RENDERED: SEPTEMBER 17, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000453-MR

STEVE ALLEN WHITWORTH — APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE DOLLY WISMAN BERRY, JUDGE
ACTION NO. 07-CI-502064

DENEEN NICOLE DELUCE
(FORMERLY WHITWORTH) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: Steve Allen Whitworth brings this *pro se* appeal from October 13, 2008, and December 3, 2008, orders of the Jefferson Circuit Court, Family Court Division, (family court) addressing various post-dissolution of marriage issues. We affirm.

Steve and Deneen Nicole Deluce (formerly Whitworth) were married June 21, 1998. Two children were born of the marriage. The parties were divorced by Decree of Dissolution of Marriage entered in the family court on March 4, 2008. Prior to entry of the decree, the parties entered into a property settlement agreement which was incorporated into the decree. Pursuant thereto, the parties shared joint custody of the children and exercised equal parenting time. Also, Deluce paid child support to Whitworth.

Shortly after the decree was entered, Deluce filed two motions seeking to modify the parenting schedule and to hold Whitworth in contempt for failure to abide by the property settlement agreement. Thereafter, Whitworth filed several *pro se* motions seeking various relief including modification of child support. Following a hearing, the family court entered an order on October 13, 2008, modifying the award of child support and awarding Deluce a portion of her attorney's fees. Thereafter, the order was amended on December 3, 2008. The circuit court eventually ordered Deluce to pay Whitworth $220 per month in child support payments. This *pro se* appeal follows.

Steve Allen Whitworth has raised numerous issues in this appeal. In his appellate brief, the arguments are at times incoherent and difficult to discern. However, this Court has diligently attempted to interpret and address each of Whitworth's assertions. We also note that Whitworth's appellate brief fails to conform to Kentucky Rules of Civil Procedure (CR) 76.12. In particular, Whitworth's brief exceeds the proper page limit, fails to contain a statement of

points and authorities, and fails to include any citation to the record on appeal. CR 76.12. We reach the merits of Whitworth's appeal even though his brief is nonconforming under CR 76.12. We caution Whitworth to familiarize himself with the Kentucky Rules of Civil Procedure in further proceedings before this Court. Our review proceeds accordingly.

Whitworth initially contends that the family court erred in its award of child support to him. Whitworth makes several arguments to support his claim that Deluce should pay an increased amount of monthly child support payments. Specifically, Whitworth asserts that Deluce failed to disclose some $1,700 in income for purposes of calculating child support.

Pursuant to the parties' property settlement agreement, Whitworth was responsible for providing health insurance for the parties' children. In February 2008, Deluce learned that the insurance premium had not been paid. In an effort to prevent the insurance coverage from lapsing, Deluce borrowed $1,700 from her father to pay the premium. After Deluce learned that Whitworth paid the premium, she contacted the insurance company, and the money was returned. The family court found that Deluce borrowed the money and was responsible for repaying her father. Thus, the family court concluded that such money was not income to Deluce. Upon the whole, we agree with the family court that the $1,700 should not be included as income for child support purposes.

Whitworth also argues that the family court erred by failing to impute income to Deluce in its calculation of child support. Whitworth contends that

Deluce works 32-hours per week and that another 8 hours of income should be imputed to her for a total of 40-hours per week. Additionally, Whitworth believes that Deluce received "thousands of dollars . . . from her parents and other sources" that were not included as monthly income for child support calculations. The family court considered these arguments by Whitworth and rejected them. Indeed, the family court noted that Deluce "borrowed" money from her parents for which she was responsible for repayment. Moreover, Whitworth did not present sufficient evidence that Deluce was voluntarily under-employed. *See Gossett v. Gossett*, 32 S.W.3d 109 (Ky. App. 2000). Hence, we think this argument is meritless.

Whitworth additionally maintains that Deluce neither included a wedding ring valued at $30,000 as a marital asset nor, alternatively, listed money received from sale of the ring as income. Whitworth's entire argument on this issue consists of two sentences and is as follows:

> Issue No. 2. [Deluce] failed to list as an asset, a very valuable platinum and diamond wedding ring set (estimated value of $20,000 in 2007 and $30,000 in 2008) purchased later in their marriage together by both parties as an upgraded replacement for original wedding ring set used in wedding ceremony, on neither of her MCDFs dated July 24, 2007, and February 15, 2008, nor any listing of gross income from the sale of this wedding ring set during 2007 and 2008 on either MCDF, nor the gross income from any dissipation of this marital asset by [Deluce] in contemplation of divorce. Omission of asset is fraud by [Deluce]. (Citations omitted.)

