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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-001470-MR

CHARLES DEWAYNE HENDERSON, JR. APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 06-CI-00095

EILEEN MARIE HENDERSON APPELLE

OPINION
AFFIRMING

** ** ** ** **

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

LAMBERT, JUDGE: Charles Henderson Jr., appeals from the Marshall Circuit Court's order designating Eileen Henderson as the sole custodian of the parties' child. After careful review, we affirm.

[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 KRS 21.580.

Charles and Eileen were married on November 20, 2001, and separated on January 11, 2006. Their marriage was dissolved by decree entered on June 21, 2006. That order adopted a domestic relations commissioner's recommendation dated May 31, 2006, which allocated the parties' property and debt and awarded Charles temporary custody of the parties' son. Eileen then sought full custody of the parties' son and the Marshall Circuit Court conducted a custody hearing on August 1, 2006. After the hearing, the court ordered a drug test and mental evaluation of both parties. On August 22, 2006, the domestic relations commissioner issued findings of fact, conclusions of law, and recommendations awarding custody of the parties' son to Eileen pending approval by the Circuit Court.

On August 30, 2006, Charles' counsel filed exceptions to the recommended findings and conclusions as to custody. The Circuit Court denied those exceptions in an order dated September 14, 2006, but remanded the matter back to the domestic relations commissioner for determination of a visitation schedule. Subsequent thereto, the domestic relations commissioner became a Marshall family court judge and entered an order on April 4, 2007, reiterating the recommendations from the commissioner that Charles only receive supervised visitation and regular phone contact. The family court judge went into greater detail about his prior findings of Charles' domestic violence toward Eileen and Charles' history of incarceration for drug charges and mental problems.

Nonetheless, due to the local rules of Marshall County, the matter was sent back to the Circuit Court for further rulings as to visitation. On May 22, 2007, the Marshall Circuit Court entered an order reaffirming the supervised visitation until such time as Charles provided a psychological evaluation to the court. Charles then filed what the court termed a motion to alter, amend, or vacate the visitation order of May 22, 2007, but that motion was denied on July 9, 2007. Charles now files this *pro se* appeal.

Initially, this Court notes that Charles' brief is disorganized, poorly written, and without any legal authority to support the strange and attenuated arguments that can be pieced together from it. In light of these deficiencies, we will do our best to address what we believe to be Charles' arguments before this Court.

First, Charles appears to argue that the trial court abused its discretion in awarding sole custody of the parties' minor child to Eileen. Charles also seems to take issue with what he deems "three separate counts of fraud against the state of Kentucky and the Education Cabinet." Charles also asks this court to address eight separate counts of contempt by Eileen, however he makes no mention of what those eight separate acts of contempt are. Charles argues that the child support based on his employment is incorrect. Finally, Charles argues that Eileen is interfering with his visitation and that he is owed some non-specified amount of money by Eileen.

In reviewing a child-custody award, the appellate standard of review includes a determination of whether the factual findings of the family court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A finding of fact is clearly erroneous if it is not supported by substantial evidence, which is evidence sufficient to induce conviction in the mind of a reasonable person. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Since the family court is in the best position to evaluate the testimony and to weigh the evidence, an appellate court should not substitute its own opinion for that of the family court. *Reichle*, 719 S.W.2d at 444. If the findings of fact are supported by substantial evidence and if the correct law is applied, a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Abuse of discretion implies that the family court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994). Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided the matter differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *Sherfey*, 74 S.W.3d at 782-83.

In the instant case, the trial court based its custody finding upon the domestic relations commissioner’s recommendations and its assessment of the credibility of both parties, after a full custody hearing. Furthermore, the trial court

utilized the mental evaluation performed at Charles' request and by a neutral court-appointed therapist. That evaluation showed no issues with Eileen but significant concerns with Charles' mental stability. Eileen was shown to have been the primary caretaker for the minor child throughout his life. The trial court's factual findings were based on substantial evidence, and as such we will not disturb its custody award on appeal, as there is no clear abuse of discretion.

Charles seems to take issue with his child support obligation, arguing that the employment it was based upon ceased as of July 29, 2004. However, Charles has made no motion to modify his child support obligation, and accordingly, we cannot address the issue on direct appeal. "The Court of Appeals is a court of review and should not be approached as a second opportunity to be heard as a trial court. An issue not timely raised before a trial court cannot be considered as a new argument before this Court." *Florman v. MEBCO Ltd. P'ship.*, 207 S.W.3d 593, 607 (Ky. App. 2006) (quoting *Lawrence v. Risen*, 598 S.W.2d 474, 476 (Ky. App. 1980).

Charles next argues that Eileen and her live-in boyfriend interfered with telephone conversations between Charles and the parties' minor son by hanging up the telephone during conversations, not answering at the time of the appointed call, or making comments or cursing during the phone calls. A careful review of the record denotes no motions before the trial court regarding these allegations. Furthermore, the custodial interference charges were dismissed by the

prosecution in Marshall County Case number 06-F-00904. Therefore, we decline to address these claims on appeal for the first time.

Charles also alleges that Eileen is guilty of "contempt, fraud, surgery [sic], parental kidnapping, crossing state lines with a minor, concealing minor, and giving false information to police and court authorities." CR 76.12(4)(v) requires a statement with reference to the record showing the issue was properly preserved for review and, if so, in what manner. As discussed in *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. 1990), under this rule it is "mandatory that an attorney cite to the record where the claimed assignment of error was properly objected to or brought to the attention of the trial judge." We can find no such citations to the record *anywhere* in Charles' brief. Accordingly, we are not convinced that any of these remaining arguments were preserved for review or were in any way brought to the attention of the trial court. Thus, we will not address them for the first time on appeal.

We did, however, find one mention of contempt discussed in the trial court's April 4, 2007, order. The court found Eileen was *not* in contempt for failure to abide by the visitation orders, because she was granted sole custody on September 14, 2006, and was within her rights to leave the state of Kentucky. The court instructed Charles to go to the state in which Eileen now lives to exercise visitation and seek enforcement of his supervised visitation rights, or to seek modification of its order. Charles did not seek modification of the court's order.

We are unable to discern Charles' remaining arguments concerning money allegedly owed to him or felony and forgery charges, and Charles makes no citations to the record or to any legal authority whatsoever anywhere in his brief. Therefore, we strike those portions of Charles' brief. *See* CR 76.12(4)(v) and CR 76.12(8)(a). Charles has failed to follow any semblance of proper procedure in raising these issues, and accordingly we will not address the arguments on appeal.

The Marshall Circuit Court's award of custody to Eileen Henderson was not clearly erroneous and was supported by substantial evidence. The remaining arguments were without merit and were not preserved for appellate review. Accordingly, we affirm the orders of the Marshall Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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