COMMONWEALTH OF KENTUCKY
SUPREME COURT
2014-SC-000809-DE
(2012-CA-002210)

KEVIN ADDISON — APPELLANT

v.

LYDIA ADDISON — APPELLEE

ON APPEAL FROM THE HARDIN COUNTY CIRCUIT COURT
HON. PAMELA K. ADDINGTON
CASE NO. 2006-CI-01275

BRIEF OF THE APPELLANT

Respectfully Submitted:

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CERTIFICATE OF SERVICE

Pursuant to CR 76.12, I hereby certify that a true copy of the foregoing was this 9 day of January, 2015 served in accordance with CR 5.02 and CR 5.03 by mail upon the following parties: Susan Clary, Clerk, Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601, to Samuel P. Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229, Attorney for the Appellee, Allen McKee Dodd, at Dodd & Dodd Attorneys, PLLC, 2000 Waterfront Plaza, 325 West Main Street, Louisville, KY 40202 and, to the GAL for the children, Hon. LeeAnna Dowan-Hardy, and to Honorable Pamela K. Addington, Hardin Circuit Court Judge, both via Courthouse mail at the Hardin County Justice Center, 120 North Dixie Avenue, Elizabethtown, KY. I further certify that the record on appeal was not withdrawn from the Circuit Court by the undersigned, or the party on whose behalf this brief is filed.

JEREMY S. ALDRIDGE
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INTRODUCTION

This matter is before the Court following its Order granting discretionary review of the Court of Appeals decision reversing and remanding the opinion of the Hardin Circuit Court. The underlying case involves a child custody modification wherein the trial court granted the Appellant/Cross-Appellee sole custody of two minor children. The Appellee/Cross-Appellant appealed the decision to the Court of Appeals, which reversed and remanded the opinion holding that the trial court improperly placed a time restriction on the hearing without considering the admissibility or exclusion of the evidence, denying the Appellee/Cross-Appellant the opportunity to offer testimony.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This matter arises of the Court of Appeals ruling from a decision of the Hardin Circuit Court to modify custody and the parenting time of the Appellee/Cross Appellant, Lydia Addison (hereinafter "Lydia") upon motion of the Appellant/Cross-Appellee, Kevin Addison (hereinafter "Kevin"). R. 494-495 and 1041-1045. The trial court ruled in favor of Kevin, awarding him sole custody of the parties' children and granting supervised visitation to Lydia after finding that Lydia had engaged in conduct that lead the children to believe they were sexually abused by Kevin when they were not. R. 1041-1045.

The parties were married in 1999 and divorce proceedings commenced in June 2006. R. 2-4. The Hardin Circuit Court entered a decree of dissolution on March 2, 2007. R. 36. Two children were born of the marriage, namely, S.A. (11 years of age) and M.A. (7 years of age). Consistent with the terms of the parties' settlement agreement, Lydia was awarded sole custody of the parties' children, with Kevin receiving reasonable parenting time pursuant to the agreement of the parties R. 20-21.

Prior to the decree of dissolution being entered, Lydia and the children relocated to Valparaiso, IN after Lydia met a man online. R. 68 and 1000. Kevin, who is employed by the Army Corp of Engineers, was deployed to Iraq for a period of six (6) months following the parties' separation. R. 351. Despite the Appellant's assertion that Kevin largely failed to take the opportunity to become involved in, and to be knowledgeable about his children's lives, the record clearly indicates otherwise. Immediately following his return to the states, Kevin began having problems enforcing his visitation necessitating frequent Court intervention. *See record generally*. Less than a month after the decree of dissolution was entered, Kevin was forced to file a motion seeking Court intervention and visitation with

his children. R. 37-40. Lydia immediately counter filed a petition to domesticate the foreign order in the state of Indiana and sought to modify Kevin's visitation. R. 68-82.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, and after a telephonic hearing with the Hon. James Johnson, who was the presiding judge over the case in Indiana, it was determined that Kentucky was the proper jurisdiction to hear the post-decree issues of the parties. R. 95, 97-98, 121-124.

