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Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-1423-MR

KYLE LONG — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE STEPHEN JONES, SPECIAL JUDGE
ACTION NO. 19-CI-00013

SAMANTHA LONG (NOW SCRUGGS) — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, EASTON, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Kyle Long has appealed from the May 7, 2024, order of the Harlan Circuit Court granting his former wife Samantha Long's motion to relocate and amend the visitation schedule.[1] Because the circuit court failed to make any

[1] Although Kyle included the November 4, 2024, order denying his Kentucky Rules of Civil Procedure (CR) 59.05 motion in his notice of appeal as an additional order being appealed, only the May 7, 2024, order is appealable. In *Hoffman v. Hoffman*, 500 S.W.3d 234, 236-37 (Ky. App. 2016), this Court explained:

findings of fact or conclusions of law related to the best interest standard when it ruled on the motion, we vacate and remand.

Kyle and Samantha were married in Harlan County, Kentucky, in 2004, and they are the parents of four children, born in 2001, 2006, 2011, and 2013. The parties separated in December 2018, and Samantha filed a petition to dissolve the marriage in January 2019. In the petition, Samantha sought custody of the minor children as well as child support, with Kyle having visitation. In his answer, Kyle requested joint custody of the children with 50/50 shared parenting time.

In March 2020, the parties entered into a property settlement agreement that also addressed custody. Kyle and Samantha agreed to share joint custody of the three remaining minor children (the eldest had reached the age of 18 by that time and was emancipated), with Samantha designated as the primary residential custodian and Kyle to have visitation as they agreed upon. If they were

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Orders denying CR 59.05 relief "are interlocutory, *i.e.*, non-final and non-appealable and cannot be made so by including the finality recitations." *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011). The reason is that "[u]nder the civil rules concerning appellate procedure, the filing of a CR 59.05 motion suspends the running of the time for an appeal, and the entry of an order overruling a CR 59.05 motion resets the time for appeal so that a party has the full thirty-days to begin the appeals process." *Mills v. Commonwealth*, 170 S.W.3d 310, 322 (Ky. 2005), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009).

unable to agree, Kyle would have standard visitation. In April 2020, the court entered its findings of fact, conclusions of law, and order, in which it adopted the parties' property settlement agreement, and a separate judgment and decree dissolving the parties' marriage.

The subject of this appeal began in 2023, when a disagreement arose between the parties related to Samantha's desire to relocate out-of-state with the children. In July 2023, Kyle filed a response and objection after Samantha verbally informed him of her intention to move to South Carolina with the children to live with her current boyfriend (now husband). Kyle argued that it would be in the children's best interest to remain in Harlan, as they had lived, attended school, played sports, and had friends there for their entire lives. He did not believe that moving to live with her boyfriend was a sufficient reason to uproot the children from their "stable, safe and nurturing environment." Kyle also stated that if Samantha wished to relocate to South Carolina, he should be designated as the primary residential custodian so that the children could remain in Harlan. By separate motion, Kyle moved the court to award joint custody with shared 50/50 parenting time. Kyle filed affidavits in support of his requests.

Also in July 2023, Samantha moved the court to amend the visitation schedule to grant her permission to relocate. In the motion, Samantha stated that she was getting married and moving to Greenville, South Carolina, where her

fiancé resided and owned a construction business. She was willing to meet Kyle in Johnson City, Tennessee, for exchanges so that he could have his every-other-weekend visitation. She stated that Kyle had not exercised his Thursday evening visitation in more than 10 months because he traveled for his work as a nurse.

The court held a one-hour hearing on January 3, 2024, regarding Samantha's motion to relocate and amend the visitation schedule. Samantha and Kyle both testified that their agreement as to visitation was that Kyle would have visitation with the children every other weekend and for two hours on Thursday evenings when it was Samantha's weekend; Samantha was the primary residential custodian. Samantha testified about her desire to relocate to Greenville, South Carolina, where her current husband, Richie Scruggs, lived. She asked the court to keep the current visitation schedule, with the exception of the Thursday visits as Kyle had not been exercising his visitation those evenings. She also asked the court to give Kyle extended summers and holidays. She was not asking the court to take away Kyle's rights; the only difference would be related to pick-ups and drop-offs, but she was willing to meet him more than halfway. On cross-examination, Samantha agreed that the children had done well in Harlan County schools, played sports, and had friends. Kyle testified that he did not believe relocating the children to South Carolina was in the children's best interest. At the conclusion of the testimony, the circuit court did not make any oral findings and

took the motion under submission. The court directed the parties to tender proposed orders on the relocation and parenting time issues, which they did.

In April, while the motion was still pending, Kyle filed with the court copies of text messages he had received from Samantha's new husband, in which the new husband told Kyle that the court was granting the motion to relocate, although an order had not yet been entered. Kyle also requested an evidentiary hearing, if necessary, to determine the basis for the new husband's assertions.

On May 7, 2024, the court entered an order (which had been tendered on March 14, 2024, by counsel for Samantha), granting Samantha's motion to relocate with the children to South Carolina. She would remain the primary residential custodian, and Kyle's visitation schedule was modified to accommodate the relocation. The court set out the visitation schedule to include three-day holiday weekends, the full summer break (with the exception of one week), and fall break. The court did not mention the every-other-weekend visitation that the parties had been exercising.

