

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001823-ME

REX M. PAYTON

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 04-CI-00222

ALICE L. LOY PAYTON

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

ACREE, CHIEF JUDGE: The central issue before us is whether the Rowan Circuit Court erroneously denied Appellant Rex Payton's motion to modify child custody and, in turn, granted Appellee Alice Loy Payton sole custody. Finding no error, we affirm.

I. Facts and Procedure

Rex and Alice married on July 15, 1995. Two minor children were born of the marriage: Mackenzie, born on November 11, 1996, and Cameron, born on August 20, 1998. The parties lived as a family in, among other places, Fayette County, Kentucky, but Rex and Alice separated in June 2003. Alice and the children moved to Rowan County, Kentucky, to live with Alice's parents. On July 6, 2004, Alice filed a dissolution petition in Rowan Circuit Court.

On November 12, 2004, Rex and Alice entered into a settlement agreement. Under its terms, the parties agreed to share joint custody of their children, with Alice being the primary residential parent and Rex enjoying reasonable time-sharing.¹ The decree of dissolution, entered June 15, 2005, incorporated the settlement agreement.

Several years passed without incident. In 2009, Alice obtained a fellowship in pediatric urology at Cincinnati Children's Hospital.² Alice informed Rex she intended to move to Florence, Kentucky, with the children. In response, Rex moved to modify the time-sharing arrangement, and sought to be designated the

¹ The settlement agreement designated Alice the "primary caregiver" and afforded Rex standard "visitation." However, in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), our Supreme Court clarified, that in a joint custody arrangement, the parent in whose home the children primarily live is deemed the "primary residential parent." *Id.* at 765. Further, the non-residential parent "does not have 'visitation,' a sole-custody term which is frequently misused in this context, but rather has 'time-sharing,' as he or she is also a legal custodian." *Id.* In light of this terminology, we interpret the parties' settlement agreement as designating Alice the primary residential parent and affording Rex parental time-sharing.

² During the marriage, Alice attended medical school and completed her residency at the University of Kentucky.

children's primary residential parent. The circuit court denied Rex's motion; Alice followed through with her plans and moved to Florence with the children.

After Alice completed the two-year fellowship program at Cincinnati Children's Hospital, she accepted a pediatric urology position in Toledo, Ohio. In July 2011, Alice and the children relocated to Ottawa Hills, Ohio. Rex opposed the move. In a motion filed on July 5, 2011, Rex moved to amend custody from joint to sole. As grounds for his motion, Rex claimed Alice's move to Ottawa Hills rendered the joint custody arrangement unworkable. Simultaneously, Rex filed a motion for a custodial evaluation. The latter motion was heard on July 22, 2011, and, on August 2, 2011, the circuit court entered an order denying Rex's motion for a custodial evaluation.

The circuit court then held a hearing on Rex's motion to modify custody. The circuit court heard testimony and received evidence from Rex and Alice, as well as several other witnesses, including: Janet Granada, the principal of East Jessamine High School (EJHS); Jennifer Rocco, a guidance counselor at EJHS; Tammy Cole, president of the EJHS' Band Boosters Club; Stephanie Hazelwood, a friend of Rex; Katelyn Conrad, a friend of Mackenzie; Drew McNeil, a minister at an United Methodist Church in Morehead, Kentucky; and Ben Shields, Alice's brother-in-law. The court also interviewed the children *in camera*.

Rex and Alice are both working parents. Rex is employed as the band director and a music teacher at EJHS, and has held that position for several years. Alice is a pediatric urologist in Toledo, Ohio. Alice testified that she had first

attempted to find a position in the pediatric urology field in Kentucky, but was unable to do so. Rex and Alice each work long hours, including, at times, evenings and weekends.

Both Rex and Alice expressed concern regarding the supervision and safety of the children while in the care of the other. Rex testified that, while living with Alice, Mackenzie began experimenting with drugs, alcohol, and sex. Alice submitted evidence that Mackenzie, while in Rex's care, visited a gas station and attempted to visit a Rite-Aid at 1:00 a.m. Rex further testified Alice rarely helped the children with homework and school projects, often was not home with the children before and after school, and, at times, would leave the children alone in the middle of the night when called into work. Alice testified she and the children always eat dinner together and frequently have "family game nights." Alice testified that Mackenzie and Cameron each received academic awards at the end of the 2011 school year, and submitted their most recent report cards demonstrating their excellent academic records.