The issue of the wedding ring was not addressed in the October 13, 2008, or December 3, 2008, orders from which Whitworth appeals. It appears that Whitworth did not raise the issue before the family court. An issue not raised in the lower court will not be addressed for the first time on appeal; thus, we decline to reach the merits of this issue. *See Richardson v. Rees*, 283 S.W.3d 257 (Ky. App. 2009).

Whitworth further maintains that the family court erred by failing to order an exchange of the parties' financial information within ten days of the motion to modify child support. Whitworth argues that such exchange was required by "Local Rule 713." In this case, the family court was aptly familiar with the parties' respective financial situations. The family court utilized the parties' monthly income and determined that Deluce's child support obligation should be reduced to $220 per month. If the family court erred as to "Local Rule 713," we view any error harmless. CR 61.01.

Whitworth argues that the family court erred by denying his motion to "order [Deluce] to hire a certified public accountant to provide [the] true monthly gross income of" Deluce. Generally, the family court has discretion regarding the appointment of an expert to offer an opinion at trial. Kentucky Rules of Evidence (KRE) 706; *see also Robinson v. Robinson*, 569 S.W.2d 178 (Ky. App. 1978), *overruled on other grounds by Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981). In this case, we perceive no abuse of that discretion.

Whitworth also claims that the family court erred by ordering him to pay Deluce $2,174.67 as reimbursement for back child support payments. Initially, Whitworth agreed in the property settlement agreement to pay Deluce $5,000 as reimbursement for back child support. He agreed to use a portion of the children's lump sum social security payment to pay Deluce the back child support. Apparently, the lump sum social security payment was calculated incorrectly and was ultimately reduced. As a consequence, Whitworth filed a motion to modify the lump sum payment he owed Deluce. Based upon the corrected lump sum social security payment amount, the family court lowered Whitworth's payment from $5,000 to $2,174.67. However, Whitworth argues that the family court erred by requiring him to pay such amount from the children's lump sum social security payment.

As previously pointed out, Whitworth agreed to pay the back child support from the children's social security payment per the terms of the property settlement agreement. Thus, the family court did not impose this condition upon Whitworth; rather, Whitworth imposed the condition upon himself by agreeing to same in the property settlement agreement. The family court merely reduced said amount in light of the miscalculation of social security benefits. Moreover, social security benefits received by a child based upon a parents' disability may be considered as income for child support purposes. *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996). Upon the whole, we perceive no error.

Whitworth finally contends that the family court erred by awarding Deluce a portion of attorney's fees and by refusing to award attorney's fees to Whitworth.

In its October 13, 2008, order, the family court specifically stated:

> There is no question but that a considerable amount of time has been expended deciphering and responding to Mr. Whitworth's lengthy and often convoluted motions. Before one motion could be resolved, counsel and the Court were met with another. And while there were clearly some meritorious assertions, the bulk of Mr. Whitworth's pleadings were irrelevant, repetitive, lacked any legal basis, and bordered on harassment. Therefore, Ms. Deluce's motion for attorney's fees is granted in part. . . .

An award of attorney's fees is within the discretion of the family court. *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986). An abuse of discretion occurs if the award of attorney's fees is "arbitrary, unreasonable, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

Whitworth failed to demonstrate that the family court abused its discretion in its award of attorney's fees to Deluce or in its refusal to award attorney's fees to Whitworth. The family court was obviously frustrated with Whitworth's numerous *pro s*e motions. The court specifically commented that Whitworth's motions were "lengthy and often convoluted" and "bordered on harassment." Because of Whitworth's conduct, the family court properly exercised

its discretion and awarded Deluce a portion of her attorney's fees for responding to those motions. As such, we view Whitworth's contention to be without merit.

For the foregoing reasons, the orders of the Jefferson Circuit Court, Family Court Division, are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Mitchell A. Charney
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