Kyle timely filed a CR 59.05 motion to vacate, alter, or amend the court's order. He argued that the order did not contain any findings of fact or conclusions of law to support the relocation or that relocation was in the children's best interest. He also disputed the court's use of the "skeleton" order tendered by Samantha's counsel, which did not address the proper standards or include any

analysis to support the ruling, and pointed out that the court did not address the text message issue. In November 2024, the court entered a short order, containing no analysis, denying the CR 59.05 motion. This appeal now follows.

On appeal, Kyle argues that the circuit court's order should be reversed because there was no finding by the circuit court that relocation was in the children's best interests and because it failed to rule on his pending motion for equal parenting time.

We must first address Samantha's failure to file a responsive brief in this appeal. Kentucky Rules of Appellate Procedure ("RAP") 31(H)(3) provides sanctions for failing to file an appellee brief:

> If the appellee's brief has not been filed within the time allowed, the court may: (a) accept the appellant's statement of the facts and issues as correct; (b) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (c) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). Here, we have opted to reverse (vacate) the circuit court's order pursuant to RAP 31(H)(3)(b) because Kyle's brief and our review of the record support his argument that the circuit court did not make any findings or conclusions as to the best interest of the children when it granted the motion to relocate.

In appeals from matters involving custody matters, our general standard of review is set forth as follows:

> On appeal, we review the family court's findings of fact only to determine if they are clearly erroneous. CR 52.01. A family court's findings "are not clearly erroneous if supported by substantial evidence, which is 'evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.'" *Eagle Cliff Resort, LLC v. KHBBJB, LLC*, 295 S.W.3d 850, 853 (Ky. App. 2009) (quoting *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

Childress v. Hart, 592 S.W.3d 314, 316 (Ky. App. 2019) (footnote omitted).

This Court addressed a situation very similar to the present matter in *Childress*, *supra*, and made it clear in that case that a best interest standard governs a modification of timesharing based upon relocation and that the court must make appropriate findings of fact and conclusions to support its ruling. It first stated:

> There are several factors courts must consider in determining whether a modification of timesharing is in a child's best interest, which are partially listed in [Kentucky Revised Statutes (KRS)] 403.270. "The basis for a modification decision is thus fact-driven rather than law-driven, because the legal standard is whether the relocation is in the best interests of the child, which is stated plainly in the statute." *Anderson v. Johnson*, 350 S.W.3d 453, 455 (Ky. 2011). In review of the family court's decision on appeal, it is imperative to know what facts the court relied on to determine whether it made a mistake of fact or law. *Id*.
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> . . . . Additionally, under *Pennington* [*v. Marcum*], the burden of proving relocation is in the *best interest of the*

> *child* is on the relocating parent. 266 S.W.3d [759,] 769 [(Ky. 2008)]. Therefore, Kentucky law requires family courts to make findings of whether relocation is in a child's best interest.

Childress, 592 S.W.3d at 317.

The *Childress* Court then addressed the lack of findings in the family court's order:

> Because the family court must determine relocation is in the best interest of the child, we hold that it erred by issuing a bare-bones order. Here, the family court held a two-hour hearing, ultimately concluding, without specific findings, that moving to Jefferson County was not in the best interest of the child. This is a clear violation of CR 52.01, which provides: "In all actions tried upon the facts without a jury or with an advisory jury, the court ***shall*** find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment[.]" (Emphasis added.)
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> CR 52.01 creates a general duty for trial courts to find facts and engage in *at least* a good faith effort at fact-finding and that the found facts be included in a written order. *Anderson*, 350 S.W.3d at 458. "Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the [family] court's attention." *Id*.
>
> > [T]he final order of [a family] court, especially in family law cases, often serves as more than a vehicle for appellate review. It often becomes a necessary reference for the parents and third parties, such as school officials, medical providers, or other government agencies with responsibilities

> requiring knowledge of the facts determined by the [family] court.
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> *Keifer v. Keifer*, 354 S.W.3d 123, 126 (Ky. 2011). "A bare-bone, conclusory order . . . setting forth nothing but the final outcome, is inadequate and will enjoy no presumption of validity on appeal." *Id*.

Childress, 592 S.W.3d at 317-18.

Unlike in the present case, the family court in *Childress* concluded that relocation would not be in the child's best interest, "which is a conclusion of law required under KRS 403.320." *Id*. at 318. The problem in *Childress* was that "the order included no findings of fact to support this conclusion, which clearly violates CR 52.01." *Id*. The Court went on to observe:

> As the Kentucky Supreme Court found in *Anderson*, simply saying that it is not in a child's best interest to move raises the question, "Why?" As a matter of judicial efficiency, we need more specific findings from family courts to adequately review their decisions. Without such findings, we, and third parties, will be at a loss regarding a court's decisions.

Childress, 592 S.W.3d at 318.

In the present case, the court did not address the best interest of the children at all, and the court declined to do so when it simply denied Kyle's CR 59.05 motion without any analysis, despite his request that it make the requisite findings of fact and conclusions of law. Therefore, we must vacate the circuit court's order.

For the foregoing reasons, the May 7, 2024, order of the Harlan Circuit Court granting Samantha's motion to relocate and amend the visitation schedule is vacated. This matter is remanded with directions that the circuit court make appropriate findings of fact and conclusions of law, as discussed above. In addition to ruling on Samantha's motion, the court is directed to consider and rule on any other pending motions related to custody and visitation, including but not limited to Kyle's motion requesting equal parenting time and his allegation of possible *ex parte* communications.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell D. Alred
Harlan, Kentucky

NO BRIEF FOR APPELLEE.