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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001044-ME

KEN ROGERS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE BROWN, JUDGE
ACTION NO. 14-CI-500671

CASEY RAMSEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

KRAMER, JUDGE: Ken Rogers appeals an April 24, 2017 order of the Jefferson Family Court that modified the parenting schedule he shared with appellee, Casey Ramsey, regarding their two minor daughters, C.R. and K.R. Finding no error, we affirm.

By way of background, Ken and Casey never married and ended their relationship in November 2013. On December 14, 2015, the Jefferson Family Court entered an order that granted them joint custody of C.R. and K.R., who were respectively ages four and two at the time, but designated Ken as the primary residential parent because the girls had already been residing with him for the prior eighteen months and because he was providing most of their financial support. Casey, for her part, was awarded visitation and parenting time every other weekend, from Friday to Monday, and one overnight per week.

In December 2016, Casey then moved to modify visitation. In her motion and accompanying affidavit, she claimed Ken regularly disregarded her joint custody rights with respect to the girls' education; she outlined her concerns regarding whether Ken was providing the girls with educational stability; and she expressed her desire to have more time with the girls, and to enroll them in a public school located within her cluster (which would require the girls to reside with her). Ken filed no response to Casey's motion, and an evidentiary hearing was scheduled for March 10, 2017.

In February 2017, Casey filed of record her witness list and much of the evidence she intended to present during the upcoming hearing. This evidence included printouts of some of her text message exchanges with Ken; the girls' attendance records and report cards from St. Paul; notes from one of the girls'

teachers; and pictures of some of the clothing the girls wore while in Ken's care, which Casey claimed was too small for the girls to be wearing. Ken, for his part, filed no witness list and gave no indication of the evidence he intended to present.

As to what was subsequently adduced during the hearing, the certified record contains no recording or transcript of those proceedings; but, in its April 24, 2017 order, the family court summarized the evidence that was presented, stating in relevant part:

> 6. At the time of the December 2015 order, [Ken] reported no complaints as to [Casey's] parenting skills, other than his assertion that [Casey] did not consistently exercise her time.
>
> 7. [Casey] has consistently denied [Ken's] assertions that she exercised inconsistent parenting time with the children or consented to [Ken] being the primary residential parent during the eighteen (18) month period prior to the entry of the December 2015 order. [Casey] has repeatedly expressed her desire to be the children's primary residential parent or to exercise a shared parenting time schedule with [Ken]. [Casey] also asserts [Ken] is controlling and interferes with her ability to jointly parent the children.
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> . . .
>
> 11. [Ken] unilaterally enrolled the children at St. Paul Catholic Preschool in August 2015. [Ken] chose the school without discussing it with [Casey]. The school is located near [Ken's] home, but more than thirty (30) minutes from [Casey's] home. Neither party nor the children are Catholic.

12. For the 2015-2016 school year, the older child was in pre-kindergarten and the younger child was in pre-school. The curriculum is educational in nature and is not considered a daycare.

13. For the 2015-2016 school year, the children missed over thirty (30) days of school each.

14. For the 2016-2017 school year, the oldest child is currently in kindergarten and the younger child is in pre-kindergarten.

15. For the 2016-2017 school years, both children had absences in excess of twenty (20) through February 2017, not including the two (2) weeks of school that have passed since they were removed from school.

16. The majority of the absences occurred during [Ken's] parenting time with the children. [Ken] did not inform [Casey] when the children missed school during his parenting time.

17. There are no reported concerns with tardies or late arrivals to school.

18. According to [Ken], the younger child has been unhappy in her pre-kindergarten class since the beginning of the year. Prior to the school year, [Ken] requested the child be placed in the classroom, where the older child had been placed the year before. Recently, [Ken] had requested the younger child be switched to the other pre-kindergarten room, but the school chose not to accommodate the request.

19. [Ken] also alleges the school was unsafe. [Ken's] concerns relate mainly to lost or missing items belonging to the children. [Ken] also alleges a fellow student hugged the younger child and tagged the older child during a game of tag, which [Ken] considered inappropriate touching.

