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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002080-ME
and
NO. 2011-CA-001907-ME

DAVID CHRISTOPHER EATON APPELLANT

v.

APPEALS FROM FAYETTE FAMILY COURT
SECOND DIVISION
HONORABLE JOHN P. SCHRADER, JUDGE
ACTION NO. 05-CI-03532

KRISTINA NICOLE JOHNSON APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

COMBS, JUDGE: David Eaton appeals from several orders of the Fayette Family Court relating to custody of a child and contempt. After our review, we affirm.

We shall first address the procedural posture of this case. It consists of two

appeals, 2010-CA-002080 (Appeal A) and 2011-CA-001907-ME (Appeal B). However, we decline to address the merits of Appeal A. Kentucky Civil Rule[s] of Procedure (CR) 76.12 sets forth the requirements for briefs submitted to this Court. It provides that "[a] brief may be stricken for failure to comply with any substantial requirement of this Rule 76.12." CR 76.12(8)(a). Eaton's brief for Appeal A is deficient for several reasons:

1) It fails to comport with the requirements of CR 76.12(4)(a)(iii), which mandates that the cover should include the file numbers, the caption with named parties, and the certificate.
2) Its Statement of Points and Authorities is not a succinct statement of issues with the authorities listed below as required by CR 76.12(4)(c)(iii).
3) Contrary to CR 76.12(4)(c)(v), the argument does not set forth any statements to the record indicating how the issues were preserved for appellate review.
4) The Appendix does not begin with the order from which the appeal is taken, a violation of CR 76.12(4)(c)(vii). In fact, the Appendix contains several judgments and orders, and it is difficult to discern which one is the actual subject of the appeal.

Furthermore, it appears from an examination of the record that some – if not all – of the issues contained in the brief already have been litigated to finality. It is true that we accord more leniency to briefs filed *pro se*. However, Eaton, the appellant now before us, is represented by counsel, who also happens to be his

mother. Presence of counsel notwithstanding, the procedural irregularities are legion and flagrant. Therefore, we have deemed it appropriate to strike this brief.

The brief for Appeal B contains fewer deficiencies. Most notably, the Appendix is organized correctly and readily provides the orders from which the appeal is taken. Nevertheless, it also neglects to identify how the issues were preserved for review. But because this is an expedited case involving the primary residence of a child and we are able to identify the subject matter of the appeal, we will review for manifest injustice. *Elwell v. Stone*, 799 S.W.2d 46, 47 (Ky. App. 1990). Manifest injustice results from an error that "so seriously affect[s] the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Commonwealth v. Jones*, 283 S.W.3d 665, 678 (Ky. 2009) (*citing Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

We shall briefly recapitulate the facts relevant to Appeal B. Eaton and Kristina Johnson were never married. They are the parents of a six-year-old son. Eaton and Johnson have engaged in significant litigation throughout the child's short life, including allegations of domestic violence and drug abuse. Johnson was granted sole custody of the child in 2007.

In 2009, Johnson, who has a Bachelor's degree in Art Administration and Theatre, moved to New York City in order to attend an exclusive acting conservatory. The child remained in Lexington with Johnson's mother. Johnson remained in close contact with her mother and her son, staying actively involved in his school activities and returning to Lexington between semesters. Upon

completing her course of studies at the conservatory, in June 2011, Johnson filed a notice of intent to move to New York City with the child as well as a motion to modify timesharing.

During the discovery process, the court ordered that a deposition be taken on July 21, 2011. Upon arriving at the office where the deposition was to take place, Eaton and his counsel refused to participate in the deposition, claiming that Eaton was afraid of Johnson. On July 25, 2011, Johnson filed a motion to compel Eaton to pay the costs and fees associated with the deposition. The court made arrangements for another deposition in a more neutral location and entered an order for it to be held on August 4, 2011.

On August 2, 2011, Eaton's attorney delivered a letter to Johnson's counsel and to the court, advising that Eaton's employer refused to let him take off from work on the day of the deposition. Neither Eaton nor his counsel appeared for the deposition. On August 5, 2011, Johnson filed a motion for a rule for Eaton to show cause why he was not in contempt of court. The court ordered a hearing for August 15, 2011, to address the issues regarding relocation, timesharing, and contempt.

Following the hearing, the court orally gave its findings, which it rendered in writing on September 22, 2011. It permitted Johnson to relocate the child to New York City and found Eaton in criminal contempt of court. As sanctions for the contempt, the court ordered Eaton to pay Johnson's attorney's fees associated with the missed depositions. On October 12, 2011, the court additionally ordered that

Eaton should provide Johnson with an insurance card for the child. Eaton appeals the findings regarding relocation, contempt, and the insurance card.

Eaton's first argument is that the Fayette Family Court did not have jurisdiction to make the determination regarding relocation and timesharing. However, this is simply a rehash of an argument that Eaton has already presented to this Court upon which this Court has already ruled. On August 4, 2011, Eaton filed a petition for a writ of mandamus to stay the August 15 hearing. On August 9, 2011, he filed a motion for emergency relief. Those pleadings were based on the same arguments made in the case now before us.

Our court determined that the Fayette Family Court was acting properly and denied both the writ of mandamus and the motion for emergency relief. Citing *Coffman v. Rankin*, 260 S.W.3d 767, 769 (Ky. 2008), we held that because the trial court had before it a motion of intent to relocate the child supported by an affidavit, it had jurisdiction to hold a hearing[1]. Order Denying Emergency Relief, 2011-CA-001432-OA, August 11, 2011. Therefore, this argument is moot.

