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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000101-ME

CALLY MARIE SIMPSON F/K/A
CALLY SIMPSON JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 16-CI-04138

TREVOR HARRIS JONES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Cally Marie Simpson appeals from an order of the Fayette Circuit Court reducing child support, requiring a "right of first refusal" for either parent, and limiting Simpson's ability to remove the parties' child from preschool to visit the maternal grandparents in Florida. Finding no error, we affirm.

Simpson and Trevor Harris Jones are the parents of one child born in 2015. The parties separated in October 2016. They entered into a separation agreement when their marriage was dissolved in February 2017. The pertinent part of that agreement addressing child support stated:

> Effective today, based on Husband's current income and not imputing any income to Wife, Husband will pay to Wife the sum of $1,009.00 per month to be recalculated after two years based on each party's then current income.
>
> During this two year period, Husband shall continue to pay $260 per month for the child's day care expenses.

At the time of separation and dissolution, Simpson was the primary caregiver for the child. However, the actual timesharing changed to 50/50 within three months after dissolution, and Jones accepted employment with less travel but also potentially less income. Thus, Jones moved to adjust his child support payments accordingly.

Simpson objected to the motion, and Jones added his requests for the right of first refusal and that Simpson not be permitted to withdraw the child from preschool unless the parties agreed.

The parties briefed the issues, and the circuit court held hearings on March 15, July 13, and September 19, 2018. The circuit court entered its initial order ruling on all issues on November 15, 2018; a second order concerning the

pending issues was entered on November 29, 2018. The circuit court denied Simpson's motion to alter, amend, or vacate (Kentucky Rule of Civil Procedure (CR) 59.05) on January 11, 2019. Simpson appeals from those orders.

As an initial matter, we note that "[o]ur case law is clear . . . that there is no appeal from the *denial* of a CR 59.05 motion. The denial does not alter the judgment. Accordingly, the appeal is from the underlying judgment, not the denial of the CR 59.05 motion." *Ford v. Ford*, 578 S.W.3d 356, 366 (Ky. App. 2019). Therefore, we shall only address the circuit court's ruling on Simpson's CR 59.05 motion insofar as it modified the parties' right of first refusal; all other issues brought in the motion were denied and will not be reviewed except from the ruling in the underlying judgment.[1]

Our standard of review is stated here:

> We review the establishment, modification, and enforcement of child support obligations for abuse of discretion. *Plattner v. Plattner*, 228 S.W.3d 577, 579 (Ky. App. 2007). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001) (citing *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000)). "[And] generally, as long as the trial court gives due consideration to the parties' financial circumstances and the child's needs, and either conforms to the statutory

[1] The January 11, 2019, order also appointed a parenting coordinator upon Simpson's motion for same. As neither party takes issue with the appointment, we will not discuss that portion of the CR 59.05 ruling.

> prescriptions or adequately justifies deviating therefrom, this Court will not disturb its rulings." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000) (citing *Bradley v. Bradley*, 473 S.W.2d 117 (Ky. 1971)).

McCarty v. Faried, 499 S.W.3d 266, 271 (Ky. 2016). Furthermore, "[t]he period of time during which the children reside with each parent may be considered in determining child support, and a relatively equal division of physical custody may constitute valid grounds for deviating from the guidelines." *Plattner*, 228 S.W.3d at 579 (citations omitted). "Because physical custody of the children is evenly divided between the parents, they bear an almost identical responsibility for the day-to-day expenses associated with their care." *Id*. at 580.

When Simpson and Jones entered into their settlement agreement, which established joint custody, Simpson assumed most of the timesharing because of Jones's work travel schedule. The parties entered into litigation over another issue (*Simpson v. Jones*, No. 2017-CA-001934-ME, 2019 WL 258160 (Ky. App. Jan. 18, 2019)), which ultimately resulted in an agreed 50/50 timesharing arrangement. The circuit court deemed this increase in Jones's caregiving time as a material change in circumstances, warranting an adjustment in child support. Jones's child support obligation was reduced from $1,009.00 per month to $569.10 per month, retroactive to the date Jones filed for his motion for reduction in payments.

