Circuit Court for Prince George's County
Case No. CAD 16-24479

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 590

September Term, 2017

RODERICK BARNETT

v.

DOMINIQUE BARNETT

Meredith,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: February 5, 2018

In the Circuit Court for Prince George's County, following a two-day trial, the court granted an absolute divorce to appellee, Dominique Barnett, from appellant, Roderick Barnett, on grounds of adultery, or the alternative grounds of construction desertion. The court ordered joint legal custody of the parties' children, granted physical custody of the children, and tie-breaking authority, to appellee.

From that judgment, appellant raises two questions for our review, which we have recast, as:[1]

1. Did the trial court err in its custody determination?

2. Did the trial court err in granting the divorce on the grounds of adultery?

BACKGROUND

The parties were married on June 28, 2010. Their two children, a girl and a boy, were age three and eight at the time of trial.[2] Both parents were college graduates and employed – appellant as a Federal employee and appellee as a public school teacher. This

[1] In his brief, appellant asks:

1. Did the trial court err in its assessment and analysis of the relevant factors considered in the establishment of custody, with emphasis placed on relocation? Was that error adverse to the best interest of the minor children?

2. Did the trial court err in granting Appellee an absolute divorce on the basis of adultery?

[2] We were advised by appellant's counsel at oral argument that he learned "just this morning" that the parties have recently become the parents of twins. That fact is obviously not reflected in the record before us and is not implicated in this opinion.

appeal presents no property or financial issues. Marital problems began to surface in approximately 2014, which we shall discuss, *infra*, as needed to support our opinion.

REQUEST to DISMISS[3]

Appellee, in her brief, has asked this Court to dismiss this appeal, pursuant to Md. Rule 8-504(c), as "Appellant failed to provide a coherent argument supported by the record in his brief." Appellee's description of the state of appellant's brief is accurate.

In her critique of the sufficiency of appellant's brief, appellee asserts, variously, that:

- Appellant makes only non-specific assertions as to the trial court's errors, without providing citations to either the record or trial transcript, and provides only "sweeping accusations and conclusory statements";
- The brief does not provide either statutory enactment or case law in support of appellant's conclusions as to the court's erroneous findings; and
- "[V]iolates appellate practice by purporting to hold the trial court to non-applicable standards."

In conclusion, appellee asserts:

> Appellant fails to cite authority for factual claims, purported testimony and alleged "clearly erroneous" decisions of the trial court. Appellant's brief is drafted in such a manner as to deprive Appellee of the very information required to properly refute Appellant's claims. The Appellant further seeks to turn opposing counsel into his own researcher – finding every vague

[3] Despite appellee's language in its "Conclusion," the request to dismiss the appeal is not accepted as a motion for the same. Such a motion is not permitted to be filed within the appellee brief pursuant to Rule 8-603(c) and, as such, would have been required to be filed within ten days of appellant's brief pursuant to Rule 8-603(a)(3), which it was not. However, this Court may address the merits of the request on our own initiative pursuant to Rule 8-602(a)(8).

> statement, document or ruling by the court in the maze of trial transcript and record extract.

We agree with appellee that appellant's brief reveals numerous and substantial violations of several rules of appellate procedure. It is appellant's obligation to provide us with the facts and legal authority to support his position, not this Court's to pore through 364 pages of trial testimony to find it. We also point out that the pages of the record extract are not properly numbered, and in some instances, misnumbered in violation of Rules 8-501(i) and 8-503(a).

We considered similar circumstances in *Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188 (2008), concluding, in dismissing the appeal:

> We recognize that dismissing an appeal on the basis of an appellant's violations of the rules of appellate procedure is considered a "drastic corrective" measure. We also are mindful that reaching a decision on the merits of a case "is always a preferred alternative." This Court will not ordinarily dismiss an appeal "in the absence of prejudice to appellee or a deliberate violation of the rule." The instant appeal, however, presents us with many and substantial violations of the appellate rules of procedure that have clearly caused needless difficulty (1) to [appellees] in addressing the merits of [] appellate issues, as well as the additional time and expense in bringing these violations to our attention, and (2) to this Court in determining what documents are or are not in the record and where supporting facts are located in the record. Any one of [the] violations alone may not warrant dismissal. In combination, however, [the] violations represent a complete disregard of the rules of appellate practice.

Rollins, 181 Md. App. at 202-03 (internal citations omitted).

We emphasize that we would be well-justified, pursuant to Md. Rules 8-504(c) and 8-602(a)(8) as well as to our holding in *Rollins*, in dismissing this appeal. However, because we cannot conclude that appellant's violations were intentional, and we further

conclude that, in view of our holding that, while appellee's counsel has been inconvenienced, appellee has suffered no prejudice, we decline appellee's invitation to dismiss, and shall address the merits, as best we can, from the essentially unhelpful brief submitted by appellant.[4] We do so for two essential reasons: (1) the merits present, essentially, questions of sufficiency of the evidence, and (2) the trial court prepared and filed an extensive memorandum opinion, which provides adequate factual reference for our review.

DISCUSSION

Standard of Review

There are three interrelated standards of review involved when reviewing child custody determinations, outlined as follows:

> When the appellate court scrutinizes factual findings, the clearly erroneous standard of [Md. Rule 8–131(c)] applies. [Second,] if it appears that the [court] erred as to matters of law, further proceedings in the trial court will ordinarily be required unless the error is determined to be harmless. Finally, when the appellate court views the ultimate conclusion of the [court] founded upon sound legal principles and based upon factual findings that are not clearly erroneous, the [court's] decision should be disturbed only if there has been a clear abuse of discretion.

Reichert v. Hornbeck, 210 Md. App. 282, 304 (2013) (quoting *In re Yve S.*, 373 Md. 551, 586 (2003)).

[4] We note that appellee had failed to provide a copy of her brief to appellant's counsel within the time parameters of the Court's briefing schedule. Because the brief was timely filed with the Court, and was provided to counsel sufficiently in advance of oral argument, we denied appellant's motion to strike the brief and preclude argument.

Grounds for Divorce

The court granted an absolute divorce on the ground of appellant's adultery and, alternatively, on the ground of constructive desertion.[5] We have reviewed the testimony of the witnesses who testified on the question of appellant's alleged adultery, including the parties and two women with whom appellee alleged her husband's infidelity. One of the latter, Ms. G., testified as to having sexual intercourse with appellant. The other, Ms. W., testified to exchanging phone numbers and planning a date together. Based upon that evidence, the trial court found that appellant had both a disposition and opportunity to commit adultery. The court found the testimony of the female paramours credible and sufficient to prove that "Mr. Barnett was engaged in the act of adultery."[6]

Custody Determination

Joint custody of the parties' children was ordered, with physical custody and tie-breaking authority in favor of appellee.

[5] The court also found, factually and legally, that appellee's evidence established a constructive desertion by appellant. As appellant has neither briefed, nor argued, that issue, we shall not consider it.

[6] In his brief, and at oral argument, appellant made general and imprecise references to the possibility that appellee condoned his adulterous conduct. He has not, however, offered any references to the record to support that position. We shall consider that issue waived. *See* Rule 8-504(a) (requiring a brief to contain "[a]rgument in support of the party's position on *each issue*" (emphasis added)). See also *Darling v. State*, 232 Md. App. 430, 465-66 (2017) (deeming an argument waived when appellant fails to provide support for his position in his brief), *cert. denied*, 454 Md. 655 (2017). As we noted in *Konover Prop. Tr., Inc. v. WHE Assocs., Inc.*, 142 Md. App. 476, 494 (2002), we need not "rummage in a dark cellar for coal that isn't there."

Appellant's essential challenge to the court's custody findings is that "the court did not give sufficient weight to the totality of circumstances involving the demonstrated judgment of the Appellee." He argues that the court did not engage in a proper consideration of the factors to be applied in determining the best interests of the children, the oft-referred to *Sanders* factors.[7] That assertion is belied by the record.

Indeed, in determining to order joint legal custody, the court considered twelve of the factors set forth in *Taylor v. Taylor*, 306 Md. 290, 303-11 (1986), which merely incorporates and expands the *Sanders* factors. Further, in its Memorandum and Order, the court discussed, applied the evidence to, and balanced each of the factors before determining a custody order in the best interests of the parties' children. It is because there are no factors that "'ha[ve] talismanic qualities, and [ ] no single list of criteria will satisfy the demands of every case[,]'" *Santo v. Santo*, 448 Md. 620, 630 (2016) (quoting *Taylor*, 306 Md. at 303), that courts "must look at each custody case on an individual basis to determine what will serve the welfare of the child there involved[.]" *Wagner v. Wagner*, 109 Md. App. 1, 39 (1996). As such, reliance on "'[f]ormula[s] or computer solutions in child custody matters are impossible because of the unique character of each case, and the subjective nature of the evaluations and decisions that must be made.'" *Santo*, 448 Md. at 629 (quoting *Taylor*, 306 Md. at 303).

Particularly difficult for the court in its custody determination for the case at bar, was appellee's desire to relocate with the children to Texas in order to be close to her

[7] *Montgomery County Dept. of Soc. Services v. Sanders*, 38 Md. App. 406, 420 (1977).

family. Such a custody determination, where it would be nearly impossible to award equal joint access to the children, required the court to delve beyond the factors. At the conclusion of the trial, the court acknowledged its role in consideration of such circumstances by stating:

> [Y]ou know, what I do in a case like this, I make my decision based on the evidence and what I believe is in the best interest of the children and who may provide the best opportunities for the children to interact with both sets of parents and both sides of the family. And I'm going to say it, because I've got to go back and do some re-reading of my notes, it is clear Dad's family is here, Mom has nobody; Mom's family is in Texas, Dad has nobody. It is also clear that Mom was in Texas with the oldest child before they got married. And so I got to make the determination since they have not decided.

In weighing the competing interests and the relevant factors, the court concluded: that appellee was more credible than appellant; appellant was more concerned about the children missing out on sporting events than their arriving late to school; he continues to go out at night without telling appellee where he is going; while appellee has worked towards saving their marriage, appellant has failed to attend scheduled counseling sessions; and that, as a result, appellee should have primary residential custody with the authority to make ultimate decisions about the children. Additionally, the court found that appellant had "enticed" appellee to move to Maryland, and he continues to force her to live here by using "his job, home, and the children to control [her]." Because of that finding, the court determined that appellee should have the authority to relocate with the children after the conclusion of the children's 2017-2018 school year. The court's explanation and analysis in its memorandum provide sufficient support for its conclusions. As such, we find no error in the court's determinations.

In conclusion, we find neither legal error nor abuse of discretion in the trial court's findings and orders.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.