Eaton also argues that the trial court erred by allowing the child to be relocated to New York City. We disagree. Issues of relocation and timesharing are governed by Kentucky Revised Statute[s] (KRS) 403.320(3). *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). The statute allows a court to:

> modify an order granting or denying visitation rights whenever modification would serve the best interests of

[1] Eaton has included the notice of intent and its supporting affidavit in the Appendix to his brief.

> the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

KRS 403.320(3).

In this case, the court made thorough, deliberate findings concerning the best interest of the child. It considered the involvement each parent has had with him as well as Johnson's circumstances in New York City. It found that the child needed to be with his mother because she has been significantly more involved in his education and in his activities than has Eaton -- even while she was living alone in New York. The court also acknowledged that Johnson has financial support from her family that will enable the child to maintain his standard of living, including school and extracurricular activities. The trial court carefully tailored a timesharing schedule that would alter the present timesharing arrangement to guarantee longer periods of time for the child to spend with his father – albeit on fewer occasions. The court remarked that while it had reservations about the amount of travel to which the child would be subjected, moving to New York would be a great adventure for him.

Eaton argues that the findings were erroneous for failure of the court to give proper consideration to mental health and domestic violence evidence. However, after discussing eleven factors from the Model Relocation Act (as cited in Justice Cunningham's dissent in *Pennington, supra*.) The trial court commented on Johnson's mental health history. Eaton has consistently tried to portray Johnson as

suicidal and out-of-control. However, the trial court found that Johnson has not had suicidal episodes for several years, that she is consistent in receiving treatment, and that the treatment has been successful. Additionally, the court noted that she has a very supportive family. The trial court's findings were based on detailed and frank testimony. Eaton never filed a motion for Johnson to provide medical records or to submit to a mental health evaluation. Based on his current arguments, we cannot conclude that the court's findings were manifestly unjust.

The court also addressed a Domestic Violence Order entered against Johnson in 2005 that pertained to Eaton.[2] The court noted that the judge who granted the order had first written "insufficient evidence" on the docket before scratching it out and writing "order entered." It further remarked that Eaton's petition only alleged that Johnson had ***tried*** to hit and tackle him. The court observed that Eaton had never renewed the DVO or reported any other incidents in the six years that followed. There is no suggestion that Johnson has ever acted violently toward the child. Eaton has not provided any evidence to persuade us that these findings constitute manifest injustice, and we will not reverse them.

Eaton's next argument is that the trial court erroneously found that he was in criminal contempt for his failure to participate in two court-ordered depositions.

"If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district in which the deposition is being taken,

[2] This analysis by the court was made in the context of the contempt charge rather than in its discussion as to the best interest of the child. Nonetheless, it took place at the same hearing and is relevant.

the failure may be considered a contempt of that court." CR 37.02(1). A court ***shall require*** the party who failed to appear to pay the reasonable expenses of the other party that result from the failure to appear. CR 37.04(1). A party who has failed to act may apply for a protective order according to CR 26.03. CR 37.04(2).

Contempt is defined as "the willful disobedience toward or open disrespect for, the rules or orders of a court." *Commonwealth v. Burge*, 947 S.W.2d 805, 808 (Ky. 1996). *Criminal contempt* is conduct that demonstrates disrespect toward the court, obstructs justice, or brings the court into disrepute. *Myers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007).

Eaton does not dispute that the deposition was ordered by the court and that it was to be held within Fayette County. He also does not contend that he attempted to seek protection according to CR 26.03, which provides recourse to protective orders for offensive discovery procedures. Instead, he attempts to justify his failures to participate in the first deposition and to appear for the second deposition without citation to legal authority or to precedent.

Eaton claims that he could not participate in the first deposition because he was afraid that Johnson would physically harm him. The trial court did not find this contention to be credible. As mentioned before, it noted that six years had passed without any violent episodes occurring between Johnson and Eaton. Furthermore, the record is replete with evidence – including Eaton's own testimony – that during those six years, Johnson and Eaton had sent each other thousands of text messages, talked on the phone, and engaged in sexual

intercourse. The court found that Eaton acted upon his counsel's advice when he left the deposition; nonetheless, it determined that he had acted in contempt of court according to the Rules of Civil Procedure.

Eaton also argues that he was not showing disrespect to the court by missing the second deposition because his employer did not permit him to take time off. However, Eaton testified that when he requested the time off, he did not tell his employer the reason because he was embarrassed. The court found this behavior to be both contemptuous and disrespectful and imposed sanctions for payment of Johnson's reasonable expenses relating to the missed depositions. Eaton has not provided any valid argument that the court's finding and order amounted to manifest injustice. Therefore, we have no basis upon which to reverse it.

Eaton's final argument is that the court erred by ordering Eaton to provide Johnson with an insurance card for the child. Eaton testified at trial that he had insurance coverage in place for the child for three years in order to be in compliance with an order of the court. Johnson cannot use the insurance for the child without the card. Nonetheless, Eaton contends that the trial court erred in ordering him to give Johnson a copy of the insurance card. The trial court acted wholly properly and rationally in ordering that the card be transferred to Johnson.

Finally, we again note that Eaton's mother, a licensed attorney, has served as his counsel. The numerous errors, coupled with the frivolous nature of many of the arguments and issues raised, clearly implicate CR 11. At this juncture, we shall refrain from invoking that rule against counsel because of the undoubtedly

emotional involvement that she has in this matter. However, we caution that a repetition of the noncompliance with the rules merit a more serious consideration of CR 11 sanctions in the future.

We affirm the orders of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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