NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

A.V.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D19-530
	)	
T.L.L.,	)	
	)	
Appellee.	)	
	)	

Opinion filed August 7, 2020.

Appeal from the Circuit Court for Pasco County; Alicia Polk, Judge.

Windy L. Wilkerson of Wilkerson Law Firm, P.A., Brandon, for Appellant.

Joyce A.G. Evans, Tampa, and Mark A. Neumaier, Tampa, for Appellee.

PER CURIAM.

In this paternity action, A.V., the father, appeals from the final judgment and challenges the trial court's determination of time-sharing, the parenting plan, the decision to grant T.L.L., the mother, ultimate decision-making authority over educational issues, and the award of child support. We agree with the father that the final hearing was rife with errors, not the least of which was the magistrate's decision to allow the

telephonic testimony of the mother's medical expert over the father's objection and without a determination of good cause as required by Florida Family Law Rule of Procedure 12.451(b). This error was compounded when the magistrate allowed the telephonic witness to testify without being properly sworn. See Fla. Fam. L. R. P. 12.451(d). This testimony was central to the magistrate's findings, and the mother has not convinced us that its admission was harmless. Accordingly, the final judgment must be reversed.[1]

Because this case must be remanded for a new final hearing, we briefly address two of the father's claims of error in the final judgment. First, we remind the trial court that its determination regarding child support must be supported by competent substantial evidence, and that includes any decision to include in kind payments in a party's monthly income. See Dep't of Rev. ex rel. Shorter v. Amico, 265 So. 3d 681, 683 (Fla. 5th DCA 2019) ("[I]n kind payments should not be included in a party's monthly income for purposes of calculating income 'unless the receipt of that money is shown to reduce personal living expenses.' " (quoting Valentine v. Van Sickle, 42 So. 3d 267, 273 (Fla. 2d DCA 2010))).

Decisions regarding parental responsibility must also be supported by competent substantial evidence, including decisions regarding ultimate decision making over education and medical care. See Musgrave v. Musgrave, 290 So. 3d 536, 541-44

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[1]The father, who appeared pro se at the final hearing, raises a handful of additional procedural errors occurring at the hearing, most of which are unpreserved. He contends that cumulatively they resulted in a violation of due process. We need not reach this issue. However, we do not want to leave the impression that we approve of the manner in which trial counsel for the mother took advantage of the situation, nor do we condone the magistrate's complicity to the extent that she allowed counsel's conduct to go unchecked even when the pro se litigant attempted to challenge it.

(Fla. 2d DCA 2019) (reviewing whether competent, substantial evidence supported the trial court's decisions regarding shared parental responsibilities). While there may have been evidence to support giving the mother ultimate decision making over the child's medical care, there was no evidence regarding educational decision making. See Fazzaro v. Fazzaro, 110 So. 3d 49, 51 (Fla. 2d DCA 2013) (holding that the trial court's order awarding the parents shared parental responsibility for the child, but granting the mother ultimate responsibility for all decisions affecting the child's education, was an abuse of discretion where there was scant evidence to support the decision). Although there was record support for the trial court's finding that the child's school should be near the mother for medical reasons, the choice of the geographical location of the child's school is a separate issue from the host of other important decisions related to a child's education.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

CASANUEVA and LUCAS, JJ., Concur.
KELLY, J., Concurs specially with opinion.

KELLY, J., Concurring specially.

I find it necessary to address what transpired at the oral argument of this case. Both the mother and the father were present with counsel. It is evident from the record that the parties' relationship is not amicable. The mother, apparently with counsel Mark Neumaier's acquiescence, brought the parties' six-year-old son with her to

the oral argument.[2] Although counsel for the father brought the child's presence to our attention, we believed we had no legal basis to require the mother and child to leave the courtroom. As a result, the child was exposed to a discussion about the parents' conduct to which no child should be privy.

Florida Family Law Rule of Procedure 12.407(a) prohibits children who are "related to a family law case" from attending any family law proceedings without prior order of the court based on good cause shown. One purpose of the rule is to protect children who may be harmed by unnecessary involvement in family law proceedings. See Fla. Fam. L. R. P. 12.407 committee note to 2018 amendment. Rule 12.010(a) provides that the Florida Family Law Rules "apply to all actions concerning family matters," but in context I cannot conclude that rule 12.407(a) extends to appellate proceedings. Nevertheless, the underlying policy of protecting children is no less imperative. If common sense, common decency, and professionalism are inadequate to put counsel and parents on notice that a small child should not be in attendance under these circumstances, the existence of this rule ought to make it clear to counsel that the child should not be there.[3]

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[2]Attorney Mark Neumaier filed a notice of appearance as co-counsel for the mother shortly before the oral argument. Attorney Joyce Evans prepared the mother's brief but did not participate in the oral argument.

[3]When questioned at oral argument, counsel for the mother had no explanation for the child's presence other than to say the mother wanted to be there and she brought the child because he was sick. Counsel acknowledged that he knew our oral argument proceedings are livestreamed as well as archived. Thus, the mother had no reason to bring a sick six-year-old child to the oral argument if she wanted to see what transpired.

Given all that, one would think a specific rule addressed to appellate proceedings would be unnecessary. This case, however, shows otherwise. Such a rule would have prevented this from occurring and it would have given this court a basis to require the child to be taken from the courtroom had counsel failed to secure permission for the child to attend. I encourage the Appellate Court Rules Committee to consider the advisability of adopting a rule comparable to rule 12.407(a) which would prohibit the attendance of children at oral arguments in the appellate courts.[4]

[4]The wisdom of a rule prohibiting the attendance of children at family law proceedings was further borne out as the parties departed the building. The deputy escorting them out witnessed the child attempting to go to see his father and the mother restraining him from doing so. Granted, this occurred outside of the courtroom, but this unfortunate interaction could have been avoided had the child not been in attendance.