RENDERED: DECEMBER 7, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001597-ME
AND
NO. 2012-CA-000116-ME

DISELL POINTER — APPELLANT

v.

APPEALS FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NOS. 11-D-00127; 04-CI-00125

MARTHA HALL — APPELLEE

OPINION
AFFIRMING APPEAL NO. 2011-CA-001597-ME
AND APPEAL NO. 2012-CA-000116-ME

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Disell Pointer, *pro se*, brings Appeal No. 2011-CA-001597-ME from an August 3, 2011, Order of the Nelson Circuit Court suspending Pointer's visitation with his minor son and brings Appeal No. 2012-CA-000116-ME from a December 22, 2011, Order of the Nelson Circuit Court denying

Pointer's motion to reduce child support. We affirm Appeal Nos. 2011-CA-001597-ME and 2012-CA-000116-ME.

Disell Pointer and Martha Hall were never married but had one child together – a son born in 2003. In early 2004, Hall filed a petition for custody in the Nelson Circuit Court (Action No. 04-CI-00125). The parties were subsequently awarded joint custody of their son, but the child primarily resided with Hall and shared time with Pointer. Hall lived in Bardstown and was employed by the Commonwealth of Kentucky, Cabinet for Health and Human Services. Pointer lived in Indianapolis, Indiana, and was previously employed by Pfizer Pharmaceuticals. The child spent time with Pointer every other weekend, as well as some holidays and school vacations. The parties have been unable to agree on a plethora of issues related to the child and have been involved in protracted litigation since 2004.

We initially address Appeal No. 2011-CA-001597-ME and then Appeal No. 2012-CA-000116-ME. The facts specifically relevant to each appeal will be discussed therein.

APPEAL NO. 2011-CA-001597-ME

The facts leading to Appeal No. 2011-CA-001597-ME occurred on July 8, 2011. According to Hall, she was driving the parties' son to spend the weekend with Pointer when the child began to cry. The child then proceeded to tell Hall that Pointer had forcibly spanked him during his last visit on July 4th.[1]

[1] As a result of a previous incident investigated by the Indiana Department of Child Services, an order was entered by the Nelson Circuit Court on November 9, 2010, that held Disell Pointer was

The child also told Hall that he was afraid of Pointer and did not want to spend time with him. Hall examined the child and realized he had a bruise on his right buttock. Hall decided to take the child to Kosair Children's Hospital (Kosair) where he was examined by medical personnel and interviewed by a social worker.

As a consequence, Hall filed a petition seeking an Emergency Protective Order (EPO) (Action No. 11-D-02053) and a petition seeking a Domestic Violence Order (DVO) (Action No. 11-D-00127) in Nelson District Court. The district court granted an EPO. The DVO proceeding was transferred to Nelson Circuit Court where the parties had a pending custody action (Action No. 04-CI-00125). Kentucky Revised Statutes (KRS) 403.725. Following a hearing, an order dismissing the DVO was entered by the circuit court on August 3, 2011. In the August 3, 2011, Order, the circuit court concluded, in relevant part:

> The Court dismisses the DVO, but the Court suspends Respondent's visitation, on the basis that he was previously ordered not to administer any punishments that would leave a mark. The Court Orders both parties to submit a list of five (5) qualified therapists, situated in Louisville, Kentucky, to counsel with the father and son. Once the therapist is satisfied
>
> that the child is no longer afraid of his father, visitation will be reinstated.

Pointer appeals the August 3, 2011, Order.

Pointer contends that the circuit court erred by allowing into evidence medical records from his son's July 8, 2011, visit to Kosair. Pointer specifically

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prohibited from engaging "in any form of punishment which would leave a physical mark on the parties' child."

argues that "he was not afforded the opportunity to cross-examine the Nurse who wrote the medical record" and that the records were not properly authenticated. Pointer's Brief at 16. Additionally, Pointer claims that the medical records were not disclosed in accordance with KRS 13B.090(3).

We review alleged errors as to the admission or exclusion of evidence under an abuse of discretion standard. *Hawkins v. Rosenblum*, 17 S.W.3d 116 (Ky. App. 1999). An abuse of discretion occurs if the circuit court's "decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). If the circuit court abused its discretion, we then must determine whether such error was reversible – i.e., whether the outcome of the proceeding would have been different absent the error. *Hawkins*, 17 S.W.3d 116.