Granada and Rocco discussed the quality of education available in the Jessamine County Public School System. Statistical information provided by the Kentucky Department of Education revealed 89% of students graduate from EJHS, 64% of those students attend college, and the average ACT score is 19. Additionally, the average class size at EJHS is between 21 and 26 students – a student/teacher ratio of 21-26:1. Granada and Rocco also emphasized the benefit of children attending the school system in which their parent is a teacher,

and expressed no concern regarding the use of social media to communicate with students or their own children.

Alice presented evidence of the quality of education available in Ottawa Hills. Alice testified the Ottawa Hills' public school system is ranked as one of the top school systems in the country. Evidence submitted by Alice revealed 100% of students graduate from Ottawa Hills' public high school, 98% of those students attend college, the average ACT score is 26, and the average SAT score is 1200. The student/teacher ratio in Ottawa Hills is 11:1.

Granada, Rocco, Cole, and Hazelwood all testified as to Rex's good character. Granada described Rex as an "upstanding guy" and a role model for his students. Rocco testified Rex is a good father and a great band director. Cole described Rex as "wonderful." At the time of the evidentiary hearing, Granada, Rocco, and Cole had received no complaints from teachers, students, or parents concerning Rex. Hazelwood testified Rex is calm, takes time to talk and listen to Mackenzie and Cameron, always puts the children first, and is certainly capable of caring for them.

Alice and her witnesses, however, questioned Rex's credibility. Shields testified Rex would often "tell stories" and frequently lied about irrelevant, minor issues. Alice corroborated Shield's testimony. Similarly, McNeil claimed Rex had developed a reputation for dishonesty.

Additionally, substantial testimony was received concerning Rex's alleged "sex addiction." In 2009, Rex was arrested on an outstanding bench warrant for

failure to appear on a charge of failing to provide proof of automobile insurance,³ and, concurrently, was cited for “loitering for the purpose of prostitution.” During the evidentiary hearing, Rex admitted he was arrested at 3:00 a.m. with a lady Rex met online who had a prior history – supposedly unknown to Rex at the time – as a prostitute. However, the loitering charge was ultimately dropped and his record expunged. Likewise, the Education Professional Standards Board⁴ did not pursue charges, and the Jessamine County School System held a tribunal, after which all charges against him were dismissed. Rex also admitted he attended Celebrate Recovery – a support group at a church in Lexington, Kentucky – and Alcoholics Anonymous for personal issues;⁵ Rex denied, however, having a sex addiction and denied ever seeking counseling for sex issues. Likewise, Granada and Hazelwood testified they perceived no evidence of a sexual addiction.

In contrast, Shields testified that Rex was in possession of a “self-help sex addict” book in the early 2000s. Shields also claimed, when Rex and Alice were living apart, Rex snuck into Alice’s house and took a picture of Alice while she was in the shower. Likewise, McNeil testified that, in August 2002, Rex confided in McNeil that he was struggling with pornography issues, and admitted to running up a \$20,000 credit card bill by visiting internet pornography websites. Alice

³ Rex claimed he had recently moved and did not receive notice of the hearing regarding the no-insurance charge.

⁴ The Education Professional Standards Board is responsible for, *inter alia*, investigating and prosecuting all cases of educator misconduct.

⁵ Despite attending AA, Rex also denied having an alcohol or substance abuse problem. Instead, Rex testified he attended AA simply to listen to the attendees’ stories.

confirmed McNeil's version of events. McNeil stated he would be concerned about Rex having custody of the children and being around teenage girls due to Rex's unresolved addiction issues.

On September 7, 2011, the circuit court concluded it was in the children's best interest to reside with Alice and granted Alice sole custody. Rex then filed this timely appeal.

II. Issues on Appeal

Rex contends the circuit court erred in denying him sole custody of Mackenzie and Cameron because the circuit court's decision went against the weight of the evidence. Rex also asserts the circuit court's September 7, 2011 order was flawed since it: (1) failed to adequately consider the wishes of the children;⁶ and (2) was drafted by Alice's attorney and should therefore be discarded. Finally, Rex asserts that the circuit court erroneously denied his motion for a custodial evaluation.

