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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001622-MR

GREGORY W. REAMS — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 97-CI-00544

LISA BUCKLES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

NICKELL, JUDGE: Gregory W. Reams appeals from an order of the Laurel Circuit Court denying his motion to designate him as the primary residential custodian of his twin daughters, and denying his motion to reduce his child support

[1] Senior Judge David C. Buckingham 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.

obligation to his former wife, Lisa Buckles. Upon reviewing the record and the law, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Lisa, a part-time cosmetologist, and Greg, a law enforcement officer, were married in August of 1995. In May of 1996, they became the parents of twin girls. They separated in June of 1997 and the next month Greg petitioned the Laurel Circuit Court to dissolve the marriage. Greg stated in his petition that both he and Lisa were fit parents, they should share joint custody of the twins, and it was in the girls' best interest for Lisa to be their primary residential custodian. In Lisa's verified response, she alleged Greg was unfit and asked for both maintenance and child support. An agreed order entered August 15, 1997, awarded Greg and Lisa joint custody of the twins with Lisa being designated the primary residential custodian and Greg being ordered to pay $500.00 each month in child support. The dissolution decree entered on November 20, 1998, increased Greg's monthly child support obligation to $540.15.

In succeeding years, Lisa filed several motions to increase child support. In November of 2004, Greg moved to be designated the twins' primary residential custodian because they were missing a considerable amount of school while in Lisa's care. Lisa moved the trial court to interview the twins if it considered Greg's motion to designate him as the primary residential custodian. Greg did not object to the court conducting such an interview. Lisa filed an affidavit with the court explaining the twins had been tardy from school on

occasion due to the distance she had to travel to transport the girls between her home and the school. In response, Greg moved the court in March 2005 to modify custody and appoint a guardian *ad litem* (GAL) for the girls. He claimed Lisa's home endangered the twins, Lisa made the girls tardy for school, she overmedicated them, and the beds in her home were flea-infested. Alternatively, Greg requested extended visitation with his daughters.

In April of 2005, Greg's monthly child support obligation was increased to $746.00. The increase was made retroactive to September 7, 2004, which created an arrearage of $1,440.00. As part of the agreed order, neither party was to play tape recordings of any conversations in the presence of the twins and both parents agreed to participate in a custody evaluation.

In July of 2005, Greg moved for a reduction in child support claiming there had been a material change of at least fifteen percent under KRS 403.213. In October of 2005, Lisa moved to increase the child support award to $1,080.00 each month because Greg had accepted a new job as a State Vehicle Enforcement Officer earning gross monthly pay of $3,396.00, in addition to gross wages of $1,379.00 a month as a teacher.

An agreed order entered in November of 2005 confirmed Lisa and Greg had agreed to a custody/timesharing evaluation. Another agreed order, this one entered in June of 2006, withdrew Greg's motion to decrease child support and Lisa's motion to increase child support. It also withdrew all contempt motions filed by the parties, specified visitation terms, and specified Greg's monthly child

support obligation was to remain at $746.00 per month with an additional monthly payment of $100.00 to erase the child support arrearage. Four months later, Greg renewed his motion to modify custody and to designate him as the twins' primary residential custodian. In November 2006, the trial court appointed a GAL for the twins at Lisa's request.

Ultimately, the matter was assigned for a final hearing that would be limited to four hours, evenly divided between the parents, *based upon Greg's attorney's estimate of the time needed*. There was no verbal or written objection to the time allotted for the hearing. The four-hour limit was noted on the docket sheet for February 13, 2007, an order entered on February 14, 2007, and an agreed order entered on May 1, 2007.

On January 29, 2007, the GAL asked the court to allow the twins to testify in chambers before the final hearing. The GAL requested the procedure because the interviews and research she had conducted yielded "drastically inconsistent information making it impossible to make a recommendation at this point." Lisa agreed with the GAL's request, citing KRS 403.290 as authority for the court interviewing children who are the subject of a custody dispute. Our review of the record did not reveal any objection from Greg.