Simpson takes issue with this, arguing that the amount in the separation agreement should be enforced. She also questions the circuit court's imputation of her earning capacity at $21,193.00 rather than at minimum wage. Yet she fails in her burden of proving that the circuit court abused its discretion in modifying child support. *McCarty*, *supra*. Kentucky Revised Statute (KRS) 403.180(2) provides, in pertinent part, that the terms of the separation agreement are binding upon the circuit court "unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable." KRS 403.213(1) allows for modification of child support "only upon a showing of a material change in circumstances that is substantial and continuing."

Here the circuit court found that the parties' equal timesharing constituted a material change in circumstances warranting a modification of child support. The court then required both parties to submit proposed alternative computations before making the determination of the monthly contributions of each.

> KRS 403.212(2)(d) allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. A trial "court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the

> child support obligation." KRS 403.212(2)(d). The statute further specifies that "[p]otential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." The court may consider the totality of the circumstances in determining whether a parent is voluntarily unemployed or underemployed. *Polley v. Allen*, 132 S.W.3d 223, 226-27 (Ky. App. 2004).
>
> [T]he trial court's determination of [appellee's] earning capacity involves a finding of fact, which will not be disturbed unless clearly erroneous. CR 52.01. Due regard shall be given to the opportunity of the trial court to evaluate the weight of the evidence and the credibility of witnesses. *Id.* The trial court was responsible for deciding that question of fact based on the parties' testimony and other evidence. *See also Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). While there was contrary evidence in the record, the trial court's findings regarding [appellee's] earning capacity was supported by substantial evidence.

Maclean v. Middleton, 419 S.W.3d 755, 775 (Ky. App. 2014). Simpson cannot point to any legal authority or anything in the record that convinces us that the circuit court abused its discretion in its modification or amount of child support. Thus, we affirm those determinations.

Simpson next contends that the circuit court erred in awarding to both parents the right of first refusal, namely:

> As to the right of first refusal, both parties will have the option to keep the minor child if the parent scheduled to have him is going to be away overnight

> rather than having him stay with a relative or a babysitter. There will be no "makeup" time for these events unless the parties agree to that in advance. The right of first refusal is an option and not a requirement and therefore neither parent is subject to criticism if they are unable to keep the minor child when the other parent will be gone overnight. Each parent will notify the other immediately of any travel plans which would impact their timesharing with the minor child, giving the other parent as much time as possible to consider whether they are able to exercise the right of first refusal.

The right of first refusal was clarified in the circuit court's ruling on Simpson's CR 59.05 motion to read:

> The Court therefore modifies its Order of November 15, 2018 to provide that both parents will have the right of first refusal to provide child care for the minor child in the event the other parent will be gone overnight except that each party may elect to have that party's parents provide overnight care for the minor child for no more than three overnights per month, either in Lexington or Paris.

Simpson sees Jones's position on this issue as "motivated by jealousy" and an attempt "to prevent [her] parents from having quality time with [the child]." We see it as neither. The circuit court, in an effort at fairness, made this right of first refusal available to both parents, not just Jones, and its solution offered equal grandparenting time. We fail to be convinced that the circuit court's resolution of this issue was an abuse of discretion. "We must be highly deferential to a family court's determination with respect to time-sharing and may reverse it only if it constitutes a manifest abuse of discretion. If the factual findings underlying the

court's determination are supported by substantial evidence, we may not interfere with the family court's exercise of its discretion." *Hempel v. Hempel*, 380 S.W.3d 549, 551 (Ky. App. 2012) (citations omitted). We decline to set aside the circuit court's award of right of first refusal to both parents.

Simpson lastly argues that the circuit court erred in limiting her ability to remove the child from preschool to visit the maternal grandparents in Florida. Again, Simpson fails in her burden of proof. The circuit court's determination was based on the expert testimony of Simpson's own witness. The court permitted the child to be withdrawn from school in the afternoons when instruction was not structured as it is in the mornings, and it allowed Simpson to withdraw the child one day per month, "but the child should not miss two or three days." We can discern no abuse of discretion in this determination. *Id.*

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
R. Bruce Stith, III Lexington, Kentucky	Eileen M. O'Brien Lexington, Kentucky