In this case, the medical records introduced consisted of the emergency room department record from the July 8, 2011, visit to Kosair by the parties' son. The medical records were certified, signed by the medical records custodian, and the custodian's signature was notarized. Thus, the medical records were properly authenticated pursuant to KRS 422.300(2) which provides, in part:

> Medical charts or records of any hospital licensed under . . . KRS 216B.105 . . . that are susceptible to photostatic reproduction may be proved as to foundation, identity and authenticity without any preliminary testimony, by use of legible and durable copies, certified in the manner provided herein by the employee of the hospital charged with the responsibility of being custodian of the originals thereof. Said copies may be used in any trial, hearing, deposition or any other judicial or administrative action

> or proceeding, whether civil or criminal, in lieu of the original charts . . . .

It is well-established that if the "document in question meets the requirements of the statute [KRS 422.300], the document's authenticity . . . is satisfied." *Matthews v. Commonwealth*, 163 S.W.3d 11, 22-23 (Ky. 2005). Thus, the Kosair medical records were properly authenticated under KRS 422.300(2).

Also, the Kosair medical records were admissible pursuant to an exception to the hearsay rule. Kentucky Rules of Evidence (KRE) 803(6) provides for the admission of records of regularly conducted activity including medical records such as the Kosair medical records. *See id.* KRE 803(6) provides:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . .

Because the Kosair medical records were kept in the course of Kosair's regularly conducted business, we think the records were properly admissible per KRE 803(6).

Pointer's contention that the medical records were admitted in violation of KRS 13B.090(3) is without merit. KRS 13B.090 is applicable only to

administrative hearings and has no application to a domestic proceeding in circuit court. Thus, we conclude the circuit court properly admitted into evidence the Kosair medical records.

Pointer next contends that the circuit court "erred in undertaking an alleged criminal issue which happened in Indiana and was brought to trial in Kentucky." Pointer's Brief at 21. We find this argument to be vague and confusing but we have nonetheless attempted to address it. The record on appeal reflects that Hall properly filed the petition for the EPO and the petition for the DVO in Nelson District Court pursuant to KRS 403.740 and KRS 403.750. Domestic violence actions are not criminal actions nor is a prosecutor involved. The EPO and DVO were properly filed as civil proceedings in Nelson County, Kentucky, given the alleged domestic violence was perpetrated against a child and the child primarily resides in Nelson County. KRS 403.725. Accordingly, we view Pointer's argument that an Indiana criminal matter was brought to trial in Kentucky to be without merit.

Pointer next contends that the circuit court "erred by allowing the orders to be written under a case number that was inconsistent with the judge's ruling." Pointer's Brief at 18. We have reviewed the record, including the relevant action numbers, and simply find no error by the court below.

Finally, Pointer contends that the circuit court erred by "interviewing a child witness without granting [Pointer] an opportunity to cross[-]examine the testimony that was presented." Pointer's Brief at 27. The record reveals that the

circuit court interviewed the parties' son in camera, and Pointer was permitted to observe the interview as it was conducted through the court's closed circuit television system. Following the court's interview, Pointer did not request the opportunity to cross-examine or question the child. Because Pointer did not make such a request to the circuit court, the issue is not properly preserved for appellate review, nor has Pointer requested this court to review the error under Kentucky Rules of Civil Procedure (CR) 61.02.

We believe any remaining allegations of error regarding the EPO/DVO proceeding are without merit or are moot.

In summation, we conclude that the circuit court did not abuse its discretion by suspending Pointer's timesharing with his son, pending counseling of Pointer and his son.

APPEAL NO. 2012-CA-000116-ME

Appeal No. 2012-CA-000116-ME was taken from a December 22, 2011, Order of the Nelson Circuit Court denying Pointer's motion to reduce child support. A review of the record reveals that Pointer's child support obligation has dramatically decreased over the past several years since entry of the original support order in June 2004. Based upon Pointer's previous employment with Pfizer Pharmaceuticals, Pointer's child support obligation was originally $1,237.41 per month effective June 18, 2004. Pointer subsequently lost his job with Pfizer and filed a motion to modify his child support. Based upon Pointer's motion to modify, his child support obligation was reduced to $437.97 per month by order

entered May 7, 2008. The May 7, 2008, order also provided that the child support issue would be reviewed in six months. An evidentiary hearing was conducted on December 3, 2008. Following the December hearing, the circuit court denied Pointer's request to further reduce his child support obligation. The circuit court determined that Pointer was voluntarily underemployed and specifically found as follows:

> (1) [Pointer] has a college degree in genetics and chemistry, (2) [Pointer] worked as a chemist for three or four years in Bowling Green with a starting salary of $37,500.00, (3) that [Pointer] then worked for Pfizer where his salary ranged from $37,500.00 to $89,500.00, (4) that [Pointer] claims to be working 60 hours per week while earning about $500.00 per month, and (5) that if [Pointer] worked 60 hours per week and earned $8.00 per hour, his gross income would exceed the amount that his child support has presently been calculated. . . .

December 3, 2008, Calendar Order.