The court called the case for the final hearing on June 26, 2007. According to the witness list he filed with the court, Greg anticipated calling a minimum of eleven witnesses and introducing fifteen exhibits. Lisa anticipated calling four witnesses and introducing eight exhibits. The trial court was to

determine three issues during the hearing: 1) should Greg be designated as the twins' primary residential custodian; 2) should Greg's monthly child support obligation be reduced; and 3) which school should the twins attend.[2] The hearing commenced at 1:29 p.m. with the court again announcing, without objection, that the hearing would be limited to four hours. The court began by interviewing the twins in the presence of the GAL, but without the parents. While the approximately twelve-minute recording is difficult to hear due to low volume, the girls can be heard to say they want to remain enrolled at East Bernstadt Elementary School, they mostly stay with their mother, and while they are to spend alternate weekends with their father, they rarely see him because of his work schedule, spending that time instead with their paternal grandparents.

Greg used his two hours to question John LaRusch, the licensed professional clinical counselor who conducted the court-ordered child custody evaluation in 2005-2006 and deemed Greg to be the best parent to be named as the primary residential custodian; Lynette McPhetridge, a guidance counselor who maintained it is easier for children to transition to a larger school at the beginning of the sixth grade when they naturally form cliques and lifelong friendships rather than waiting until the beginning of the ninth grade; and James Durham, a principal

[2] The trial court's conclusion that the twins should remain enrolled at East Bernstadt Elementary School is not challenged on appeal. According to the GAL's sealed report, the dissolution was generally tranquil until Lisa transferred the girls from Johnson Elementary School, where Greg's mother was the principal, to East Bernstadt. Neither parent lived in either school district, but East Bernstadt was just about four miles from Lisa's home whereas Johnson Elementary required about a thirty-minute drive.

and deputy sheriff who stopped Lisa around 1:00 a.m. on May 14, 2005, for drunk driving. Greg completed his case by calling Lisa and himself. Lisa's case consisted of testimony from Scott Buckles, her current husband, and herself.

The trial court kept meticulous time during the hearing advising both parties of the amount of time they had remaining throughout the proceeding. There were no requests for additional time during the hearing. Neither party sought the opportunity to supplement their proof with additional documentation or asked to call rebuttal witnesses.

At the conclusion of the hearing, the trial court took a short recess and returned to the bench with her decision. The court stated: 1) the twins would continue attending East Bernstadt for stability purposes because the children were under stress; 2) Greg and Lisa have demonstrated they cannot parent together and cannot communicate, therefore they will now do so with the help of a parenting coordinator; 3) for child support purposes, $1,458.33 was imputed to Lisa based on her testimony that she could earn that amount as a cosmetologist if she were working, and $4,042.00 was figured as Greg's gross monthly income with credit for paying $230.00 each month for health insurance for the twins. Greg's income was extrapolated from his year-to-date gross income for the first five months of 2007. A tuition credit was not included in the calculation of Greg's income, however, overtime earned in 2007 was included in the computation. Based upon these figures, the court calculated a monthly child support obligation of $728.49 which was a slight decrease from $746.00, but not equal to the fifteen percent

change required by KRS 403.213(2) to invoke the rebuttable presumption justifying a modification of child support due to a "material change in circumstances." The court went on to say it had met with the twins, had considered all the required statutory factors, and having determined split custody would not work, denied the motion to modify custody. This appeal followed.

ANALYSIS

Greg's first of three arguments is that he was denied due process by the trial court's imposition of a four-hour time limit on the taking of evidence at the final hearing. Lisa maintains review should be denied due to noncompliance with CR[3] 76.12(4)(c)(v). Greg's brief does not "contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." *Id.* As a result of Greg's noncompliance with CR 76.12, we would be well within our authority to deny review as Lisa has requested. *Elwell v. Stone*, 799 S.W.2d 46 (Ky. 1990). In the alternative, we may review unpreserved allegations of error for manifest injustice rather than considering them on the merits. *Id.*; CR 61.02.

