

RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000535-ME

RHONDA J. THOMPSON

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE NORA J. SHEPHERD, JUDGE
ACTION NO. 07-CI-00241

PAUL F. WOODWARD

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Rhonda J. Thompson brings this appeal from a February 28, 2013, order of the Clark Circuit Court, Family Court Division, designating Paul F. Woodward as the primary residential parent of the parties' minor child. We affirm.

Rhonda and Paul were married in 1990. Two children were born of the parties' marriage – a son born on November 16, 1991, and another son born

March 26, 1997. Rhonda and Paul were divorced by decree of dissolution of marriage entered in the Montgomery Circuit Court on June 23, 1999. The court awarded Rhonda sole custody of the minor children and awarded Paul standard visitation. There was little activity of record over the next few years. In 2002, the action was transferred from Montgomery Circuit Court to Fayette Circuit Court as Rhonda and the children had moved to Lexington. Paul, who was in the military, resided in Virginia.

In early 2007, Paul filed a motion for change of venue as Rhonda and the children moved to Clark County. Paul's motion was granted, and the action was transferred to Clark Circuit Court, Family Court Division. Subsequently, on May 25, 2007, Paul filed a Verified Motion to Modify Custody. Therein, Paul averred:

Upon [Paul's] return home from his tour of duty, he discovered that while he was overseas his [oldest] son . . . was molested by a "friend" of [Rhonda's]. As a result of that event, [oldest son] began acting out to include touching his younger brother in an inappropriate manner. Instead of contacting [Paul], [Rhonda] kept this situation a secret and gave up custody of [oldest son] at which time he was sent to a counseling facility called Brooklawn. After three years of treatment, [oldest son] was returned home to [Rhonda] with the stipulation that he could not have contact with Robert Thompson ([Rhonda's] husband).

By agreed order entered on September 5, 2007, the parties were awarded joint custody, and Rhonda was designated the primary residential parent.

On May 15, 2012, Paul filed another Motion to Modify Custody.

Therein, Paul sought to be awarded sole custody of the parties' youngest son.¹

Following a hearing, the family court entered an order on February 28, 2013, and made the following findings of fact:

[B]ased upon evidence, this Court no longer sees this custody arrangement as in the best interests of the child. [Rhonda] has allowed said child to have unsupervised contact with his older brother, . . . , who sexually molested him when he was younger. Although the Court recognizes that [oldest son] is not a pedophile and that a relationship between the two brothers should be nurtured, it is negligent of [Rhonda] to allow unsupervised contact between him and her younger sons Also, [Rhonda] has failed to keep said child in counseling even though the child has shown several signs that counseling is needed, including bedwetting and problems at school. [Rhonda] has also failed to follow this Court's orders regarding timesharing arrangements and also encourages the child to not want to visit [Paul].

The family court did not modify the award of joint custody but did modify timesharing to designate Paul as the primary residential parent of the parties' youngest son. This appeal follows.

Rhonda contends that the family court erred by designating Paul as the primary residential parent. Rhonda specifically argues that the family court erred as a matter of law by not applying the modification of custody standard set forth in KRS 403.340. We believe Rhonda is mistaken.

It is well-established that a change in the primary residential parent designation is not a change of custody; rather, it is merely a modification of

¹ Paul and Rhonda's oldest son (born on November 16, 1991) was emancipated.

timesharing under a joint custody arrangement. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). In fact, a change in the primary residential parent designation is simply just a modification of “where and to what extent the child spends time.” *Id.* at 769. And, where a modification of timesharing occurs “the specific language of KRS 403.320(3)² controls.” *Id.* at 769. KRS 403.320(3) permits modification of a timesharing arrangement “whenever modification would serve the best interests of the child.” *Id.* at 769 (citation omitted).

In the case *sub judice*, Rhonda and Paul shared joint custody of their youngest son pursuant to an agreed order entered September 5, 2007. Such order designated Rhonda as the primary residential parent. Paul was seeking to modify the award of joint custody to an award of sole custody. However, the family court denied his request. Instead, the family court left the award of joint custody undisturbed but modified the primary residential parent designation. Therefore, the family court properly applied KRS 403.320, and we perceive no merit in Rhonda’s claim to the contrary.

Rhonda also asserts that the family court erred by not allowing the parties’ minor son to testify as a witness regarding his wishes as to the custody

² KRS 403.320(3) reads:

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.

determination. Rhonda specifically contends that it was error to exclude the child's testimony without first determining his competency as a witness.

KRS 403.290(1) provides:

The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

While the competency of a particular child to testify may be an issue, the family court must also determine whether it will consider the testimony of such child.

While a child's wishes as to custody/timesharing are a factor to consider under KRS 403.270, such wishes are rarely dispositive. 16 Louise E. Graham & James E. Keller, *Kentucky Practice – Domestic Relations Law* § 21.13 (2d ed. 1997). In this case, there were allegations that the minor son was left unsupervised with his older brother, who had sexually abused the minor son in the past. So, while the wishes of the child may be at times relevant, the family court specifically based its determination of best interest upon the fact that “it [was] negligent of [Rhonda] to allow unsupervised contact between” the minor child and his brother, who had sexually abused him. Therefore, even if the family court erred, any error was nonprejudicial. We believe Rhonda's contention to be without merit.

Rhonda also argues that the family court erred by allowing introduction of inadmissible hearsay testimony. Rhonda specifically contends that the court erred by allowing her to testify about “what happened between [the parties' oldest son]

and the neighbor boy who abused him and what happened between [the oldest son] and the minor child at issue.” However, Rhonda failed to indicate how this evidentiary issue was preserved for our review. It was incumbent upon Rhonda to specify in her appellant’s brief how issues were preserved for appeal. Kentucky Rules of Civil Procedure (CR) 76.12. CR 61.02 allows the court to review unpreserved error and reverse upon a showing of manifest injustice. *See Martin v. Com.*, 207 S.W.3d 1 (Ky. 2006). Upon our review of the entire record in this case, we cannot conclude that a palpable error resulted under CR 61.02 resulting in manifest injustice. We, thus, reject this contention of error.

For the foregoing reasons, the order of the Clark Circuit Court, Family Court Division, is affirmed.

VANMETER, JUDGE, CONCURS.

LAMBERT, JUDGE, DISSENTS, WITHOUT SEPARATE

OPINION.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Tracey E. Burkett
Richmond, Kentucky