Thereafter, the trial court frequently heard motions of the parties on various post-decree matters throughout the following months, to include matters involving Kevin's visitation. In the months and years following the entry of the decree of dissolution, it was necessary for the trial court to hear countless motions filed by Kevin to secure his previously ordered visitation. *See record generally.* In March 2009, Kevin moved the Hardin Circuit Court for a modification of custody, seeking to be named a joint custodian as he was having extreme difficulty in accessing information about the medical and educational needs of the parties' children and to incorporate a proposed parenting time calendar as the parties were again having difficulty reaching an agreement. R. 325-328. Lydia immediately filed a response, objecting to the modification and stated in her affidavit that she was cooperating fully with Kevin's visitation. R. 334. Remarkably, she failed to mention anything about potential sexual abuse allegations in her response despite later suggesting that she was aware of the allegations as early as 2007. Deposition of the Respondent Lydia Addison, December 3, 2010, Page 46, pg 45-47.

It was only after it became clear that the trial court would repeatedly enforce the order allowing Kevin to see the children (and that a show cause was issued for Lydia based on her failures to cooperate with Kevin's parenting time) that Lydia began making vague

sexual abuse allegations with no credible evidence anything concerning had ever happened to the children. R. 377-412, R. 423.

In February 2010, it was necessary for Kevin to yet again file a motion to adopt a formal parenting time schedule. R. 373. The motion was remanded following representations by Lydia and opposing counsel that Kevin would receive parenting time on February 25, 2010. R. 406. However, the parenting time did not occur and vague allegations of child maltreatment began to surface. R. 394. Thereafter, Kevin filed a contempt motion - based upon the refusal of parenting time - and also renewed his motion for the adoption of proposed parenting time. R. 377, 409. A show cause was issued for Lydia as a result of her refusals to cooperate with Kevin's parenting time and a contempt hearing was set for April 6, 2010. R. 412. However, on March 19, 2010, at the presentation of the renewed motion for the adoption of the parenting time schedule, Lydia objected, bringing the vague sexual abuse allegations to the trial court's attention for the first time. R. 413. The motion was subsequently overruled based upon sexual abuse allegations. *Id.*

It was during this time that it was finally revealed to Kevin that the children were seeing a person purporting to be a therapist named Danielle Vance. R. 394. Later discovery would reveal that, in 2009, shortly after Kevin filed his motion to modify custody, the children began counseling at Family Focus and were assigned to a person named Danielle Vance. *Id.* Despite Ms. Vance being unlicensed, significantly lacking in training, and being related to a close personal friend of Lydia's, Lydia allowed Ms. Vance to "treat" the children for an extended period of time. See Deposition of Danielle Vance, February 18, 2011, *generally*.

After the sexual abuse allegations were unsubstantiated following investigation by the Cabinet for Health and Family Services, Kevin moved to reinstate his parenting time, to make up dates in which he missed, and to outline a schedule for the remainder of the year. R. 414-418, 423. The trial court overruled the motion based upon an ex-parte letter purportedly tendered by Danielle Vance, though the letter was not on official letterhead and was unsigned. R. 426-428. Kevin then filed a motion requesting summer parenting time to be supervised by his spouse or by another appropriate caregiver. R. 429-433. Thereafter, the trial court receives yet another unsigned letter, again purported to be from Danielle Vance, voicing objections to Kevin receiving parenting time. R. 436-438.

On July 19, 2010, the Court entered an Order allowing Kevin to commence supervised parenting time. R. 442. Each party filed additional motions, which respect to modifying the dates and locations of the parenting times over the following months. *See record generally.*

On November 3, 2010, Kevin filed a motion for the Court to grant him unsupervised parenting time and the matter was set for a hearing for March 24, 2011. R. 461-475. Kevin also subsequently filed a motion to have an independent therapist evaluate the children, which was granted by the Court. R. 480-483, 491. However, the agreed upon therapist would not see the children because they were still being seen by Danielle Vance. Thereafter, Kevin filed a motion for the parties and children to be evaluated by Dr. Kelli Marvin, a forensic psychologist that the Hardin Circuit Court utilizes frequently as an expert in child dependency, neglect and abuse cases, to give objective recommendations to the Court regarding Kevin's parenting time and access to the children. R. 494-497. The Court sustained the child access evaluation motion, ordering the parties to participate and

for Kevin to pay all costs of the evaluation via Order entered on February 2, 2011. R. 496-497.

