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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000960-ME

ROBERT JAMES BUCHINO — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 08-D-00150

ANDREA NICOLE DISANTO — APPELLEE

AND

NO. 2009-CA-001374-ME
&
NO. 2010-CA-000637-ME

ROBERT JAMES BUCHINO — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 05-CI-00685

ANDREA NICOLE DISANTO — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Robert James Buchino appeals from multiple orders of the Scott Family Court, entered on April 22, 2009, June 17, 2009, and February 17, 2010. Those orders pertained to a domestic violence order entered on behalf of Appellee, Andrea Nicole Disanto; Appellant's timesharing with his and Appellee's minor children; and Appellant's child support obligations. Because we find no error in the trial court's orders, they are all affirmed.

The parties were divorced in 2006, and Appellee was granted sole custody of the parties' two children. On September 23, 2008, Appellee was granted an emergency protective order (EPO) against Appellant. A hearing was held and a domestic violence order (DVO) was entered for the protection of Appellee against Appellant. In addition to prohibiting Appellant from contacting Appellee, the DVO ordered Appellant to undergo domestic violence counseling with a certified provider; undergo a substance abuse assessment, including drug screenings; and undergo a mental health assessment. Kentucky Alternative Programs (KAP) was directed to monitor Appellant's progress and Appellant was ordered to follow the recommendations made as a result of his assessments. In

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

addition, the DVO ordered that Appellant was to have no contact with the children until the assessments were completed and reviewed by the court.

On December 1, 2008, Appellee filed a motion to hold Appellant in contempt for an alleged violation of the DVO. A hearing was held on December 3, 2008, during which time the DVO was amended to prohibit Appellant from contacting his former stepson. The trial court found that Appellant had violated the DVO and sentenced him to seven days incarceration, to be probated for one year.

On January 9, 2009, Appellee filed another motion to hold Appellant in contempt for an alleged violation of the DVO. A hearing was held and the trial court held that Appellant had violated the DVO. He was sentenced to seven days incarceration and ordered to submit to a hair follicle drug screen.

On March 11, 2009, Appellant filed a motion asking the trial court to reconsider its December 3, 2008, order of contempt and seeking to reinstate timesharing with his two children. The motion was denied on April 22, 2009, and the trial court advised Appellant that the divorce proceeding was the proper forum to address custody issues. The trial court also released Appellant from the supervision of KAP. In response, Appellant filed appeal number 2009-CA-000960-ME, on May 20, 2009.

Concurrently, on May 20, 2009, Appellant filed a motion to set aside or modify the divorce decree and a motion to reinstate timesharing with the children. The trial court denied both of Appellant's motions. In so doing, the trial

court noted that the divorce decree had been found conscionable by the parties' previous judge, the Honorable Tamra Gormley. The trial court also ordered that reports from the children's counselors be filed with the court within 30 days. In response, Appellant filed appeal number 2009-CA-001374-ME.

On September 2, 2009, Appellant filed a motion to modify child support and for reimbursement of daycare expenses. In an attempt to verify the income and expenses of the parties, the trial court requested that Appellant provide verifiable documents to prove his income and health insurance premiums paid on behalf of the children. Although Appellee provided what her daycare expenses were, the daycare information had been redacted and Appellant argued that they were not in verifiable form. The trial court ruled that, due to the history of domestic violence between the parties, that Appellee was not required to provide any documents that would disclose the location of herself and the children. An arrears order was entered requiring the Appellant to pay $100.00 per month towards his arrearage of almost $7,000.00 and to continue paying $1,018 per month on the current support. The Appellant filed appeal number 2010-CA-000637-ME. We will address the arguments made in all three of Appellant's appeals herein.

Appellant's first argument on appeal is that the trial court erred by failing to reinstate his timesharing upon the successful completion of all court-ordered assessments, counseling and drug testing, and in ruling that appellant's motion to reinstate timesharing was improperly filed in the domestic case.

Timesharing arrangements are left to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *See, e.g., Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Timesharing is governed by KRS 403.320, which states, in relevant part:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. . . . If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, *which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health*.

