequately care for them for longer periods of time. She believed it was in the children's best interest to relocate with her, as she planned to be married and reside in Danville, and her relocation should not affect Robert's ability to have timesharing every other weekend. On December 17, 2015, Sarah renewed her motion.

The family court held a hearing on February 19, 2016. Robert withdrew his contempt motion but continued to oppose Sarah's proposed move with the children and sought equal timesharing. The family court heard testimony from Robert, his mother (paternal grandmother), Sarah and her mother (maternal grandmother).

Robert testified that while Sarah was the primary caregiver for the children and they lived with her after the dissolution of the marriage, he supported the children financially, was involved in their lives and visited them frequently.

Robert testified that his frequent visits were curtailed after Sarah made the decision that she wanted to move to Danville. Currently, his visits are limited to Tuesdays from 3:15 to 5:00 p.m. and every other weekend. Robert testified that

the children enjoy spending time with him and they enjoy many fun activities together. The children share a bedroom at his condo, which is one mile away from Sarah's house, and enjoy swimming in his pool.

Robert testified he wants to spend more time with the children than what Sarah is allowing and wants equal timesharing. Although, as of January, he began working a Monday through Friday 6 a.m. to 2:30 p.m. shift, his parents are able to come to his condo at 4:30 a.m. and stay with the children and take them to school.

Robert denied that he failed to give one daughter her laxatives as prescribed, allowed another daughter to not wear her glasses and did not take the children's asthma condition seriously. While he did smoke, he never smoked around the children or smoked when they were in the car with him.

Robert testified he thought he and Sarah were good parents and that the children deserved to have both their parents involved in their lives. He did not want Sarah to move the children to Danville because in Louisville they were near people who cared about them and were actively involved in their lives, including both sets of grandparents and extended family members.

Paternal grandmother corroborated Robert's testimony that he was very involved in caring for the children and had a strong relationship with them. She did not assist him in caring for the children when he had overnight visits at his condo.

Sarah testified that Robert was largely uninvolved in caring for the children and had short visits with them after the divorce. She has raised them with help from both sets of grandparents.

Sarah testified Robert only asked to have the children overnight when he learned she was dating and after he began living with his parents. He had the children some weekends from Saturday at 11 a.m. or noon, until Sunday at 6 p.m. Sometimes paternal grandmother picked them up on Saturdays. They tried having Sunday overnights but Robert preferred dropping the children off at 6 p.m.

Once Robert began working the dayshift from 6 a.m. to 2:30 p.m., he received visitation on Tuesdays from 3 to 5 p.m. but generally did not arrive until around 3:45 p.m., wearing his gym clothes. He received every other weekend visitation from Friday at 3:30 p.m. to Sunday at 6 p.m.

Sarah testified that while Robert loves the children, Robert is more of their friend than father. While the children like to see Robert for weekday visits, they do not like to have overnight visits with him. When they return, they are whiny, sleepy and have not had their hair or teeth brushed. Sarah testified that one daughter with constipation problems typically would come home needing extra medication after the end of the weekend. Robert did not believe the children have asthma and one time one child returned from a weekend wheezing and required many asthma treatments. Another child never wears her glasses when Sarah video chats with her while she is with Robert for the weekend, and Robert frequently forgets to return her glasses. She has smelled smoke on the children's clothing.

Sarah testified she believes the move to Danville will be good for the children. They enjoy spending time with her fiancé and his children. The children would start kindergarten in the fall and attend Boyle County schools.

She testified her move should not affect Robert's ability to maintain visitation with the children. The current schedule Robert has with them can continue after she moves and they have discussed meeting one day a week at the half-way point, and him maintaining every other weekend visitation.

Maternal grandmother testified and corroborated Sarah's testimony that Robert provided very little care for the children and is typically late for his Tuesday visitation. When the children return from weekend visits with Robert, their hair is uncombed, very tangled and hasn't been washed. On one occasion, she saw Robert smoking in the car while the children were inside.

Maternal grandmother testified that she met Sarah's fiancé and he is good with his children and Sarah's children. She believes the children will have a good life in Danville because it is a nice community with good schools. She will stay involved in the children's lives.

On April 25, 2016, the family court issued an order resolving whether Sarah could relocate and set a new timesharing schedule (first order). It made detailed factual findings before granting Sarah's motion to relocate, concluding it was in the children's best interest that Sarah be named the primary residential parent based on Sarah's historic role as primary caregiver and Robert's current work schedule, which would limit his ability to care for the children overnight.

While Sarah relocating ninety minutes from Robert would limit his ability to see the children on a daily basis, it would not affect his ability to have regular and consistent parenting time with children similar to his current schedule.