In July 2011, Kevin was forced to file a motion for make up parenting time as Lydia had once again failed to cooperate, in addition to a motion to compel Lydia to cooperate with Dr. Marvin. R. 498-505. Counsel for the parties were able to reach an agreement and an Agreed Order was entered by the trial court on July 27, 2011. R. 524.

Over the course of the next several months, each party filed a series of motions. Of significance was Lydia's motion for an additional thirty (30) days to submit information to Dr. Marvin and for an order to clarify Dr. Marvin's role. R. 567. The Court permitted Lydia to provide additional information and a hearing date was obtained for January 2012 to address Kevin's parenting time. Additionally, Dr. Marvin's report was submitted to the Court after its completion on January 8, 2012.[1]

Dr. Marvin's initial report to the trial court consisted of a Child Access Evaluation Conclusory Report, a Narrative Report of Kevin, a Narrative Report of Lydia, and a Sources of Information and Review of Records Report. Overall, the Report consisted of over seventy-five (75) pages. In her recommendations, Dr. Marvin recommended that Kevin get liberal and unsupervised access to the children. Child Access Evaluation, Conclusory Report, January 8, 2012, pg 26.[2] She further stated that regardless of whether Lydia encouraged or supported the generation of allegations of sexual abuse, she played an active role in denigrating Kevin in the children's eyes. *Id.* She further noted that behaviors and attitudes consistent with what is sometimes called "parental alienation" were

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[1] Dr. Marvin's report was tendered on January 8, 2012 but the report contains a clerical error and reflects the date of report as of January 8, 2011.

[2] Appendix 2 – Dr. Kelli Marvin, Child Access Evaluation, *Conclusory Report*, January 8, 2012.

deemed to have long been present on Lydia's behalf. *Id.* at 27. She noted that in instances in which behaviors and attitudes exist that are consistent with what is sometimes referred as parental alienation, then "a transfer of primary care and custody is typically recommended as this is viewed to be the only means by which to ensure cessation of denigrating behaviors and afford the target parent the time necessary to repair parent-child relationships". *Id.* She went on to note that, "In extreme cases, supervised contact with the denigrating parent is advised". *Id.* at 27.

The Appellant states in her Statement of the Case that the Conclusory Report stated that "the sole viable recommendation" was that the children remain in Lydia's care in Indiana. Appellant's Brief, page 5. However, the Appellant actually omits the bulk of the sentence and paragraph in an apparent attempt to mislead the Court. The report actually states in paragraph two (2) of the recommendations that

> "Assuming that the petitioner does not seek a transfer of primary care and custody to his residence in Kentucky and/or the subject children remain in the primary care and custody of the respondent: The animus and geographical distance between the parties pose significant challenges. The petitioner and subject child require as much extended and uninterrupted time as possible if there is to be any hope of repair to the father-daughter relationships. As such, given the unique constellation of factors, the sole viable recommendation that the examiner can offer is a heavily modified version of what is sometimes referred to as the Ackerman Plan....",

Dr. Marvin then outlines the terms of those recommendations regarding Kevin's parenting times should he not seek a transfer of custody. Conclusory Report, pg 27.

She does not—anywhere—in her original report make a recommendation that the children remain in Lydia's care as suggested by the Appellant in her brief. *Id.* In fact, Dr. Marvin indicates in her report in the very last paragraph, that

> "should the Petitioner follow-through on his stated intention to file for primary care and custody of the subject children, and should the Court

> order a change in primary residence of the subject children, the examiner will gladly submit an addendum, at the request of the Court, addressing specific schedules of visitation for the Respondent." *Id.* at 28.

Following the filing of Dr. Marvin's report, Kevin moved the Court for an addendum to her report for Dr. Marvin to make custodial recommendations. R. 628-631. Kevin also filed a motion requesting the Court to modify custody wherein he was granted sole custody of the minor children and for supervised parenting time for Lydia. R. 632-642. Additionally, the Court awarded him unsupervised visitation based upon the report filed by Dr. Marvin. R. 643-645.

