

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001058-ME

JEFFREY B. FORTWENGLER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 09-CI-500277

SHANNON DOYLE-FORTWENGLER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; KRAMER AND D. LAMBERT, JUDGES.

ACREE, CHIEF JUDGE: Appellant Jeffrey Fortwengler appeals from the Jefferson Family Court's June 12, 2015 order denying his motion for sole custody of the parties' three younger children and granting Appellee Shannon Doyle-Fortwengler's motion to modify the parties' parenting schedule as to those same children. The issue before us is whether the family court abused its discretion

when it declined to admit into evidence school attendance records of the parties' two older children. We see no abuse and affirm.

Jeffrey and Shannon divorced in 2009. They agreed, at that time, to share joint custody of their five children: twins Ashton and Sierra, born August 21, 1997; Ian, born August 26, 2003; and twins Jasper and Jillian, born June 30, 2004. Custody has never changed.

The parties' parenting time with the children, however, has been an ongoing issue and has changed often. In 2011, the family court entered an order declaring Jeffrey primary residential parent of Ian, Jasper, and Jillian, and affording Shannon parenting time every other weekend. Shannon was named primary residential parent of Ashton and Sierra.¹

A few years later, Jeffrey filed a motion for sole custody of Ian, Jasper, and Jillian. Shannon countered by moving to increase her parenting time to a 50/50 parenting time arrangement. The family court held a hearing on those motions in April 2015.

Jeffrey and Shannon both testified, each leveling numerous negative allegations at the other. Jeffrey testified Shannon neglects Ian, Jillian, and Jasper's medical, dental, and educational needs; fails to provide proper care and supervision; and has intentionally alienated Ashton and Sierra from him and is attempting to do the same with Ian, Jillian, and Jasper. Jeffrey also testified the

¹ Jeffrey's relationship with Ashton and Sierra was, and is, strained. Court-ordered therapy yielded no measurable benefit. In 2011, the family court declined to afford Jeffrey an established visitation schedule with Ashton and Sierra and, instead, allowed them to initiate contact with Jeffrey at their leisure. They have chosen not to foster a relationship with Jeffrey.

children have been negatively impacted by Shannon's increased involvement in their lives, and claimed that Shannon devalues education.

Shannon testified the children enjoy spending time with her and wish to see her more. She denied causing the children any harm. Shannon testified Jeffrey frightens the children at times. She further stated the children are struggling under Jeffrey's care and desire to spend more time with sisters Ashton and Sierra. Shannon emphasized that, if the kids were to reside with her during the week, she would ensure they complete all homework assignments and maintain high marks at school.

The family court interviewed all five children in chambers. The family court described them as "well mannered," "well adjusted," and comfortable speaking to the court. Ashton and Sierra reinforced their wish not to have a relationship with Jeffrey. Ian, Jillian, and Jasper each expressed their desire to spend more time with their mother, yet equal time with both parents. All five children testified that Jeffrey is very strict with many household rules while Shannon is more lax but has rules and will implement discipline when necessary and appropriate.

Jeffrey attempted to submit into evidence Ashton's and Sierra's school attendance records at the hearing. Those records indicate, while under Shannon's care, Ashton and Sierra each missed over twenty days of school during the 2014-2015, 2012-2013, and 2010-2011 school years.² The circuit court

² The number of days missed varied by year; some years the girls missed less than twenty school days and some years the girls missed significantly more than twenty school days.

disallowed the evidence, noting the motions and hearing were focused on the younger children (Ian, Jillian, and Jasper), not Sierra and Ashton.

The family court, by order entered June 12, 2015, denied Jeffrey's motion to modify custody and granted Shannon's motion for increased parenting time. The family court found equal parenting time to be in the children's best interest and, therefore, ordered the parties to exercise a week on/week off parenting schedule. The family court reasoned:

There are several factors for the Court to consider when making such a determination as was discussed earlier. In the present matter, the wishes of the children factor heavily in the decision of this Court. Despite the highly contentious nature of these proceedings, the parties have managed to raise well spoken, intelligent, well-adjusted children. They are at an age where they can appropriately express their wishes with regard to spending time with each parent and each child expressed well thought out reasons in support of a shared parenting schedule.

Jeffrey appealed.

Jeffrey argues on appeal that the family court abused its discretion when it declined to admit into evidence Ashton's and Sierra's school attendance records. He contends this evidence is relevant to Shannon's parental fitness, demonstrates Shannon is unwilling to enforce school attendance requirements and confirms that it is not in Ian's, Jillian's, and Jasper's best interest for Shannon to have more control over and involvement in their education.

A family court's decision with respect to relevancy of evidence under KRE³ 401 is reviewed under an abuse of discretion standard. *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 577 (Ky. 2009). The test for abuse of discretion is whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citation omitted).

Subject to certain delineated exceptions, “[a]ll relevant evidence is admissible.” KRE 402. Evidence is relevant if it has “any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” KRE 401.

In this case, the family court found the two older children's school records irrelevant to the issue of whether Shannon should have increased parenting time with the three younger children. We cannot say the family court abused its discretion.

The family court endeavored, correctly so, to focus on the younger children as they, not Ashton and Sierra, were the subject of the parties' respective motions. Ashton's and Sierra's school attendance records have very little bearing, if any, on Shannon's ability to parent Ian, Jillian, and Jasper. Children are unique. Each child's personality, strengths, weaknesses, and needs are distinctive. Notably, the school attendance records tendered by Jeffrey offer no explanation as to *why* Ashton and Sierra missed school. And, many of the days missed were

³ Kentucky Rules of Evidence

excused. While we fully appreciate Jeffrey's argument, we are not convinced the family court abused its discretion when it chose to exclude Ashton's and Sierra's school attendance records.

To the extent the family court's decision could be classified as error, it was most certainly harmless. CR⁴ 61.01.⁵ The family court received a wealth of evidence over a multi-hour hearing. Jeffrey testified. Shannon testified. School personnel testified. A neighbor testified. Allegations of unfitness were made by each party against the other. Jeffrey denigrated Shannon's parenting abilities and character for a significant portion of the hearing; Shannon refuted Jeffrey's claims. All five children talked to the family judge in chambers. In light of the abundance of evidence presented, there is little doubt what impact admitting Ashton's and Sierra's school attendance records would have had on the decision of the family court that ruled them inadmissible. It would have had none. Any error occasioned by the family court's exclusion of this evidence was harmless.

We affirm the Jefferson Family Court's June 12, 2015 Order granting Shannon's motion for additional parenting time.

⁴ Kentucky Rules of Civil Procedure.

⁵ CR 61.01 provides:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

D. LAMBERT, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS BY SEPARATE OPINION.

KRAMER, JUDGE, DISSENTING: I agree with the well-reasoned majority opinion in theory. However, I note that Shannon did not file a brief in this appeal. Whether her failure to do so is the result of inadvertence or intended as a confession of error, our civil rules provide this Court with three options when considering this appeal. Kentucky Rules of Civil Procedure 76.12(8)(c) provides:

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

Given the Court's authority in the absence of an appellee brief, I would regard Shannon's failure to file a brief as a confession of error and reverse the judgment without considering the merits of the case. Accordingly, I respectfully dissent.

BRIEF FOR APPELLANT:

William D. Tingley
Louisville, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed