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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000446-ME

MARY ELIZABETH WILSON APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 07-CI-00557

KYLE DERRICK NELSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Mary Elizabeth Wilson appeals from a judgment of the Marshall Circuit Court, Family Division, designating Kyle Derrick Nelson as the primary residential parent of the parties' two minor children. Wilson also

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

challenges the family court's assessment of child support – specifically, the court's finding that she was voluntarily unemployed. After our review, we affirm as to both issues.

Wilson and Nelson are the parents of two minor children, both of whom are under five years of age. The parties were never married, but they lived together until shortly after their youngest child's birth in June 2006. At the time relevant to this appeal, Nelson was self-employed in construction and married with two stepchildren. Wilson was unemployed and lived with the parties' children at her parents' home.

On November 29, 2007, Nelson filed a petition for permanent custody of the children – or, in the alternative, joint custody – in the Marshall Circuit Court. Nelson claimed that Wilson had denied him visitation with the children for as long as three consecutive months and had refused to allow him to spend Thanksgiving with the children. He also claimed that he could provide a more stable home life for the children. The petition also included a request for child support. In response, Wilson countered with her own request for permanent custody of the parties' children as well as child support.

On May 6, 2008, the circuit court entered a custody order setting forth an agreement between the parties to share joint custody of the children. Wilson was designated as primary residential parent, and Nelson was allowed standard visitation along with five weeks of summer visitation. Because of concerns about Wilson's extensive criminal record and history of abusing alcohol, it was further

ordered that: (1) in the event Wilson was incarcerated, she would immediately give notice to Nelson and cede temporary custody of the children to him; and (2) if Wilson was ordered to enter an in-house treatment program, the court would entertain any motion regarding a change in temporary custody.

Soon thereafter, on July 11, 2008, Nelson filed a motion to modify custody on the grounds that Wilson had engaged in behavior that placed the children at risk of physical and emotional harm. He specifically claimed that Wilson "continues to abuse alcohol in the presence of the minor children and engages in criminal activity in multiple counties." At the time of the motion, Wilson was set to be tried on a charge of assaulting a police officer and had recently been arrested and charged with theft in Calloway County, Kentucky. Accordingly, Nelson asked the circuit court for a hearing on the motion and to designate him as the children's primary residential parent. However, on August 7, 2008, the court denied Nelson's motion without a hearing, finding that he had failed to present sufficient facts to justify a hearing to modify custody under KRS 403.340(3) and KRS 403.350.

Nelson renewed his motion to modify custody on October 29, 2008. In support of the motion, he indicated that since the order of August 7, 2008, was entered, Wilson had been arrested for driving under the influence (second offense), resisting arrest, disorderly conduct, and driving on a suspended license, as a result of which she was incarcerated in the Marshall County jail. Despite the terms of the agreed custody order, Wilson had neglected to give notice to Nelson or to cede

temporary custody of the children while she was incarcerated. Nelson also alleged that Wilson had been abusing alcohol in the presence of the children, including while they were in a vehicle. Accordingly, Nelson once again asked for a hearing and to be designated as the children's primary residential parent. Nelson's motion for a hearing was granted, and one was held on February 5, 2009.[2]

Following the hearing, the circuit court entered findings of fact, conclusions of law, and a judgment on February 9, 2009. The court stated that the preponderance of the evidence reflected that Wilson had "an inability to control her alcohol consumption and anger" and that such "has affected her ability to parent her children." The court cited to the fact that Wilson had been admitted to a rehabilitation facility for thirty days in 2008, had served two-and-a-half months in jail during that same year, and was facing another sixty-day stint in a rehabilitation facility all because of her abuse of alcohol and inability to control her anger. The court further noted that Wilson had pled guilty to seven different criminal offenses during 2009 alone. Wilson's parents had also filed affidavits indicating that they had taken on much of the caretaking and financial support of the parties' children because of Wilson's issues.

[2] In the interim, Nelson followed up this motion with a request for emergency possession of the children because of a fear that they were in physical danger. Nelson claimed that a few days earlier, Wilson and her parents had asked him to take the children to his house because Wilson's drinking had gotten out of control. According to Nelson, Wilson's parents told him that they had "given up" on Wilson, and a physical argument had broken out between Wilson and her mother. Wilson then told Nelson that she "would rather [him] have the kids than for them to stay with her and her parents." The motion was denied in the present action for procedural reasons, but it appears from the record that the request was re-filed and ultimately granted in another proceeding.

The court also indicated that Nelson had failed two previous screens for marijuana use in 2008 and that Nelson freely admitted in court that he had used the drug. However, the court found that there was no evidence presented that Nelson's use of marijuana had affected his ability to care for the children. Consequently, the court concluded that it was in the children's best interests to modify the timesharing arrangement between the parties and to designate Nelson as primary residential parent. The court further ordered that both parties would continue to have joint custody of the children.

As to the issue of child support, the circuit court noted that Wilson was currently unemployed and facing a sixty-day sentence in a rehabilitation facility. It concluded that she was "voluntarily underemployed" and "not otherwise physically or mentally unable to at least work a minimum wage job forty (40) hours per week." Thus, the court imputed an income of $1,135.00 per month to Wilson for purposes of calculating child support and ordered her to pay Nelson the sum of $237.00 per month as of the date of the order. This appeal followed.

On appeal, Wilson first challenges the circuit court's decision to designate Nelson as primary residential parent of the parties' children. As an initial matter, we note that the Supreme Court of Kentucky has recently clarified the law pertaining to the modification of child custody and timesharing arrangements in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). In *Pennington,* the Supreme Court explained the distinction between modification of custody (*i.e.*, sole custody versus joint custody) and modification of

visitation/timesharing arrangements, such as a change in a visitation schedule. In doing so, it recognized: "If a change in custody is sought, KRS 403.340 governs. If it is only timesharing/visitation for which modification is sought, then KRS 403.320 either applies directly or may be construed to do so." *Id.* at 765. This distinction is of considerable importance, especially in cases where modification is sought within two years of a custody decree. While KRS 403.340 only allows for custody modification within two years if serious endangerment of the children or abandonment of the children to a *de facto* custodian is established, KRS 403.320 allows a timesharing arrangement to be modified at any time merely upon a showing that a change would be within the children's best interests. *Id.* at 766-67.

The Supreme Court specifically recognized that when a parent in a joint-custody situation seeks to become the primary residential parent, he is actually seeking only to modify the existing timesharing arrangement. *Id.* at 769. Thus, the question for a circuit court to resolve is whether the proposed modification would be in the best interests of the children under KRS 403.320. *See id.* It is only when a party truly seeks a change in actual legal custody – from joint to sole (or vice versa) – that the standards set forth in KRS 403.340 apply. *See id.* at 768-69.

Although Nelson's amended motion to modify custody was originally pursued under KRS 403.340, the substance of the motion reflects that he was actually seeking to be named the children's primary residential parent. Under *Pennington*, then, Nelson's request was nothing more than a motion to modify the

parties' timesharing arrangement and is, therefore, governed by KRS 403.320. *See id.* at 769. Accordingly, Nelson was required to demonstrate only that modification would serve the best interests of the children. *Id.* at 769; *see also* KRS 403.320(3). Wilson's protestations that *Pennington* is inapplicable here because it involved a relocation scenario are unavailing because the case is clearly intended to have a general applicability to custody and timesharing law.

Thus, the question becomes whether the circuit court erred in concluding that the designation of Nelson as primary residential parent was in the best interests of the children. Our review is governed by Kentucky Rules of Civil Procedure (CR) 52.01, which provides, in relevant part: "Findings 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." Findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). "When an appellate court reviews the decision in a child custody case, the test is whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Frances*, 266 S.W.3d at 756.

After reviewing the record here, we see nothing that leads us to conclude that the circuit court's findings of fact were clearly erroneous or that the court abused its discretion in applying those facts to the law and naming Nelson as the children's primary residential parent. In reaching this conclusion, we note that no recording or transcript of the February 5, 2009 evidentiary hearing was included

in the record and was therefore unavailable for our review. The burden of ensuring that the appellate record is complete is on the appellant – in this case, Wilson. If the record is incomplete, the reviewing court must assume that the omitted portions support the trial court's decision. *Commonwealth, Dept. of Highways v. Richardson*, 424 S.W.2d 601, 603 (Ky. 1967); *Wilkins v. Hubbard*, 271 Ky. 780, 113 S.W.2d 441, 442 (1938). In support of its decision, the circuit court cited to Wilson's lengthy alcohol-related criminal history and her stints in and out of jail and rehabilitation facilities. At the time of the hearing, Wilson had pled guilty to seven criminal offenses in 2009 alone, and it is clear beyond dispute that she had issues with alcohol abuse that had affected her parenting abilities. Wilson's parents had also filed affidavits indicating that they had taken on much of the caretaking and financial support of the parties' children because of Wilson's issues. Wilson complains that Nelson had his own issues with marijuana use, but the circuit court concluded that it had had little effect on his actual parenting of the children. Based on the record before us, we cannot hold that this finding was clearly erroneous or that the court abused its discretion in concluding that it was in the best interests of the children to live with their father. Therefore, the circuit court's decision to designate Nelson as primary residential parent of the parties' minor children must be affirmed.

In a related argument, Wilson contends that the circuit court abused its discretion by "rehabilitating" the intent of Nelson's renewed motion to modify custody from a desire to have sole custody of the children to a request to be their

primary residential custodian. Wilson specifically refers to the following footnote that the court included in a trial order entered on December 15, 2008, soon after the *Pennington* decision was released:

> [Nelson's] Motion is actually a Motion to modify the current visitation time sharing arrangement by designating him as the primary physical custodian in which event his burden of proof would be the best interest of the children. See the Ky. Supreme Court decision rendered October 23, 2008 of Pennington v. Marcum, 266 S.W.3d 759 (Ky. 2008). In the alternative, [Nelson] requests a modification from joint custody to sole custody, the standard of which is set forth in KRS 403.340, which will likewise be considered on February 5, 2009.

As noted above, a reading of Nelson's amended motion to modify custody reflects that he expressly sought to enlarge the amount of time the children spent with him by being designated as their primary residential parent. While Nelson argued in the alternative that he sought to change the parties' joint-custody arrangement to that of sole custody by him, it appears that this position was ultimately abandoned below. Therefore, it does not concern us.

Because *Pennington* was rendered in the midst of the present action, we do not believe that the circuit court abused its discretion by clarifying that KRS 403.320 applied to Nelson's motion instead of KRS 403.340. In doing so, the court did nothing more than synchronize a change in the law with the relief actually being sought by Nelson and to shed light on the legal standards under which the parties would be operating. As noted by the Supreme Court in *Pennington*, the terms "custody" and "timesharing" are often used interchangeably

– albeit erroneously – by attorneys and clients in this area of the law. *Pennington*, 266 S.W.3d at 767. Thus, we believe circuit courts retain the discretion to ensure that the proper terminology and standards are applied in these cases. We also note that as far as the record before us demonstrates, Wilson failed to challenge the circuit court's "rehabilitation" efforts below. Therefore, the issue is not properly before us and is considered waived.

Wilson finally argues that the family court erred in imputing a minimum-wage income to her for purposes of assessing child support even though she did not have a job. The court found Wilson to be voluntarily underemployed pursuant to KRS 403.212(2)(d), which provides as follows:

> If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

The court concluded that Wilson was capable of working at a minimum-wage job for forty hours per week and therefore imputed a potential income of $1,135.00 per month to her for purposes of calculating child support. The court ordered Wilson to pay Nelson the sum of $237.00 per month, as opposed to the standard $60.00-

per-month statutory minimum for a parent with two children and no income. *See* KRS 403.212(7).

"As are most other areas of domestic relations law, the establishment, modification, and enforcement of child support is generally prescribed by statute and largely left, within the statutory parameters, to the sound discretion of the trial court." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). Accordingly, this discretion also applies to a determination of whether a parent is voluntarily unemployed or underemployed for purposes of assessing child support. However, a trial court's discretion is not unlimited, and its decision may be reversed if it amounts to an abuse of discretion. *See Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id.*

Wilson contends that the circuit court abused its discretion in imputing income to her because she has only a tenth-grade education and had never worked full-time or received formal job-skill training. However, we believe that this argument is unavailing since these facts do not necessarily mean that she is unemployable at a minimum-wage-level job. The record does not include any evidence suggesting that Wilson is physically and mentally unable to work or that she has otherwise been unable to obtain employment.

Wilson further argues that potential income should not have been imputed to her because she had been providing care for the children – one of whom

was still under three years of age – at the time of the order. This fact is of some importance because KRS 403.212(2)(d) provides that "a determination of potential income shall not be made for a parent who . . . is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility."

From the record before us, however, it appears that as of the date of the court's award of child support, the care and financial support of the children, at least on Wilson's part, had essentially fallen to her parents while she spent time in and out of jail and rehabilitation facilities. Wilson was also facing an additional sixty days in a rehabilitation facility as of the date of the order. Consequently, we find it difficult to conclude that Wilson was actually "caring" for her children under these circumstances. Therefore, we do not believe that the circuit court fell afoul of KRS 403.212(2)(d) or otherwise abused its discretion in finding Wilson to be voluntarily underemployed and in imputing potential income to her for purposes of calculating child support.

For the foregoing reasons, the judgment of the Marshall Circuit Court, Family Division, is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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