The family court also set a parenting schedule and determined Robert would have timesharing with the children as follows: During the school year Robert would have three out of every four weekends from Friday at 5 p.m. to Sunday at 6 p.m., and every Wednesday from 5 p.m. to 7:30 p.m. in Shelbyville. During the summer, the parties would have a week on, week off parenting schedule, with Robert's parenting time contingent on the children not having to wake up early because of Robert's work schedule. Sarah was to be responsible for all transportation because it was her decision to relocate with the default exchange location to be Robert's house.

On May 4, 2016, Sarah filed a motion to alter, amend or vacate, specifically relying upon Kentucky Rules of Civil Procedure (CR) 59.05. Sarah argued the parenting schedule the family court set would be too much travel time for the children, three hours every weekend and an hour on Wednesdays. Every Wednesday timesharing was not appropriate because the children would be in school, have homework to do and attended church classes on Wednesdays. Sarah requested that Robert only have weekday visitation during the week prior to when she would have her weekend with the children.

Sarah also argued the summer week on week off parenting schedule was not feasible due to Robert's work schedule, the children would have a difficult

time being away from her for a full week, and requested that the summer schedule be modified to allow her to have the children every weekend or that the school schedule be followed year-round. She alternatively requested that the "Court enter an Order that if the children are woke[n] up early to accommodate [Robert's] work schedule, then the summer schedule be reverted to the school schedule."

Sarah also requested that the order be modified for the parties to exchange the children at a location half-way from their residences so that she not spend approximately six hours in the car each weekend.

Robert's response argued that Sarah's motion should be denied because she presented no legitimate basis to alter, amend or vacate pursuant to CR 59, her motion was simply an attempt to revisit and reargue issues that had already been heard and decided, and the current order was in the children's best interest.

On June 2, 2016, the family court granted Sarah's motion in part (second order). The family court modified the parenting schedule as to the Wednesday night parenting: "The court concludes it is in the best interest of the minor children that the Wednesday parenting time during the school year be reduced to only the Wednesday prior to [Sarah's] parenting time weekend." The family court also modified the summer schedule:

> Further, the court would like to make it clear the week on/week off summer parenting schedule is based on [Robert's] parents being able to provide care for the children in morning if [Robert] has to report to work at an early hour. If [Robert's] parents are unable to provide care for the children in the morning and [Robert's] work schedule would require the children to wake up prior to

> 8:00 am on a consistent basis during [Robert's] summer parenting time, then the parties shall use the school year parenting schedule during the summer as well. If the parties are required to use the school year parenting schedule during the summer, then [Robert's] Wednesday night parenting time shall occur every week[.]

The family court specifically stated that this was a final and appealable order and there was no just cause for delay of its entry or execution.

Robert filed an appeal from this second order. He argues that the family court erred by granting Sarah's motion to alter, amend or vacate where: (1) Sarah failed to assert any legal ground to support a CR 59 motion and was merely attempting to reargue her position; (2) the family court's second order was arbitrary, unreasonable and unfair where there was no change in circumstances; and (3) Sarah failed to make her arguments and submit relevant evidence supporting them at the previous hearing. Robert alternatively argues if the family court considered Sarah's motion pursuant to Kentucky Revised Statutes (KRS) 403.320, its ruling is still in error because he was not given sufficient notice to respond to a motion governed by a different standard, there was no change in circumstances between the two orders and the second order was not supported by any evidence.

Robert attempts to elevate form over substance. While Sarah should have filed her motion pursuant to CR 52.02 rather than CR 59.05, the form of her motion does not affect the inherent power of the family court to amend its

judgment based on the timely motion of a party. An exercise of this inherent power does not make the second order arbitrary, unreasonable or unfair.

CR 52.02 provides in relevant part that "[n]ot later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly." The Kentucky Supreme Court has opined that within the provisions of this rule "a court has unlimited power to amend and alter its own judgments." *Henry Clay Mining Co. v. V & V Mining Co.*, 742 S.W.2d 566, 567 (Ky. 1987).

Sarah's motion was timely filed and contained a clear request for the family court to amend its judgment. The family court's second order amended and clarified its first order in order to better address what the family court believed was in the best interest of the children. This was an appropriate exercise of its power.

While Sarah did make a new argument in her motion regarding weekday visitation, this does not alter the fact that there was sufficient evidence submitted during the hearing to support the second order. The family court's second order was not based on a change in circumstances pursuant to KRS 403.320, but based on the evidence it received at the hearing. While Robert prefers the first order, it was not finalized because Sarah filed a timely motion to amend it within ten days and, therefore, it was not the family court's final decision on what was in the best interest of the children.

Accordingly, we affirm the Jefferson Family Court's June 2, 2016, order amending its April 25, 2016 order rendering a final judgment on timesharing.

ALL CONCUR.

BRIEFS FOR APPELLANT:

M. Jason Lawrence
Louisville, Kentucky

BRIEF FOR APPELLEE:

Katie Brophy
Louisville, Kentucky