20. [Ken] believes the school was non-responsive to his concerns and engaged in retaliatory behavior against him and the children.

21. However, [Ken's] text message to [Casey] on January 23, 2017 indicated he wished the children to remain at St. Paul's for the 2017-2018 school year.

22. [Ken] acknowledges the older child was happy in her class prior to being removed from the school. [Ken] also acknowledges that he and the older child did not have any issues with the pre-kindergarten teacher during the 2015-2016 school year when the oldest child was in her class.

23. On February 27, 2017, Petitioner unilaterally withdrew the children from their school without consulting [Casey]. This occurred after repeated negative interactions between [Ken] and the school staff, including an argument with the principal in front of one of the children. [Casey] immediately objected to the children being removed from the school upon being informed of it by [Ken]. [Casey] also denies the younger child was unhappy in her class.

24. The principal and the older child's teacher both testified at the hearing, disputing [Ken's] claims that the school is unsafe or that the children were having problems at school. The principal reports both children were doing well in school and progressing in their learning, with no reported concerns from the teachers. The principal did report the older child was slightly behind in her reading scores.

25. The Principal and teacher both report the majority of the problems relate to lost items or other minor concerns and [Ken's] response to such issues. The teacher testified she found [Ken's] behavior threatening or intimidating at times and considered him a difficult parent to deal with. The principal was aware of the

concerns of the staff and had spoken with [Casey] about the issues about a month prior to the children being removed from school.

26. The principal indicated the children would be welcome back to the school.

27. The parties disagree as to where the children will attend the remainder of the school year and the 2017-2018 school year.

28. [Ken] would like to homeschool the children for this year and then have them attend a JCPS school of his choosing for 2017-2018. [Casey] objects to homeschooling the children out of concerns they are falling behind in their education and socialization.

29. [Casey] would like the children to return to St. Paul's for the remainder of this year, and then to attend a JCPS school from her cluster for 2017-2018.

30. For the 2017-2018 school year, [Casey] believed the parties had agreed to the children attending JCPS. [Ken] requested the children attend Carter Elementary School, but they were not accepted. [Casey] would like the children to attend Farmer Elementary School, which is in her school cluster. [Casey] reports [Ken] initially agreed to Farmer, but has since changed his mind. [Casey] has filed the necessary documentation to enroll the children in JCPS using her home address and is awaiting a letter indicating their school assignment.

31. [Casey] objects to the children attending private school for the 2017-2018 school year, due to her inability to pay tuition.

32. [Casey] expressed some concerns over [Ken's] ability to be the primary residential parent for the children, including her testimony that the children are often unbathed and improperly dressed when coming

> from his home. This was confirmed by the younger child's teacher.
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> 33. [Casey] also believes [Ken] does not properly address the children's medical concerns, including failing to utilize prescriptions for the children. [Casey] also reported [Ken] prevented her from attending a medical appointment regarding one of the children's ongoing stomach issues.
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> 34. [Ken] has consistently told this court that he makes all the decisions for the children, including picking where they attend school. [Ken] indicates this is a result of [Casey's] indifference, but produced no proof to support this claim, other than his testimony.
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> 35. [Casey] asserts [Ken] does not communicate with her in an appropriate manner, including using demeaning and threatening language and minimizing her role as a parent. [Casey] tendered text exchanges between the parties that support this assertion.

Considering the above, the family court granted Casey's motion to modify visitation. Specifically, for the duration of the girls' summer vacation, it provided Casey and Ken equal parenting time on alternating weeks. For the duration of the girls' school year, it designated Casey as the girls' primary residential parent and allowed Ken visitation and parenting time for three weekends every month from Friday after school until Monday's return to school. As to why the family court concluded it was in the girls' best interests for Casey to be their primary residential parent during the school year, it explained the basis of its ruling in relevant part as follows:

> This conclusion is based on the court's belief that [Casey] is the parent better able to manage the children's day to day educational upbringing, given [Ken's] inability to get the children to school in a consistent manner, as well as his history of making unilateral decisions on major schooling issues, such as removing them from their school, without consulting [Casey] or considering the best interests of the children. Finally, [Ken] has a history of minimizing [Casey's] parental role and ignoring the joint custody designation, both of which are not in the best interest of the children.