Dr. Marvin completed the addendum on February 2, 2012. In her addendum, Dr. Marvin recommended that Kevin be awarded primary residential care and custody of the children. Child Access Evaluation, Addendum: Conclusions & Recommendations, February 2, 2012, pg 4, paragraph 2.[3] The recommendation further suggested that the parent awarded care and custody of the children should also be awarded sole decision making power at it is clear that the parties cannot work cooperatively in the best interests of the children. *Id.* at 6, paragraph 4. As to recommendations concerning Lydia's visitation, Dr. Marvin recommended that severing of contact is not recommended. *Id.* at 5. She further noted that supervised visitation should only be undertaken if Lydia is not amenable to therapeutic interventions and there are clear/objective indications that she is attempting to undermine the stability of the subject children's residential/custodial transfer. *Id.* at 6.

Following the addendum being filed with the Court, and subsequent to Kevin paying for the two reports by Dr. Marvin out of Louisville, Kentucky, Lydia filed a motion to transfer jurisdiction for the first time since 2007. R. 648-688. The motion was overruled

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[3] Appendix 3 – Dr. Kelli Marvin, Child Access Evaluation, *Addendum: Conclusions & Recommendations*, February 2, 2012.

and a hearing on the modification of custody was set for March 30, 2012. R. 688. Thereafter, Lydia filed a motion to continue the hearing and renewed her motion to transfer jurisdiction. R. 719. On March 1, 2012, the Court entered an Order continuing the trial and overruling Lydia's motion to transfer jurisdiction. R. 742-743. A court date was set for August 16, 2012 for a six-hour hearing. *Id.*

During the several months between leading up to the final hearing, both parties filed various motions. Kevin filed a motion, which was ultimately granted, prohibiting Lydia from scheduling counseling/therapy sessions without written permission agreement. R. 746-747. Lydia filed a motion requesting a Guardian Ad Litem for the children. R. 781. Said motion was granted over the objection of Kevin. R. 842. Additionally, Lydia requested to have a custodial evaluation done by Dr. Zamanian and requested the Court to require Kevin's participation. R.774-830. Kevin, citing the numerous continuances, and costs associated with same, objected. *Id.* The court denied Lydia's request. R. 830.

The hearing was heard on August 16, 2012. After hearing the testimony, the Court orally ordered custody to be transferred to Kevin with Lydia to receive supervised parenting time. R. 943. Lydia filed a motion to unsupervise the visitation and to supplement the record on September 5, 2012. R. 948-962. The Court never specifically entered orders regarding the motion, but orally overruled the motions. Each party submitted trial memorandums. R. 977-988, 1040. The Guardian Ad Litem submitted her report. R. 963-967. The Court entered its Findings of Facts, Conclusions of Law, and Judgment on October 26, 2012. R. 1041-1045.

Lydia filed a motion to alter, amend or vacate the Judgment as well as a motion for additional findings of fact. R. 1046-1086. The Court entered an Order on November 28,

2012 overruling Lydia's motion for unsupervised visitation, but said Order was silent as it pertained to Lydia's motion to alter, amend or vacate and motion for additional findings. R. 1087. The appeal to the Court of Appeals followed.

The Court of Appeals subsequently issued numerous orders pertaining to the case and ultimately ordered the trial court to rule upon Lydia's motions to alter, amend or vacate and for additional findings of fact. The trial court subsequently filed a twenty-eight (28) page order addressing this Court's ruling.[4] *Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order*, June 21, 2013.

The Court of Appeals issued its decision on May 16, 2014 reversing and remanding the decision of the trial court concluding that the trial court improperly placed a time restriction on the hearing without considering the admissibility or exclusion of the evidence pursuant to the Kentucky Rules of Evidence (KRE), and thereby denied the opportunity to offer testimony. Kevin timely filed a motion for discretionary review, which was granted by the Court. Lydia subsequently filed a cross-motion for discretionary review, which was also granted.

ARGUMENT

I. The trial court did not improperly restrict either party's opportunity to present testimony by limiting the time of the hearing to six hours.

Kentucky law vests the trial court with the discretion to set a reasonable time limit for trial. *Hicks v. Commonwealth*, 805 S.W.2d 144, 151 (Ky. Ct. App. 1990) (see *United States v. Reaves*, 636 F. Supp. 1575 (E.D. Ky. 1986). After consideration of the time in which the case had been pending, the numerous continuances of the hearing, and the Court's

[4] Appendix 4 – *Amended and Supplemental Findings of Fact, Conclusions of Law, Decree and Order*, June 21, 2013.

calendar, the hearing was scheduled for six (6) hours well in advance, and each party had ample time to prepare and plan their respective case with the time allotted. Further, each party had equal amount of time with the witnesses called. The trial court was well within its discretion to limit this case to six (6) hours and neither the Court of Appeals nor the Appellee/Cross-movant provided evidence that in doing so was an abuse of discretion.

