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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001416-MR

RACHEL M. STONEBERGER APPELLANT

v.

APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 11-CI-00062

KEVIN R. STEVENSON APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Rachel M. Stoneberger appeals from the Henderson Circuit Court order granting Kevin R. Stevenson's motion to enroll the parties' child in the Henderson County, Kentucky, school system. We affirm in part, reverse in part, and remand.

Rachel and Kevin were married in 2008, separated in late 2010, and their dissolution of marriage was final in May 2012. Their only child was born in 2010.[1] After the dissolution, the parties shared joint custody of their daughter. There were minor conflicts along the way concerning visitation, exchange sites, and child support. But in the Fall of 2014, with kindergarten looming ahead the following year, the parties realized they were unable to come to an agreement about where the child would attend school. Both Rachel (who lives in Illinois) and Kevin (who lives in Henderson County) filed simultaneous motions asking the circuit court to decide where the child would attend school.

The circuit court held a lengthy hearing on August 9, 2016. The decision, announced from the bench, was later memorialized in writing and entered of record on August 24, 2016. Kevin, who is now a stay at home parent, was granted his motion to enroll the child in Bend Gate Elementary School in Henderson, Kentucky. Primary custodianship and visitation were adjusted accordingly. Rachel appeals.

In her first of two issues, Rachel argues that the circuit court's decision failed to consider the best interests of the child.[2] It is Rachel's belief that "[t]he best interest of the child in this case dictated that she attend the Bridgeport School System" (i.e., the school nearer to Rachel's home). Rachel insists that the

[1] The daughter was born with an underdeveloped cerebellum, resulting in poor muscle control. The child has been undergoing physical and occupational therapy through Easter Seals for many years.

[2] Kentucky Revised Statute (KRS) 403.270(2).

Bridgeport School System would better meet her daughter's needs and that Rachel's family provides a better living environment than Kevin's.

We note that there has been no change in custody: the parties remain joint custodians of their child. But by electing to allow Kevin to enroll the child in Bend Gate School the effect is to make him primary custodian.

> The standard of review in a child custody case is whether the trial court's factual findings are clearly erroneous. *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005). Findings of fact may be set aside only if they are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. And, a factual finding is not clearly erroneous if it is supported by substantial evidence. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Substantial evidence is evidence sufficient to induce conviction in the mind of a reasonable person. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Hence, a finding of fact is viewed as clearly erroneous if not supported by substantial evidence of a probative value. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964).
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> "If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the finder of fact." *London v. Collins*, 242 S.W.3d 351, 354 (Ky. App. 2007). The test for the reviewing court is not whether it would have come to a different conclusion, but whether the trial court applied the correct law and whether the trial court abused its discretion. *B.C.*, 182 S.W.3d at 219-20. Abuse of discretion implies arbitrary and capricious action that results in an unreasonable and unfair decision. *Sherfey v. Sherfey*, 74 S.W.3d 777, 783 (Ky. App. 2002), *overruled on other grounds by Benet v. Commonwealth*, 253 S.W.3d 528 (Ky. 2008). With this standard in mind, we now turn to the case at hand.

Maxwell v. Maxwell, 382 S.W.3d 892, 895 (Ky. App. 2012).

Our review of the record (including the four-hour hearing) indicates that, although Rachel testified about the attributes of the Bridgeport School System as well as addressed her fears and concerns about the Bend Gate School, she placed no other proof in the record regarding the benefits versus burdens of the two kindergartens. Kevin, on the other hand, produced as a witness the principal of Bend Gate Elementary School. The principal testified about the class sizes, the school's statewide ranking, the physical layout of the school, the daily schedule, the special needs programs offered on site, and the procedures for testing the parties' child once school began. The principal had already chosen a classroom and teacher (one with thirty years' experience as a kindergarten teacher) for the child. The principal had met the child on two occasions and had witnessed the interactions with her father and half-brother.

Both parties testified about the proximity of each school to their respective households and places of employment. Kevin, who no longer works outside the home, was available on a daily basis to pick up the child if necessity required it. Rachel, on the other hand, was an hour closer to the Henderson County school on days that she worked. If an issue arose at Bridgeport on a day when Rachel and her husband were working, she would have to resort to her parents or her in-laws to pick up the child from school.

The circuit court expressed its frustration with the Bridgeport School System's website: the court had attempted to glean independent information from that website in order to compare the two proposed kindergartens. The circuit court

also voiced its concern over valuable instruction hours lost if the child continues Easter Seals therapy during the school day.

We find neither clear error nor abuse of discretion in the circuit court's decision to allow the child to be enrolled in Bend Gate Elementary School. *Maxwell*, *supra*.

Rachel secondly argues that the circuit court erred in failing to allocate fairly the parenting times. We agree with Rachel in this regard.

> A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, as in general serves the child's best interest. *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993). With joint custody, a visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances. *Aton v. Aton*, 911 S.W.2d 612 (Ky. App. 1995).

Hudson v. Cole, 463 S.W.3d 346, 351 (Ky. App. 2015).

Although the circuit court painstakingly allocated times during the school year, Rachel should have been granted additional time with the child during the summer months to compensate for time lost during the academic year. In fact, the circuit court orally commented that this should be done, yet went on to divide summer custody by alternating weeks.

We thus reverse that portion of the order and remand the matter to the circuit court for more equitable time-sharing during the summer months. *Id*.

The order of the Henderson Circuit Court is affirmed as to school enrollment, reversed regarding time per parent, and remanded for reconsideration of the latter issue in light of matters discussed above.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Susie H. Moore
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