The family court further directed the parties to re-enroll the girls at St. Paul for the remainder of the 2016-2017 school year. The parties were ordered to enroll the girls in a school designated by JCPS based upon Casey's residence for the 2017-2018 school year unless both Ken and Casey agreed to, or a court ordered, an alternative.

Ken thereafter filed a CR[1] 59.05 motion, asserting it was in the girls' best interests "to continue the week on/week off parenting schedule throughout the year, rather than just during the summer months," and that the family court should amend its order accordingly. In support, he argued there was no evidence he had ever harmed the girls. He promised to stop making unilateral decisions regarding the girls' schooling and stated he had done so without knowing the legal parameters of his joint custody rights. He noted that he had acted *pro se* during the hearing. He also attached new evidence – consisting of approximately fifteen

[1] Kentucky Rule of Civil Procedure.

pages of what he represented were text messages he and Casey exchanged between 2014 and February 2017 – which he claimed supported that – on at least some occasions – he had informed Casey when the children missed school during his parenting time, and that Casey had occasionally used demeaning and threatening language towards him.

Casey responded, arguing she and her retained counsel had repeatedly explained to Ken the parameters of his joint custody rights prior to the March 10, 2017 hearing, and he had ignored them. She argued Ken had retained counsel in prior instances in these proceedings and had elected to proceed *pro se* during the hearing. She also argued the family court should not consider the new evidence Ken appended to his CR 59.05 motion because it was unauthenticated, she was unable to cross-examine it, and because the evidence purported to predate the March 10, 2017 hearing. Ken had offered no reason why he had been unable to present it at the hearing. The family court thereafter overruled Ken's motion.

On appeal, Ken first asserts the family court entered its order in error because he was not represented by counsel during the hearing. He also contends that the Jefferson County Attorney's office promised it would represent him but failed to do so.

To begin, his argument is unpreserved. In violation of CR 76.12(4)(c)(v), Ken fails to indicate where he raised it below; fails to cite evidence

supporting that the Jefferson County Attorney's office ever offered to represent him during the March 10, 2017 hearing; and cites no legal authority supporting that he was legally entitled to appointed counsel in the context of a visitation proceeding. *See Cherry v. Augustus*, 245 S.W.3d 766, 781 (Ky. App. 2006). That aside, Ken's argument lacks merit. Litigants are generally not entitled to appointed counsel in this context, or in the context of custody proceedings. *See, e.g.*, *Deleo v. Deleo*, 533 S.W.3d 211, 216 (Ky. App. 2017).

Next, Ken insinuates throughout his brief that he was entitled to "full custody" of his daughters, and that it was his expectation that Casey "would lose any remaining nominal custodial rights" over the girls following the hearing. To the extent that this qualifies as an argument, however, this appeal is the first occasion that Ken has ever raised it. Accordingly, it will not be considered. *See Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018) (explaining "specific grounds not raised before the trial court, but raised for the first time on appeal will not support a favorable ruling on appeal." (Citation omitted.))

Next, Ken argues the family court erred because it failed to consider the additional evidence he presented with his CR 59.05 motion. In a somewhat related vein, Ken also asks this Court to consider over thirty pages of additional evidence – which he never produced at any time before the family court – that he has appended to his reply brief.

A CR 59.05 motion is not a vehicle for raising arguments or introducing evidence that should have been presented during the proceedings,[2] and Ken does not explain why he was unable to produce the evidence he appended to his CR 59.05 motion – which purports on its face to *predate* the March 10, 2017 hearing – *during* that hearing. Accordingly, the family court committed no error in this respect. Likewise, we will not consider what Ken has appended to his reply brief because a reply brief is not a vehicle for raising new arguments or introducing new evidence, either. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979).

Next, Ken argues the family court erred because it prohibited him from testifying about, as he describes it in his brief, Casey's "refusal to pay medical care expenses for the minor children and getting them banned from their life-long pediatrics office demonstrating she does not act in the best interest of the children, yet drives a Mercedes and lives in a 5BR home."