The Court of Appeals stated that "we believe that the trial court's time limit was an abuse of discretion given Lydia's lengthy witness list and what appears to be an arbitrary imposed time limitation." See Court of Appeals Opinion, page 15. However, what the Court of Appeals fails to consider is that the hearing date, as well as the hearing date, is set well in advance of a witness list being filed per the Family Court Rules of Procedure and Practice. Lydia knew of the time constraint well in advance of the hearing. Further, there is no evidence that the trial court did not consider the facts and circumstances of the case when the matter was set for a six-hour hearing. The trial court had heard countless motions, and heard a number of arguments regarding the parties and the matter before the court.

Moreover, as noted by the dissenting opinion of Judge Moore, there is not any requirement that the court include the rationale on the record for the time limitations they put in place. An appellate court should not micromanage a trial court nor attempt to control an exercise of discretion in managing a trial court docket absent a showing of an abuse of discretions. *See Transit of Authority of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992).

The trial court, when setting the matter for a hearing, had already had the report of Dr. Marvin. The trial court had already heard motions regarding the allegations of the abuse. The trial court had a significant history with the parties. The trial court was in the

best position to determine the amount of time needed to adjudicate the issue and set an appropriate amount of time for a hearing. It was the choice of Lydia to include 53 witnesses on her witness list that she and the Court of Appeals rely upon in holding that it was an abuse of discretion to set a six hour hearing. However, it was unrealistic to expect to call 53 witnesses, and more importantly, Lydia and the Court of Appeals fail to demonstrate who she was prejudiced by not being able to call the witnesses.

The *Reaves* Court examined the realities of a trial court managing a heavy docket and the necessities of placing time limitations on the parties, so long as the limitations are reasonable and not arbitrary. As indicated by the *Reaves* Court, "recent trends in litigation have brought courts to the realization that their dockets do not belong to the attorneys or litigants, nor even to the courts themselves, but to the public." See *Reaves,* 636 F.Supp. at 1579. As such, the court's time is a public commodity which should not be squandered." *Id.* at 1578. "It has become apparent that courts must recognize that it is they, rather than the attorneys, who have a more objective appreciation of the time a case requires when balancing its needs against the exigencies of the court's docket." This is never more true than in the Family Court setting.

As Judge Moore notes in her dissenting opinion, it is widely known that the family courts in this Commonwealth have heavy dockets. In Hardin Family Court, the trial court in the matter *sub judice*, each and every Monday the Court hears Domestic Violence Petitions. On each and every Tuesday, the Court has motion hour and hearings for the ongoing family court civil cases. On each and every Wednesday, the Family Court hears Dependency, Neglect, and Abuse cases. Therefore, the Hardin Family Court only has Thursdays and Fridays available for contested evidentiary hearings. As such, litigants

often times have to wait six-months to have matters heard even with the time limitations placed by the Court of six (6) hours. In fact, Kevin originally filed a motion to modify custody in January 2012 and the case was not heard until August 2012 due to the trial court's heavy calendar.

It is impossible to know how long it would have been for Kevin to adjudicate his motion had Lydia been permitted to have a hearing in which she was permitted to call 53 witnesses to testify; however, given she called less than five witnesses in a six hour hearing, such a hearing with 53 witnesses could take over 60 hours, or approximately eight (8) days. To accommodate such a hearing, the Hardin Family Court would have to devote an entire month of Thursday and Fridays to these two litigants alone, which of course, would mean other litigants would have the adjudication of their cases delayed even further. And if every litigant and their attorney was given the time requested by Lydia and her attorney, the Hardin Family Court would get to adjudicate approximately twelve (12) cases per year. While counsel certainly understands that this is a hypothetical, the intention of the hypothetical scenario using the witness list of Lydia is to demonstrate the slippery slope that the majority has created with its opinion.

