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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000973-ME

KEVIN SCOTT GRAHAM APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
FAMILY COURT DIVISION
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 12-CI-02395

JONELL TAYLOR GRAHAM (NOW HOMER) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, STUMBO, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kevin Scott Graham brings this appeal from Findings of Fact, Conclusions of Law, Judgment and Order (Order) entered May 20, 2015, in the Hardin Circuit Court, Family Court Division, modifying timesharing for the parties' minor child to designate Jonell Taylor Graham (now Homer) the primary residential custodian. We affirm.

Kevin and Jonell were married March 16, 2007. One child was born of the marriage in 2009. Following the birth of the child, Kevin and Jonell resided primarily in Ohio. In January 2012, the parties separated when Kevin and the child moved to Hardin County, Kentucky. Jonell remained in Ohio. Kevin subsequently filed a petition for dissolution of marriage in the Hardin Circuit Court, Family Court Division (family court) on December 27, 2012. The parties entered into a separation agreement resolving, *inter alia*, issues of custody and time-sharing with the parties' child. Pursuant to the agreement, the parties were awarded joint custody, Kevin was designated the primary residential custodian, Jonell was awarded time-sharing, and Jonell was ordered to pay child support in the amount of $300 per month.[1] The separation agreement further provided that the parties could subsequently agree to modify the time-sharing arrangement. The separation agreement was incorporated into the decree of dissolution of marriage entered in the family court on August 13, 2013.

On April 16, 2014, Jonell filed a motion to modify the parties' time-sharing arrangement. Therein, Jonell asserted she should be designated the primary residential "custodian" as she could provide a more stable and nurturing home for the child. In support thereof, Jonell asserted that Kevin's work schedule

[1] The Kentucky Supreme Court in *Pennington v. Marcum,* 266 S.W.3d 759 (Ky. 2008), thoroughly reviewed the concept of joint custody versus visitation/time-sharing. In its analysis the Supreme Court concluded that in the modification of visitation/time-sharing arrangements, the proper characterization is to designate a primary residential parent as opposed to a custodian. However, family and circuit courts continue to routinely reference "primary residential custodian" in their opinions and orders. For purposes of this opinion, our reference will be to parent and not custodian.

required a third party to provide a majority of the child's care. Jonell, on the other hand, was not working outside the home and was available to care for the child full time. Jonell also pointed to Kevin's consistent lack of parental attentiveness, Kevin's repeated neglect of the child's dental needs, and Kevin's failure to acknowledge or seek medical treatment for the child for his frequent sinus/respiratory illnesses.

Prior to a hearing being conducted upon Jonell's motion to modify time-sharing, Kevin informed Jonell by email dated May 23, 2014, that he had been offered employment in Colorado. In an effort to negotiate a modification of the time-sharing arrangement to accommodate Kevin's possible relocation to Colorado, Kevin and Jonell communicated via email for approximately ten days regarding modification of the time-sharing arrangement. The parties' dispute whether an agreement was reached, but it is undisputed that Jonell emailed Kevin on May 31, 2014, asking "Are you ready to have your attorney put it in writing?" And, on June 3, 2014, Kevin responded "My attorney had been informed of this matter and what we have agreed upon. I'll keep you posted." Apparently, Kevin did not relocate to Colorado and never produced a written agreement drafted by his attorney.

As a result, Jonell requested a hearing upon her previously filed motion to modify time-sharing. On April 10, 2015, the family court conducted an evidentiary hearing on the motion. On May 20, 2015, the family court entered

Findings of Fact, Conclusions of Law, Judgment and Order, granting Jonell's motion. In the ruling, the family court made the following findings of fact:

> The parties fully discussed, negotiated and agreed upon a set of terms which they determined were in the best interest of their child. Mr. Graham went so far as to clearly state the parties had an agreement and he would instruct his attorney to put the agreement terms in writing. Mr. Graham did not provide any substantive reason for his failure to follow through with this agreement and confirmation to Ms. Homer.

The family court then concluded that it was in the child's best interest to designate Jonell as the primary residential custodian or parent, and awarded Kevin time-sharing. This appeal follows.

We begin our analysis by noting that the Kentucky Supreme Court has held that a post-decree motion related to modification of time-sharing is deemed an action tried without a jury. *Anderson v. Johnson,* 350 S.W.3d 453 (Ky. 2011). Thus, our standard of review is governed by Kentucky Rules of Civil Procedure (CR) 52.01. CR 52.01 provides that the family court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This Court will not disturb those findings unless they are clearly erroneous. *Moore v. Asente,* 110 S.W.3d 336 (Ky. 2003). Findings of fact are not clearly erroneous if supported by substantial evidence of a probative value. *Ky. State Racing Comm'n v. Fuller,* 481 S.W.2d 298 (Ky. 1972).

Kevin initially contends that the family court erred by modifying the parties' time-sharing arrangement to designate Jonell the primary residential parent. Specifically, Kevin argues that the family court erroneously proceeded by applying the best interest analysis as if the parties were on equal footing rather than requiring Jonell to carry the burden of proof upon whether modification was in the child's best interest, as set forth in Kentucky Revised Statutes (KRS) 403.320. Kevin also asserts that the family court erred by granting the motion to modify because she "failed to provide any evidence . . . to support the claims she made to obtain the hearing in the first place . . . [thus] the court should have denied her motion as failing to provide sufficient evidence for the court to grant the relief sought." Kevin's Brief at 8.

Our Supreme Court has held that a motion seeking to change the primary residential parent designation in a joint custody arrangement constitutes a motion to modify time-sharing and is not treated as a motion to modify custody. *Pennington v. Marcum,* 266 S.W.3d 759 (Ky. 2008).[2] The *Pennington* Court held that a motion to modify the primary residential parent designation is properly brought under KRS 403.320, "Visitation of Minor Child." *Id.* And, a parent seeking to modify time-sharing by changing the primary residential parent designation bears the burden of proof and must demonstrate that modification would serve the child's best interests. *Id.*

[2] In *Pennington,* 266 S.W.3d 759, the Court emphasized that if parents are granted joint custody with one parent designated the primary residential parent and the other parent granted time-sharing, this arrangement should be specifically referred to as "shared custody."

In this case, the family court properly required Jonell to bear the burden of proof that modification of the parties' time-sharing was in the child's best interest. The court conducted a hearing and heard extensive testimony from both parties. The family court made very detailed findings pursuant to KRS 403.270. In fact, in its May 20, 2015, Order, the family court specifically found that Jonell "has met her burden of proof as necessary under the current case law and applicable statutory provisions." Therefore, we reject Kevin's contention that the family court failed to properly allocate the burden of proof upon Jonell and did not require her to provide evidence to support her motion.

Kevin next asserts that the family court erred by failing to consider all the factors relevant to a best interest determination under KRS 403.270(2) before modifying the primary residential parent designation.[3] Kevin particularly asserts that the family court did not consider the child's adjustment to home, school, and community (KRS 403.270(2)(d)) and did not consider the mental and physical health of the child and of all individuals involved (KRS 403.270(2)(e)). We disagree.

In its May 20, 2015, Order modifying the parties' time-sharing arrangement, the family court specifically considered the factors relevant to a

[3] Jonell Taylor Graham (now Homer) responds that this argument should not be addressed on the merits as Kevin Scott Graham did not raise this issue by filing a motion for more definite findings under Kentucky Rules of Civil Procedure (CR) 52.04 or in his motion pursuant to CR 59.05 to alter, amend, or vacate. As set forth in this Opinion, the family court did make findings pursuant to the factors set forth in KRS 403.270(2); therefore, we believe the issue was sufficiently preserved for appellate review. *See Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011).

determination of best interests of the child under KRS 403.270 and found as follows:

> (a) The Court finds that the wishes of the parents in this matter are equal insomuch that both parents wish for the child to primarily reside with them.
> (b) The child is too young to properly weigh in on that matter.
> (c) The Court finds that the interaction of the child with both parents is strong; however, the child has significantly bonded to Ms. Homer's family, to include her husband, his son who is of close age to the parties' child, and the extended family residing close to the Homer family. Ms. Homer is a stay at home mom thus negating the need for the child to continue spending his daily time in daycare. Although the child is coming of Kindergarten age, the Court can take judicial notice that Hardin County recently only provides for half-day kindergarten instruction thus leaving the remainder of the child's day spent in daycare while waiting for Mr. Graham to return home.
> (d) The child has adjusted well to the Homer family. Testimony was unrefuted as to this by Mr. Graham.
> (e) The Court has considered the prior reports regarding Ms. Homer's mental health and the testimony of Dr. Cebe. The Court finds that Ms. Homer's mental health is no longer of concern. Further, it appears that Mr. Graham is also no longer concerned regarding the mental health and wellbeing of Ms. Homer as Mr. Graham has provided no evidence to rebut Dr. Cebe's testimony. Mr. Graham did not participate in any mental health evaluations.
> (f)-(i) these factors do not appear to be of issue in this case. . . .

May 20, 2015, Order at 3.

As demonstrated by the above detailed findings of fact, the family court considered the factors relevant to the determination of best interest under KRS 403.270(2). And, the family court specifically found pursuant to KRS

403.270(2)(d) that the child was well-adjusted to Jonell's home. As the child had not yet reached school age, his adjustment to school was irrelevant. Regarding the mental health of those involved pursuant to KRS 403.270(2)(e), the family court considered the testimony of the mental health provider that evaluated Jonell. The provider testified that at the time she evaluated Jonell there was no indication of any serious or disabling psychopathology and concluded that Jonell was stable. Thus, we believe that the family court clearly considered each relevant factor under KRS 403.270.

Kevin next maintains that the family court considered inadmissible evidence in reaching its decision to modify the parties' time-sharing arrangement. Kevin specifically asserts that the family court erroneously considered the email exchange between the parties from May 23, 2014, to June 3, 2014. As evident from the text, the emails were an effort to reach an agreement to modify the parties' time-sharing arrangement to accommodate Kevin's move to Colorado. Kevin claims that admission of the emails was error and violated Kentucky Rules of Evidence (KRE) 408.

KRE 408 is entitled "Compromise and Offers to Compromise" and provides:

> Evidence of:
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> (1) Furnishing or offering or promising to furnish; or
>
> (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to

> either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

It is well-established that evidence of an offer to compromise or settle a controversy involved in litigation is inadmissible. KRE 408; 32 C.J.S. *Evidence* § 522 (2016). KRE 408 excludes admission of facts demonstrating that an offer was made, the terms thereof, and anything that occurred during negotiations if same is an inseparable part of the attempt to compromise.

Despite Kevin's assertion to the contrary, a review of the emails reveals that the parties did actually reach an agreement regarding a modification of their time-sharing arrangement. Kevin and Jonell negotiated the terms and eventually agreed that Jonell would serve as the primary residential parent for the next three years while Kevin would exercise time-sharing. The email communications between Kevin and Jonell concluded with Kevin's declaration that he would have his attorney prepare the necessary documents memorializing the parties' agreement to modify time-sharing.

We believe the emails are evidence of an actual agreement between the parties to modify time-sharing and do not constitute an offer to compromise

within the meaning of KRE 408. Accordingly, we conclude the family court did not violate KRE 408 by admitting the emails into evidence.

Kevin also contends that the family court erred by taking judicial notice of irrelevant facts. More specifically, Kevin asserts that the family court erroneously took judicial notice of the school schedule for public kindergarten students in Hardin County. In its May 20, 2015, Order granting Jonell's motion to modify the time-sharing arrangement and to designate her the primary residential parent, the family court found:

> Ms. Homer is a stay at home mom thus negating the need for the child to continue spending his daily time in daycare. Although the child is coming of Kindergarten age, the Court can take judicial notice that Hardin County currently only provides for half-day kindergarten instruction thus leaving the remainder of the child's day spent in daycare while waiting for Mr. Graham to return home.

Findings of Fact, Conclusions of Law, Judgment, and Order at 3.

Judicially noticed facts are governed by KRE 201(b)(1), which specifically provides:

> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed[.]

In the case *sub judice*, Jonell asserted that the child spent much of his time in the care of third parties while Kevin served as the primary residential parent. Jonell was a stay-at-home mom to her stepson and would not need the

assistance of a third party to care for their son after school each day. At the time of the hearing, the child was apparently still living primarily with Kevin in Hardin County. And, if the child were to attend public kindergarten, he would attend a one-half day program and would need child care for the remainder of the day while Kevin worked. Certainly, the schedule of the local public school system was a fact not subject to reasonable dispute, was also generally known within the community and could be a fact judicially noticed under KRE 201(b)(1). However, our inquiry does not end here. The preservation of an alleged error in the admission or exclusion of evidence is governed by KRE 103, which provides, in relevant part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
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> (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
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> . . . .
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> (e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kevin acknowledges he did not object to the court taking judicial notice of the Hardin County public kindergarten school schedule at trial. As Kevin failed to properly preserve this issue for appellate review, our review necessarily proceeds under the palpable error rule. KRE 103(e). Thereunder, an "unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of the party' and, even then relief is appropriate only upon a determination that manifest injustice has resulted from the error." *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 212 (Ky. 2012) (citing Kentucky Rules of Civil Procedure 61.02). Manifest injustice occurs "if the error seriously affected the fairness, integrity, or public reputation of the proceeding." *Kingrey v. Com.*, 396 S.W.3d 824, 831 (Ky. 2013) (citations omitted).

In this case, we simply cannot conclude that the admission of the Hardin County public kindergarten school schedule affected Kevin's substantial rights or resulted in manifest injustice. The fact that Jonell could provide care for the child if he were in kindergarten one-half day is only one of many facts the family court considered. The court also considered that the child had bonded with Jonell's family, including her husband and step-son. Further, the court concluded that the parties' child had bonded with Jonell's extended family that resided near her in Ohio. And, this testimony was unrefuted by Kevin. Regardless of whether the child attended kindergarten one-half day or all day, there would be a need for child care at other times when Kevin worked. As Jonell was not working outside the home she could clearly provide this care if the child was primarily residing

with her. Thus, we conclude that in light of the other evidence presented, the alleged error did not affect Kevin's substantial rights or result in manifest injustice and, thus, did not constitute a palpable error under KRE 103(e).

For the forgoing reasons, the Findings of Fact, Conclusions of Law, Judgment and Order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Jason A. Bowman Louisville, Kentucky	William D. Tingley Louisville, Kentucky