Without any record of the March 10, 2017 hearing,[3] this Court has no means of determining the family court's basis for excluding Ken's testimony, much less what the actual substance of Ken's testimony was, and we are not at

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[2] *See Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005).

[3] Ken includes several citations in his brief to what he represents is a video recording of the March 10, 2017 hearing, but no video recording is noted in the certification of the record on appeal. It was Ken's obligation as the appellant to ensure that the complete record was certified for review by this Court and to provide the circuit court clerk with a list of any videotaped proceedings in his designation of evidence. CR 75.01.

liberty to guess. *See* Kentucky Rule of Evidence (KRE) 103;[4] *see also Oldfield v. Oldfield*, 663 S.W.2d 211, 212 (Ky. 1983) (explaining "[I]f consideration of the transcript of evidence is necessary to the determination of the issue raised by appeal, and the transcript of evidence is not designated for inclusion in the record, the appellate court finds itself unable to resolve the issue because the record is insufficient[.]").

Lastly, Ken argues the family court improperly weighed the evidence when considering the best interests of the children. In particular, he argues the family court should have believed his testimony that it was in the girls' best interests for him to remove them from St. Paul; and, that the family court's decision did not give proper weight to the following factors: (1) he provided most of the girls' living expenses and primary care for three and a half years; (2) Casey owed him an arrearage of child support; and (3) in his view, Casey has had very little involvement in the girls' lives "except when made by the courts."

[4] In relevant part, KRE 103 provides:

> (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 . . .
>
> (2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

Ken's argument lacks merit. As to why, we begin by noting the applicable standard of our review. A motion seeking to change the primary residential parent designation in a joint custody arrangement, such as the one Casey filed in this matter and the family court granted, constitutes a motion to modify time-sharing and is properly brought under KRS[5] 403.320(3). *See Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). As the parent seeking to modify time-sharing, Casey bore the burden of proof and was required to demonstrate that modification served the girls' best interests. *Id*. In ruling on Casey's motion, the family court was required to make findings of fact and conclusions of law consistent with the factors relevant to the best interest standard, as set forth in KRS 403.270.

A trial court's rulings as to time-sharing may be reversed only for abuse of discretion. *See, e.g.*, *Hempel v. Hempel*, 380 S.W.3d 549 (Ky. App. 2012); *Pennington*, 266 S.W.3d at 769 ("Every case will present its own unique facts, and the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court."). Our standard of review is governed by CR 52.01, which 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."

[5] Kentucky Revised Statute.

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).

Under the circumstances of this case, the family court acted well within its prerogative as fact-finder and adequately considered the girls' best interests when modifying the parties' visitation rights and designating Casey as the primary residential parent during the school year. Putting aside that we presume the testimony adduced during the March 10, 2017 hearing supported the family court's decision,[6] the evidence Casey filed of record prior to that hearing lends further support to the family court's conclusions that Ken had a history of inconsistently getting the girls to school; making unilateral decisions on major schooling issues; and minimizing Casey's parental role and ignoring the joint custody designation.

Likewise, with respect to Ken's testimony that it was in the girls' best interests to be removed from St. Paul, the family court chose to believe Casey's evidence to the contrary. While Ken maintains that he provided most of the girls' living expenses and primary care for three and a half years, the family court noted

[6] To the extent that the record is incomplete, the reviewing court must presume that the omitted portions support the trial court's order. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1968).

that nothing of record indicated he voiced any complaints regarding Casey's parenting skills or that he challenged her ability to also provide for the girls. As to Casey's child support arrearage, the family court likewise considered it in its order; that issue remains pending before the family court; but the family court ultimately chose to give it little weight in this visitation matter, and Ken cites nothing that supports a child support arrearage, in and of itself, is entitled to dispositive weight in visitation proceedings. And, while Ken asserted Casey has had very little involvement in the girls' lives, the family court noted Ken's evidence to that effect consisted solely of his own testimony, and it likewise chose to believe Casey's evidence to the contrary.

In short, we perceive no clear error or abuse in the family court's determination. Accordingly, we AFFIRM.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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