

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001708-ME

CHELSEY LAMBERSON (fka GOODMAN)

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT,
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 13-CI-00686

ANTHONY MULROONEY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON, AND KRAMER, JUDGES.

KRAMER, JUDGE: Chelsey Lamberson appeals from the Hardin Family Court's order modifying the timesharing arrangement between the parties. The order designated Anthony Mulrooney as the primary residential parent and awarded Chelsey parenting time in accordance with the Hardin County Local Rules. After careful review of the record, we affirm.

Chelsey and Anthony maintain joint custody of S.M. (Child). Their previous timesharing agreement from 2014 split timesharing evenly among them. Child would spend six months of the year residing with Chelsey and the other six months residing with Anthony. This was primarily due to Chelsey moving to Germany following her husband's deployment. Chelsey's husband serves in the U.S. Army. As Child was to begin kindergarten in the fall of 2017, Anthony moved to modify timesharing asking to become the primary residential parent. Chelsey, who was about to move to Texas with her husband, also asked to be named the primary residential parent.

In May 2017, a hearing was held to determine which option would be in the best interest of Child. The family court heard testimony from the parties, a social worker from the Cabinet, and several of the parties' family members. At the conclusion of the hearing, the family court found it to be in Child's best interest for Anthony to be the primary residential parent. The family court entered findings of fact and conclusions of law to that effect in September 2017. This appeal followed. Additional facts will be discussed as they become relevant.

On appeal, Chelsey makes two arguments. First, she argues the family court committed reversible error when it excluded a forensic report from a counselor in Germany on hearsay grounds. Second, she argues the court's finding

that it was in Child's best interest to primarily reside with Anthony was clearly erroneous. We will address each argument in turn.

Chelsey's first argument involves the family court's exclusion of evidence. Our review of a court's decision to exclude evidence is limited to abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The evidence at issue was a certified forensic report related to an alleged event that transpired between Child and the son of Anthony's girlfriend.¹ Anthony's girlfriend and her son live with Anthony. During Child's time with Chelsey in 2016, Child reported there was certain sexual conduct between Child and the girlfriend's son that occurred during Child's previous six-month stay with Anthony. Following this allegation Chelsey took Child to see a therapist and the forensic report was ultimately drafted.

The family court heard extensive testimony surrounding this alleged incident from Chelsey, Anthony, and the Cabinet social worker. However, when Chelsey attempted to introduce a certified forensic report from Germany under the

¹ Of note, at the time of the alleged incident Child and the girlfriend's son were approximately four and five years old, respectively.

business record exception to the hearsay rule, Anthony objected. The family court excluded the certified forensic report on foundational grounds. Specifically, the family court ruled a proper foundation was not laid because a custodian or other qualified witness did not testify that the report was made in the course of a regularly conducted business activity. On appeal, Chelsey argues this was reversible error. In her view, KRE² 803(6)(A) allows a business record to be admitted if it satisfies the requirements of KRE 902(11). This argument lacks merit.

Chelsey is correct that KRE 902(11)(A) explains that a business record can be self-authenticating, and the record custodian need not testify regarding its authenticity *if* the record is properly certified. Here, the forensic report at issue appears to be properly certified. However, Chelsey ignores subsection (B) of KRE 902(11), which states:

A record so certified **is not** self-authenticating under this paragraph **unless** the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(Emphasis added.)

² Kentucky Rule of Evidence.

As Anthony correctly pointed out at the hearing and again in his brief, Chelsey did not include the forensic report in her exhibit list nor did she provide any other type of notice regarding her intention to introduce the report at the hearing. Because of this, Anthony did not have a fair opportunity to challenge it as contemplated by KRE 902(11)(B). Thus, the family court did not abuse its discretion in excluding the evidence.

Chelsey's second argument is that the family court was clearly erroneous when it found it was in Child's best interest to primarily reside with Anthony and modified timesharing to that effect. Specifically, Chelsey asserts that the following facts mandate a different finding: (1) Chelsey is a stay-at-home mom and Anthony's work schedule forces him to have family members look after Child while he is at work; (2) Chelsey is superior at facilitating communication with Child's relatives through technology such as facetime; and (3) Chelsey handles the Child's mental health better evidenced by Anthony's response, or lack thereof, to the alleged incident that took place between Child and his girlfriend's son.

Pursuant to KRS³ 403.320(3) parenting time may be modified “whenever modification would serve the best interests of the child.”⁴ *Pennington v. Marcum*, 266 S.W.3d 759, 767 (Ky. 2008). Whether the party seeking modification of parenting time has met their burden is left to the sound discretion of the family court. Thus, the question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous. *See Hudson v. Cole*, 463 S.W.3d 346, 350 (Ky. App. 2015) (citing *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982)); CR⁵ 52.01. Findings of fact “are not clearly erroneous if they are supported by substantial evidence.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

After a thorough review of the record, it is clear the family court was fully informed at the time it concluded a modification of parenting time was in Child’s best interest and that its rulings were supported by substantial evidence. The family court placed substantial weight on the fact that Child will remain in the same county she was born and will be in the same area where all her extended family reside. This is clearly within the family court’s discretion. Regardless of Anthony’s work schedule or ability to facilitate facetime communications, it was

³ Kentucky Revised Statute.

⁴ Factors relevant to a best interest determination in custody/timesharing cases can be found in KRS 403.270(2)(a)-(k).

⁵ Kentucky Rule of Civil Procedure.

uncontroverted that Child saw all her extended family more frequently when Anthony was exercising his timesharing. Furthermore, regarding the alleged sexual incident, the family court found Anthony's response to be appropriate following the response of the Cabinet and Child's therapist. The Cabinet social worker directed Anthony not to discuss the incident with Child or his girlfriend's son and did not pursue the allegation further, beyond recommending stricter supervision. Child's therapist in Germany did not recommend Child for additional therapy indicating the situation was not an ongoing issue.⁶ We are satisfied the family court considered these facts and properly conducted the best interest analysis as reflected in its written findings. *See Cabinet for Health & Family Servs. v. K.H.*, 423 S.W.3d 204, 212 (Ky. 2014) ("While the family court's written order did not specifically address each factor, its findings lead us to believe that each factor was properly considered."). Thus, the family court's determination that it was in Child's best interest for Anthony to be the primary residential parent was not clearly erroneous.

In light of the foregoing, the order of the Hardin Family Court is
AFFIRMED.

ALL CONCUR.

⁶ Of note, this therapist was not the same therapist who drafted the forensic report at issue.

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