KRS 403.320(1)-(2) (emphasis added). In the case before us, the trial court made a finding of domestic violence and entered a DVO in conformity therewith. Appellant has failed to cite to any law or show otherwise how the trial court abused its discretion in failing to reinstate timesharing between Appellant and his children. Although he alleges that he successfully completed all court-ordered counseling, assessments, and tests, he has failed to show that this is supported by the record. Furthermore, Appellant has failed to show that the trial court's request that timesharing motions be filed in the companion civil case was an abuse of discretion. Accordingly, this argument is without merit.

Appellant next argues that the trial court erred by refusing to reconsider its finding that the Appellant had violated the terms of the domestic violence order and by refusing to hear Appellant's objections concerning Appellee's response. In essence, Appellant argues that the finding of contempt by the trial court was

unsupported by substantial evidence because the testimony of several witnesses was untrue. It is well established that "(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[2] 52.01. Unfortunately, we were not provided with a video record of the contempt hearing. It is incumbent upon Appellant to present the Court with a complete record for review. *See Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 926 (Ky. 2007); *Davis v. Commonwealth,* 795 S.W.2d 942, 948-949 (Ky. 1990). When the record is incomplete, this Court must assume that the ruling of the trial court is supported by the omitted record. *Commonwealth v. Thompson,* 697 S.W.2d 143, 145 (Ky. 1985). "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record." *Id.*

> In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court. It is the duty of a party attacking the sufficiency of evidence to produce a record of the proceeding and identify the trial court's error in its findings of fact. Failure to produce such a record precludes appellate review.

Davis, 795 S.W.2d at 948. (internal quotation omitted). Accordingly, we must assume that the finding of contempt was substantially supported by the evidence, and that the trial court did not abuse its discretion in so finding.

Appellant next argues that the trial court abused its discretion when it refused to modify the divorce decree and when it found the property settlement

[2] Kentucky Rules of Civil Procedure.

agreement and decree to be conscionable. Appellant challenges the provisions of the property settlement agreement which relate to child support. He argues that he was unrepresented at the time the agreement was entered into and that the child support obligation is ambiguous and incorrect under Kentucky law.

> In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

KRS 403.180(2).

Typically, a separation agreement "is an enforceable contract between the parties, and it is not the place of courts to disturb it absent some showing of fraud, undue influence, overreaching or manifest unfairness."

Pursley v. Pursley, 144 S.W.3d 820, 826 (Ky. 2004)(citations omitted). It is the burden of the party challenging the agreement to show that it is "manifestly unfair and inequitable." *Peterson v. Peterson*, 583 S.W.2d 707, 711 (Ky. App. 1979). Appellant agreed to child support provisions in the agreement and has failed to show evidence of fraud or overreaching in the execution of the agreement. Accordingly, he has failed to show that the agreement was manifestly unfair and inequitable. *See id.* We further note that the statutes allow for modification of child support outside of the decree, providing Appellant with other grounds to pursue a child support modification. KRS 403.213. Accordingly, Appellant has

failed to show that the trial court abused its discretion in upholding the divorce decree and incorporated settlement agreement.

Appellant's final argument on appeal is that the trial court erred by requiring the Appellant to provide complete, verifiable income and other child support-related information without placing the same requirement on the Appellee. Specifically, Appellant argues that Appellee was allowed to provide documents, concerning the payment of childcare expenses, that had information redacted from them. In response, Appellee maintains that she has moved out of the Commonwealth, in an effort to protect herself from Appellant, and that the information was redacted in an attempt to restrict Appellant from having access to her location.

KRS 403.211(6) states:

> The court shall allocate between the parents, in proportion to their combined monthly adjusted parental gross income, reasonable and necessary child care costs incurred due to employment, job search, or education leading to employment, in addition to the amount ordered under the child support guidelines.

There is no specific requirement that child care expenses be documented. Appellee provided documentation to the trial court regarding her child care expenses, albeit with redacted information. Given the circumstances of this case, specifically the history of domestic violence between the parties, we find no error with the trial court's acceptance of such documentation. Appellant has failed to provide legal

support for his argument that the information should be made available to him and his argument is therefore without merit.

For the foregoing reasons, the April 22, 2009, June 17, 2009, and February 17, 2010, orders of the Scott Family Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Christopher D. Hunt
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BRIEFS FOR APPELLEE:

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