As Judge Moore notes in the dissent, the trial court manage this case and its parties well. Lydia had sufficient time to make her case and to have a meaningful opportunity to be heard. There was nothing arbitrary or unreasonable about the time limitations set in this case.

II. The trial court did not err in not permitting the children to testify

Under Kentucky law, "[t]he court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation." KY. REV. STAT. ANN. §

403.290(1) (West 1972). "The decision of the court is discretionary since the statutory language is permissive rather than mandatory." *Chappell v. Chappell*, 312 S.W.3d 364, 365 (Ky. Ct. App. 2010). Our courts have likewise upheld the statute and determined that that the decision of whether to interview the children is within the discretion of the trial court. *Brown v. Brown*, 510 S.W.2d 14 (Ky. 1974); *Miller v. Harris*, 320 S.W.3d 128 (Ky. App. 2009). The children's testimony became unnecessary at trial when Lydia requested the G.A.L. to be appointed. The G.A.L. spoke to the children and were well aware of their wishes as to their custodian. Further, their testimony arguably would have been the product of the extreme parental coaching and influence they had received for an extended period of time from their mother. Finally, the children had previously been interviewed and evaluated by Dr. Marvin. The trial court did not abuse its discretion in any manner concerning the time permitted to present evidence or to not allow the children to testify.

The majority opinion cites the cases of *Coleman v. Coleman*, 323 S.W.3d 770 (Ky. App. 2010) and *Leahman v. Broughton*, 244 S.W. 403 (Ky. App. 1992) as authority that it was an abuse of discretion to exclude testimony of the children without a preliminary examination by the trial court to determine witness competency. As such, the majority holds that the Court cannot unilaterally exclude the testimony of the children but can protect the witnesses from undue harassment or embarrassment under KRE 611. This holding and reliance on the previous cited cases ignores two important factors.

First, the *Coleman* trial court did not have the benefit of a rather extensive interview and evaluation of the child by two (2) different psychologists, as the trial court in the matter *sub judice* had. Second, with such information, the trial court has the ability and obligation under KRE 611 to exercise reasonable control over the mode of presenting evidence to

avoid needless consumption of time. To reiterate, the testimony of the children would offer nothing to the Court in determining the children's best interest. The Court had the benefit of countless hours of interviews of the children by the GAL and the two psychologists. Moreover, Lydia did not request to take the testimony of the children by avowal nor has she demonstrated any evidence that would suggest that their testimony would in change the outcome of the trial court.

The majority opinion acknowledges that the Court has discretion as to whether it may interview a child pursuant to the *Brown* case but appears to hold that *Coleman* requires the Court to allow a parent to call a child as a witness, if the child is competent. The case law addressing the issue concerning children being permitted to be called as a witness in a child custody case is limited. However, the Appellant contends that the decision in *Parker v. Parker*, 467 S.W.2d 595 (Ky. 1971) is most controlling. The court stated:

> "Most trial courts are extremely reluctant to permit parents to embroil their children in controversies between themselves, to subject them to questioning in the presence of parents and the rigors of cross-examination, especially where the child is of tender years. Even though proceedings concerning custody of children remain adversary proceedings in our law and even though in such proceedings a party is generally permitted to be present when all witnesses are examined and given the right of cross-examination of all witnesses, the situation here presented is a delicate one. The elementary principles of humanitarianism are so strongly against the placing of a child between its parents that we feel a trial court should have a wide latitude in protecting the child."

While this Court addressed the testimony of children in its decision of *Couch v. Couch*, 146 S.W.3d 923 (Ky. 2004), the decision is silent as it pertains to the trial court's ability to decline to allow a parent to call a child as a witness. The Appellant contends such a holding is warranted for the reasons outlined in *Parker*. Under the majority's holding, if a litigant wishes to call a child, regardless of age, to testify, the trial court

prohibit such testimony unless the child is determined to be incompetent to testify. In other words, the court has no control over the presentation of children's testimony and no discretion as to whether the children will testify in court if a litigant calls the children as witnesses. Such a holding is in direct conflict to what the *Parker* court was attempting to avoid.

CONCLUSION

Based on the foregoing, the Appellant respectfully requests this court to reverse the opinion of the Court of Appeals, and affirm the previous Findings of Facts, Conclusions of Law, and Decree entered by the trial court.

RESPECTULLY SUBMITTED,

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