We choose not to review Greg's claim for other reasons. The motion hours leading up to the final hearing, and the final hearing itself, reveal: *Greg,* through his attorney, *suggested the amount of time needed to conduct the hearing* to the trial court; Greg did not object or request additional time when the court allotted four hours for the taking of evidence, to be divided evenly between the

[3] Kentucky Rules of Civil Procedure.

parties; when the hearing commenced, with full knowledge of the proof he intended to elicit, and presumably an idea of how much time would be required to develop his case, Greg did not request additional time to present his evidence; when the trial court apprised Greg that he had used his two hours, he did not request additional time, and most importantly, he did not contend he had been denied the opportunity to present witnesses or evidence critical to his case.

We are a court of review. Because Greg did not argue the denial of due process to the trial court, we will not review the claim on appeal. Pursuant to *Kennedy v. Commonwealth,* 544 S.W.2d 219, 222 (Ky. 1976), we will not allow Greg to "feed one can of worms to the trial judge and another to the appellate court."

Time limits imposed by a trial court serve an important purpose for the orderly, fair, and expeditious processing of litigation. If Greg thought he needed more than two hours to present his case he should have advised the trial court of that fact when the court scheduled the hearing or during the six months that passed between entry of the order setting the hearing and commencement of the hearing. Moreover, as soon as Greg realized he could not complete his case within the time allotted by the court it was incumbent upon him to advise the court and request additional time. He took none of these steps.

Furthermore, our review of the record confirms there was no palpable error requiring reversal. Greg has not shown he was denied the opportunity to present *specific* witnesses, testimony or exhibits, nor has he demonstrated how

such evidence would have changed the hearing's outcome. Additionally, he has not demonstrated the witnesses and exhibits he planned on presenting were relevant or otherwise admissible. Under these facts we will not reverse the trial court for an alleged due process violation on which it was never given the opportunity to rule.

Under this same heading, Greg criticizes the trial court's evidentiary rulings claiming Lisa was allowed to pose hypothetical questions for which supporting evidence was not subsequently introduced; hearsay testimony was admitted about Greg and his mother attempting to persuade the twins to live with Greg without the laying of a proper foundation; Lisa asked LaRusch if his opinion of Greg as being the best primary residential custodian would change if the twins' stated desires had changed since he spoke with them without offering proof to that effect; and the court erroneously admitted an affidavit from Lisa containing inadmissible hearsay. As a result of these alleged errors, Greg claims the court's decision was based on inadmissible evidence.

We review evidentiary rulings for an abuse of discretion. *See Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

At the outset, we must note that this was a bench trial. As such there was no danger a jury would be misled by inadmissible hearsay or other evidence.

Furthermore, the judge was intimately familiar with the parties, the pleadings (including Lisa's affidavit which was attached to a pleading within the file), and the protracted nature of the litigation as she had previously reviewed the case as the Laurel County Domestic Relations Commissioner before being named a circuit court judge. Admission of incompetent evidence during a bench trial is not fatal; it may be deemed harmless if the court's decision was not based on the challenged evidence, *G.E.Y. v. Cabinet for Human Resources,* 701 S.W.2d 713, 715 (Ky. 1985); *Holcomb v. Davis*, 431 S.W.2d 881, 883 (Ky. 1968), or the matter in issue was established by other competent evidence. *Escott v. Harley*, 308 Ky. 298, 214 S.W.2d 387, 389 (1948). Thus, were we to conclude the trial court erred, reversal would not be automatic.

Based upon the complete record, there was substantial evidence upon which the trial court could have denied the custody modification. Thus, we deem any irregularity in the admission of proof to be harmless and reject any allegation of an abuse of discretion.