III. Standard of Review

Before turning to the merits, we would be remiss not to point out that Rex's brief falls short of the mandate contained in Kentucky Rules of Civil Procedure (CR) 76.12 for presenting arguments to this Court. Specifically, this rule requires, *inter alia*, that all appellants' briefs include:

⁶ During the evidentiary hearing, the circuit court interviewed Mackenzie and Cameron, separately, *in camera*. The interviews were supposedly recorded, but a copy of that recording is not included in the record. However, the parties do not dispute, and the circuit court's September 7, 2011 order reflects, both children expressed their desire to live with Rex.

An “ARGUMENT” conforming to the statement of Points and Authorities, with ample supportive references to the record and *citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner.*

CR 76.12(4)(c)(v) (emphasis supplied). Critically, Rex neither includes in his brief statements identifying how he preserved the issues he now raises, nor cites any legal authority in support thereof.⁷ It is axiomatic that every argument be supported by legal authority. Without such support, a reviewing court is left aimlessly adrift in the appellant’s sea of fact, fiction, and argument. We will not perform the advocacy research that an appellant or his attorney should have performed. Rather,

[o]ur courts have established that an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues or arguments advanced on appeal. [W]ithout any argument or citation of authorities, [a reviewing c]ourt has little or no indication of why the assignment represents an error. It is not our function as an appellate court to research and construct a party’s legal arguments, and we decline to do so here.

Hadley v. Citizens Deposit Bank, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations and quotation marks omitted); *Summe v. Gronotte*, 357 S.W.3d 211, 215 (Ky. App. 2011) (“An appellant will not be heard to complain that the trial court failed to follow rules of law, unless he himself reasonably follows the rules of this Court.”).

⁷ There is one exception. Rex cites statutory authority in support of his argument that the circuit court failed to adequately consider the children’s wishes. We will fully review this claim of error.

We are mindful that Rex is proceeding *pro se*. Given this circumstance, we choose not to declare Rex's claims of error waived. Instead, we will review his arguments for manifest injustice. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010); *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). Manifest injustice exists only if the error "so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Wiley v. Commonwealth*, 348 S.W.3d 570, 574 (Ky. 2010) (citing *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)); Black's Law Dictionary (9th ed. 2009) (defining "manifest injustice" as a "direct, obvious, and observable error in a trial court"). A careful review reveals no manifest injustice.

IV. Discussion

A. Custody Modification Determination

Rex first maintains the circuit court erred in granting Alice sole custody of the children. In support of his position, Rex recounts the favorable testimony and evidence submitted during the August 15, 2011 evidentiary hearing.

A motion for custody modification is governed by Kentucky Revised Statutes (KRS) 403.340. This statute authorizes a circuit court to modify custody if:

after [a] hearing it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child.

KRS 403.340(3). The best interests of the children are paramount. *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008) (“If a motion for change of custody is made more than two years after the date of the custody decree, the court must then evaluate custody based on the best interests of the child, and determine whether a change of custody from joint to sole should occur on that basis.”). Several factors are pertinent to the best-interest determination, including: (a) the parents’ wishes as to custody; (b) the children’s wishes as to their custodian; (c) the children’s relationship and interaction with their parents; (d) the children’s “adjustment to [their] home, school, and community”; and (e) “[t]he mental and physical health of all individuals involved.” KRS 403.270(2)(a) – (e); KRS 403.340(3)(c).

Rex and Alice agree a change in circumstances has occurred as Alice moved from Florence, Kentucky, to Ottawa Hills, Ohio, and Rex moved from Fayette County, Kentucky, to Jessamine County, Kentucky. The focus, then, is squarely on the best interests of Mackenzie and Cameron.

Rex suggests the circuit court failed to afford sufficient weight to his testimony and that of his witnesses. Had the circuit court properly considered the testimony presented by him and his witnesses, Rex argues, it would have logically concluded it was in the children’s best interests to reside with him.

As the trier of fact, the circuit court was certainly free to judge the credibility of the witnesses and the evidence presented. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). To that end, the trial court was “entitled to rely on the witnesses it found most convincing,” *D.G.R. v. Commonwealth, Cabinet for Health and Family*

Serv., 364 S.W.3d 106, 112 (Ky. 2012), and “to believe or disbelieve any part of the evidence presented to it.” *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006).

Here, the trial judge’s findings of fact accurately reflect the testimony and evidence presented during the August 15, 2011 evidentiary hearing. As in most “he said/she said” scenarios, the circuit court received substantial evidence favorable to Rex and substantial evidence favorable to Alice. The circuit court ultimately chose to afford more weight to Alice’s evidence, and, where substantial evidence supports both, it was well within the trial court’s prerogative to do so. *See Moore*, 110 S.W.3d at 354. Further, the circuit court’s September 7, 2011 order reveals it considered the relevant factors delineated in KRS 403.340(c) in making its best-interests determination. In sum, we are not persuaded that Rex suffered a manifest injustice and affirm the circuit court’s custody modification determination.

