

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000809-MR

TARA HAMILTON

APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 04-CI-00385

BARRY REVIS HAMILTON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Tara Hamilton appeals the order of the Floyd Family Court that modified timesharing with her infant child. We affirm.

Tara and Barry Revis Hamilton were married on July 20, 2002. The parties had one child of the marriage, Madison. On April 16, 2004, the parties

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

filed a joint petition for legal separation, which was eventually converted to a petition for dissolution of marriage. On July 21, 2006, a judgment was entered by the trial court, awarding primary physical custody of Madison to Barry, and citing Tara's substance abuse issue as the foremost factor in its decision. The trial court also found that it was in the child's best interest to continue a previously created custody arrangement in which Tara was given timesharing for approximately nine days each month, to be supervised by Tara's mother. Both parties filed motions to alter, amend or vacate. A hearing was held and, in addition to correcting an inadvertent failure to dissolve the marriage of the parties in the July 21, 2006, judgment, the court ordered that the parties have joint custody of Madison, with Barry as the primary physical custodian and Tara being the non-residential parent. The timesharing arrangements of the previous order remained.

On January 30, 2007, Barry filed a motion to alter Tara's timesharing. The motion was heard on February 6, 2007, and the court granted Barry's motion and ordered Tara to have timesharing according to the court's standard timesharing schedule.² That schedule gave Tara timesharing on alternate weekends, from Friday evening to Sunday evening, and also on each Thursday evening following the weekend visitation. This appeal followed.

This Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case.

² The Court is aware of the case of *Drury v. Drury*, 32 S.W.3d 521,525 (Ky.App. 2000), which holds that a trial court should not give undue weight to the terms of a standard timesharing order. However, we do not feel that the use of such an order is misplaced in the case *sub judice*.

Drury v. Drury, 32 S.W.3d 521,525 (Ky.App. 2000) citing *Wilhelm v. Wilhelm*, 504 S.W.2d 699, 700 (Ky. 1973).

Tara argues that the trial court erred in reducing her timesharing because there was no proper motion before the court and because there was no basis for the court to modify the previous custody arrangement. KRS 403.320 sets out the applicable law relative to timesharing:

(1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

(2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

(3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

KRS 403.320 sets out two standards with which a trial court may grant or modify timesharing rights: according to the best interests of the child and under a finding of serious endangerment. The best interest of the child standard prevails in most situations except when the trial court chooses to restrict a parent's

timesharing. The timesharing schedule which Tara was provided is a standard order used in all of Floyd County. The Court has previously held that “restrict”, as used in a child timesharing statute means to provide a parent with something less than reasonable timesharing. *Kulas v. Kulas*, 898 S.W.2d 529 (Ky.App. 1995). We do not believe that the reduction in Tara’s timesharing, created by the implementation of the standard order, amounts to a restriction as envisioned by the statute. Accordingly, the standard required by the trial court is the best interest of the child.

Although the trial court did not explicitly state that the new timesharing schedule would serve the best interest of Madison, we find that it did so indirectly. The order stated that the court “has significant concerns regarding the visitation to be exercised by Petitioner.” This, when read in conjunction with the remainder of the order, which requires supervision of Tara’s time with Madison, orders Tara not to operate a motor vehicle with Madison in said vehicle, and allows Barry to request that Tara submit to a drug test, is sufficient in showing that the trial court modified the timesharing arrangement according to the best interests of Madison. Having reviewed the record, it is clear to the Court that Tara has a lengthy history of substance abuse issues. It is also clear from the trial court’s order that this history was a great factor in its decision. In light of that history, we do not believe it to be an abuse of discretion for the trial court to order a timesharing schedule in conformance with that circuit’s standard timesharing

schedule. Such a holding, however, does not preclude Tara from moving for a modification of timesharing at a later date.

Tara's argument that there was no proper motion before the trial court is without merit. Barry filed a motion to reset timesharing. The jurisdiction of the court, over custody and timesharing matters, is continuous.

For the foregoing reasons, the March 2, 2007, order of the Floyd Circuit Court is affirmed.

ALL CONCUR.

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