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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001164-ME

MARIA SALYERS — APPELLANT

v.

APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 10-CI-00541

WESLEY SALYERS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; LAMBERT AND STUMBO, JUDGES.

ACREE, CHIEF JUDGE: Maria Salyers appeals from orders of the Harlan Circuit Court awarding to her and Wesley Salyers, jointly, the custody of, and equal timesharing with, their minor children. The issue to be decided is whether the circuit court's equal timesharing allocation is contrary to the evidence. Finding ample evidence in support of the circuit court's decision, we affirm.

Maria and Wesley married in 2007. They had two children: Elaina Salyers, born on June 3, 2008, and Kobe Salyers, born on May 13, 2009. Maria is also the mother of two other minor children, born of prior relationships.

The parties separated in 2010, and Maria petitioned for dissolution of the marriage. The decree of dissolution, which reserved matters concerning child custody, child support, and timesharing, was entered January 13, 2011. Concomitantly, the circuit court entered an order establishing a temporary custody and visitation schedule in which the parties were granted joint custody; Maria was named the primary residential parent, and Wesley was awarded timesharing on alternate weekends and occasional weekdays. Thereafter, Wesley sought a permanent order of custody and timesharing. An evidentiary hearing was held before a Domestic Relations Commissioner (DRC).

After hearing the evidence, the DRC recommended Maria and Wesley be awarded joint custody of the children with no designation of a primary residential parent, and equal timesharing. The DRC proposed a timesharing schedule by which the parties would alternate custody every four days.[1] Maria filed timely exceptions to the DRC's recommendations; Wesley filed a motion requesting the circuit court adopt the DRC's recommendations.

By orders entered March 23, 2012, and April 9, 2012, the circuit court concluded that the parties should be awarded joint custody, and share equal or near

[1] The DRC's proposal also included a comprehensive holiday and summer schedule.

equal time with the children.[2] However, the circuit court remanded the matter back to the DRC for reconsideration of the timesharing schedule. Of concern was the children's ability to see and spend time with Maria's prior born children.

Another hearing was conducted before the DRC. By order entered June 11, 2012, the circuit court adopted the DRC's revised timesharing schedule – originally proposed by Maria – whereby Maria cares for the children from Tuesday at 6:00 p.m. until Saturday at 2:00 p.m., and Wesley cares for the children from Saturday at 2:00 p.m. until Tuesday at 6:00 p.m.

Still displeased, Maria appealed. Before this Court, she declares the circuit court disregarded the elements of Kentucky Revised Statute (KRS) 403.270(2) when making its timesharing determination, and asserts equal timesharing is contrary to the evidence. We disagree.

Notably, Maria is not seeking to alter the joint custody arrangement. Rather, she only attacks the circuit court's parental timesharing determination and its decision not to name her primary residential parent. *See Pennington v. Marcum*, 266 S.W.3d 759, 764-65 (Ky. 2008) (explaining custody refers to who has "responsibility for and authority over [the parties'] children" while timesharing refers to "how much time each child spends with each parent").

[2] While labeled full joint custody, the circuit court's custody determination is really one for shared custody, a subset of joint custody. *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). "In shared custody, both parents have legal custody that is subject to some limitations delineated by agreement or court order. Unlike full joint custody, time sharing is not necessarily flexible[.]" *Id.*

In making the final custody decree, including the amount of parental timesharing and determination of the primary residential parent, a family court must apply KRS 403.270. *See Frances v. Frances,* 266 S.W.3d 754, 759 (Ky. 2008). Accordingly, if substantial evidence in a record supports a family court's finding that it is in the children's best interests to reside primarily with one parent as opposed to another or, alternatively, that it is in the children's best interest not to reside primarily with either parent but for the parents to share equal time with the children, taking into consideration all the factors enumerated in KRS 403.270(2), this Court will not reverse.

In ascertaining the children's best interest, we defer to the family court's judgment and findings because "judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding . . . appellate courts should not disturb trial court findings that are supported by substantial evidence." *Id.*

KRS 403.270 denotes a non-exclusive list of factors to be considered when making a best-interest determination. The factors relevant to this matter include:

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
>
> (b) The wishes of the child as to his custodian;
>
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other

person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720[.]

KRS 403.270(2).

Maria asserts the circuit court ignored the first three factors enumerated in KRS 403.270(2) when making its timesharing decision. Maria believes the timesharing schedule disrupts her household and erodes the family unit by preventing the children from bonding with their half-siblings. Maria contends the standard visitation schedule, whereby she would be the children's primary residential parent and Wesley would have timesharing every other weekend, is a more appropriate solution.

We find Maria's argument puzzling because Maria proposed the timesharing schedule ultimately adopted by the circuit court. And, prior to signing the June 11, 2012 order, the circuit court read the order in open court, and Maria expressed satisfaction with the timesharing schedule contained therein. Yet, Maria now declares that schedule to be inappropriate and unworkable. An appeal "will not lie in favor of a party unless it was an involuntary adverse judgment. If the judgment appealed from was rendered at the instance of the complaining parties or by their consent, they will not be permitted to complain upon an appeal." *Harrel v. Yonts*,

271 Ky. 783, 113 S.W.2d 426, 430 (1938); *see also Quisenberry v. Commonwealth*, 336 S.W.3d 19, 38 (Ky. 2011) ("[I]nvited errors that amount to a waiver, *i.e.*, invitations that reflect the party's knowing relinquishment of a right, are not subject to appellate review."). In this case, not only is the appellant challenging an order to which she originally consented, she is also wrong in her substantive challenge.

The circuit court's June 11, 2012 order belies Maria's position that it failed to consider the effect on the household and children's relationship with their half-siblings when making its timesharing determination. The order specifically states that the timesharing schedule "allows the parties nearly equal time with the children but will also allow the children time with their siblings. It also appears to cause the least disruption to the children in terms of changing residences for timesharing." While the children's relationship with their half-siblings is important, that relationship should not, and cannot, take precedence over the children's relationship with their father.

Furthermore, there is ample evidence in the record to support the circuit court's finding that equal timesharing with both parents is in the children's best interest. The evidence presented to the DRC reveals both parents sincerely care for and desire to maintain a relationship with the children. There was no allegation by either party that the other is unfit to parent the children. Notably, there was no evidence of drug use, alcohol abuse, domestic violence, or parental neglect or abuse. Both parents have stable employment and housing, and are mentally and

physically sound. Both have developed a strong bond with the children. The parties live in close proximity to one another, and the children can remain in the same school district. As astutely noted by the circuit court, given the youth of the children, both parties should share in their day-to-day upbringing, and the children should enjoy the regular care and support of both parents.

In light of the foregoing, we do not find that the circuit court erred or abused its discretion. Its timesharing determination is clearly supported by substantial evidence. Accordingly, we affirm the Harlan Circuit Court's orders granting the parties' joint shared custody and equal timesharing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Turner Landis
Harlan, Kentucky

BRIEF FOR APPELLEE:

Michael Edward Roper
Hazard, Kentucky