B. The Wishes of the Children

Rex next argues the circuit failed to adequately consider the wishes of the children when making its custody modification determination. Rex emphasizes KRS 403.270(2) explicitly requires the circuit court to consider all relevant factors, including the “wishes of the child[ren] as to [their] custodian[,]” KRS 403.270(2)(b), and reiterates both Mackenzie and Cameron expressed their desire to live with Rex. In Rex’s view, the children’s wishes trump all other considerations. This is simply incorrect.

Of course, a child's expressed desire to live with one parent over another is entitled to some deference. *See Cox v. Bramblet*, 492 S.W.2d 188, 191 (Ky. 1973) (“The wishes of children are of interest when their custody is in issue.”); *Shepherd v. Shepherd*, 295 S.W.2d 557, 559 (Ky. 1956). However, that expression is “not binding on [the] courts which look to the welfare of the child rather than to [his or her] desires.” *Bowman v. Bowman*, 233 S.W.2d 1020, 1022 (Ky. 1950); *Bickel v. Bickel*, 442 S.W.2d 575, 577 (Ky. 1969) (explaining the child's desire is a relevant, but not controlling, factor). The child's wish as to his or her custodian is simply one factor among many that the trial court must consider. *See* KRS 403.340(c).

Here, the circuit court acknowledged Mackenzie and Cameron both indicated they desired to live with Rex. However, the circuit court also expressed concern that Rex had manipulated the children, and concluded, in light of *all* relevant factors and circumstances, that it was in the children's best interest to reside primarily with Alice. We find no error.

C. Order Drafted by Opposing Counsel

Rex also contends the circuit court's September 7, 2011 order should be discarded since it was drafted by Alice's counsel rather than the trial judge. It is not reversible error, and certainly not manifest injustice, for the circuit court to espouse findings drafted by another. *Prater v. Cabinet for Human Resources, Commonwealth of Ky.*, 954 S.W.2d 954, 956 (Ky. 1997). Moreover, Rex has not demonstrated that the trial judge improperly delegated her decision-making responsibility, or “that these findings and conclusions were not the product of the

deliberations of the trial judge’s mind.” *Bingham v. Bingham*, 628 S.W.2d 628, 629-30 (Ky. 1982). In fact, the circuit court’s written findings and conclusions mirror almost identically the circuit court’s oral remarks and findings announced at the close of the August 15, 2011 hearing. We perceive no manifest injustice.

D. Custodial Evaluation

Finally, Rex advocates the circuit court erroneously denied his motion for a custodial evaluation. When addressing custody, a circuit court “*may* seek the advice of professional personnel[,]” via a custodial evaluation. KRS 403.290 (emphasis supplied). Further, if so requested by a parent or the child’s custodian, the circuit court “*may* order an investigation and report concerning custodial arrangements for the child.” KRS 403.300(1) (emphasis supplied). Nothing, however, compels the circuit court to order a custodial evaluation. Indeed, these statutes leave the decision whether to grant a custodial evaluation to the circuit court’s competent, sound discretion. *See Holbrook v. Holbrook*, 2011 WL 2119368 (Ky. App. 2011)(2010–CA–001845–ME), at *4.⁸

At the time of Rex’s motion for a custodial evaluation, the custody modification issue was paramount because the resolution of that issue would impact where the children would attend school during the upcoming school year. During the hearing on July 22, 2011, the parties and the court discussed at length the time necessary for a custodial evaluation to be conducted. All agreed, including Rex’s attorney, that: (1) the school year was set to begin in a few weeks;

⁸ We cite this unpublished opinion pursuant to the authority of CR 76.28(4)(c).

(2) the custody modification hearing needed to occur before the school year commenced; and (3) a custodial evaluation could not be completed in time for the modification hearing since it would likely take at least three months. Given these circumstances, the circuit court set the custody modification matter for an evidentiary hearing on August 15, 2011, and denied Rex's motion for a custodial evaluation. These actions do not amount to manifest injustice.

V. Conclusion

For the foregoing reasons, we affirm the September 7, 2011 order of the Rowan Circuit Court.

ALL CONCUR.

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