For his second argument, Greg claims the trial court abused its discretion in denying his motion to designate him as the twins' primary residential custodian. In custody matters tried without a jury, the court's "[f]indings 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." CR 52.01; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). A factual finding supported by substantial evidence is not clearly erroneous. *Id.* at 782. "Substantial

evidence" is "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Id*. As stated in *R.C.R. v. Commonwealth, Cabinet for Human Resources*, 988 S.W.2d 36, 39 (Ky. App. 1998), "when the testimony is conflicting we may not substitute our decision for the judgment of the trial court." Once a trial court makes the required findings of fact, it must then apply the law to those facts. We will not disturb the resulting custody award, as determined by the trial court, unless it constitutes an abuse of discretion. *Sherfey*, 74 S.W.3d at 782-83. Trial courts are vested with broad discretion in matters concerning custody and visitation. *See Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961); *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Sherfey*, 74 S.W.3d at 783. While "[t]he exercise of discretion must be legally sound," *Id*., in reviewing the decision of the circuit court, the test is not whether we, as an appellate court, would have decided it differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Mere doubt as to the correctness of the trial court's decision will not merit reversal. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

In determining whether a custody modification was appropriate in the case *sub judice*, the court had a wealth of information on which to rely including: its own knowledge of the litigation as the former DRC; the LaRusch report

indicating both Lisa and Greg had parental shortcomings; the GAL's report finding such drastic inconsistencies between LaRusch's report dated May 15, 2006, and the statements made directly to her by the twins on December 15, 2006, that she could not formulate a recommendation regarding custody; the court's own interview of the girls just before the final hearing in which they said they did not want to live with their father because they rarely saw him when they were to be in his care, but instead wanted to remain primarily with their mother; live testimony; and photos of each parent's home.

Based upon the foregoing, we cannot say the court abused its discretion in denying Greg's request to be named the twins' primary residential custodian. LaRusch may have found that Lisa had faults, but he found the same to be true of Greg. He acknowledged that while Greg appeared to be more mentally stable, there were many negatives on both sides and because Greg had tried to present himself in the best light possible on the tests given during the custody evaluation, his test scores were invalid whereas Lisa's scores were reliable.

We are persuaded that after considering all the statutory factors enumerated in KRS 403.340, the trial court properly denied Greg's request for custody modification because both girls stated it was their wish to remain with their mother; their school records indicated they were thriving at East Bernstadt where they were involved in numerous extracurricular activities; they had developed a good relationship with their stepfather who transports them to school on his way to work; they each have their own bedroom in Lisa's home, but they

must share a bedroom at their father's home which they do not like to do; and the children are satisfied with the amount of time they spend with their paternal grandparents. As a result, we are confident the trial court did not abuse its discretion in denying the custody modification.

Greg's final argument is that the court erred in calculating his income and denying his motion to decrease child support. Generally, the establishment, modification, and enforcement of child support, within statutory parameters, is left to the sound discretion of the trial court and will be disturbed only upon a showing of an abuse of that discretion. *See, Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000); *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). Greg claims his 2006 tax return demonstrated a change in circumstances of at least fifteen percent such that the appropriateness of modification should be presumed under KRS 403.213(2). However, rather than using 2006 figures, the court used Greg's 2007 year-to-date gross income, $20,000.00 for the first five months of the year, to calculate a new monthly obligation of $728.49 in contrast to the current award of $746.00 per month. While the new amount represented a decrease in Greg's monthly obligation, it was not a change of at least fifteen percent which was needed to presume the need for a statutory modification. Greg argues his 2006 tax return (gross income of $35,388.00 for the year) is a better reflection of his true salary than his 2007 year-to-date income because his ability to earn overtime pay varies and is greater at the beginning of the year.

While the court *could* have figured the new child support obligation by using Greg's 2006 tax return, neither party has cited authority requiring the court to do so and we have not located such a requirement. Dividing Greg's 2007 pay by five, the number of months worked at the time of the June 26 hearing, was a reasonable approach to calculating the new child support obligation and it was based upon the most current figures available. Because this method was based upon substantial evidence, we cannot say the court abused its discretion in using this formula.

For the foregoing reasons, we affirm the order of the Laurel Circuit Court.

ALL CONCUR.

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