On July 14, 2011, Hall filed a motion to hold Pointer in contempt for failure to pay child support. Pointer responded by filing another motion to reduce child support. A hearing was conducted, and in a July 28, 2011, order, the circuit court concluded that Pointer was in contempt for his failure to pay child support as previously ordered. The circuit court found Pointer was $5,436.15 in arrears and ordered Pointer to serve 179 days in the Nelson County Jail. The order also provided that Pointer could purge himself of the contempt by paying $1,500 toward his child support arrearage. Pointer was released from jail later the same day after he paid $1,500 of the arrearage.

Relevant to this appeal, Pointer filed yet another motion to reduce his child support obligation on December 7, 2011. Following a hearing, the circuit court again denied Pointer's motion by order entered December 22, 2011. The court found that Pointer failed to provide the court with any evidence of his income or Hall's income rendering it impossible to calculate Pointer's child support obligation and to determine if modification was appropriate. It is from the December 22, 2011, order that Pointer now appeals.

Pointer contends that the circuit court erred by denying the motion to reduce his child support obligation. Pointer argues that he satisfied the criteria set forth in KRS 403.213 for modification of child support.

Modification of child support is within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of that discretion. *Plattner v. Plattner*, 228 S.W.3d 577 (Ky. App. 2007). And, the circuit court retains continuing jurisdiction over child support issues. *Combs v. Daugherty*, 170 S.W.3d 424 (Ky. App. 2005).

KRS 403.213 governs modification of child support and provides:

> (1) The Kentucky child support guidelines may be used by the parent, custodian, or agency substantially contributing to the support of the child as the basis for periodic updates of child support obligations and for modification of child support orders for health care. The provisions of any decree respecting child support may be modified only as to installments accruing subsequent to the filing of the motion for modification and only upon a showing of a material change in circumstances that is substantial and continuing.

> (2) Application of the Kentucky child support guidelines to the circumstances of the parties at the time of the filing of a motion or petition for modification of the child support order which results in equal to or greater than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed to be a material change in circumstances. Application which results in less than a fifteen percent (15%) change in the amount of support due per month shall be rebuttably presumed not to be a material change in circumstances. For the one (1) year period immediately following enactment of this statute, the presumption of material change shall be a twenty-five percent (25%) change in the amount of child support due rather than the fifteen percent (15%) stated above.

Pointer argues that pursuant to KRS 403.213(2), he is entitled to a rebuttable presumption that a material change in circumstance had occurred due to his change in income which would result in more than a fifteen-percent change (or reduction) in his current child support obligation. And, Pointer contends that the circuit court erred by finding him in contempt in July 2011 for falling in arrears in making his child support payments.

KRS 403.213(1) requires a material change in circumstances that is both substantial and continuing. And, a rebuttable presumption of a material change in circumstances is created by demonstrating that a fifteen-percent change has occurred in the amount of support due each month. KRS 403.213(2).

A close review of the record reflects that Pointer did not introduce into evidence any documentation of his or Hall's income at the December 21, 2011, hearing. The only witness Pointer called was a child support case worker, and the case worker did not testify as to the income of either party. Pointer

asserted that the county attorney possessed the parties' income documentation and that a representative of the county attorney told him he was entitled to a child support reduction. Again, other than Pointer's hearsay statements, no evidence to support his position was presented. Since child support is determined by applying the parents' incomes to the child support guidelines of KRS 403.212, the circuit court was without evidence of the parties' incomes to apply the guidelines. Without income information, the circuit court could not determine from the evidence if Pointer was entitled to a modification. Thus, we cannot conclude that the circuit court erred by denying Pointer's motion to modify child support.

Finally, Pointer asserts that the circuit court erred by finding him in contempt for failure to pay child support, by not providing him free legal representation during the contempt proceedings, and by allowing Assistant County Attorney Matthew Hite to proceed against Pointer because Hite is related to Hall. As to the contempt order and Hall's lack of legal representation during that proceeding, the record indicates that the circuit court's order finding Pointer in contempt for failure to pay child support and ordering incarceration was entered July 28, 2011. Pointer failed to timely appeal this final order. CR 73.02(1). Accordingly, this Court is without jurisdiction to consider those issues in this appeal. *Burchell v. Burchell*, 684 S.W.2d 296 (Ky. 1984).

As to Pointer's accusation regarding the alleged familial relationship between Hite and Hall, the circuit court made no findings on this issue below nor did Pointer request a specific finding as required by CR 52.04. Pointer's failure to

request a specific finding on this issue constitutes a waiver of any review by this Court. *Polley v. Allen*, 132 S.W.3d 225 (Ky. App. 2004). Even if the issue had been properly preserved for our review, Pointer failed to establish how this relationship in any way prejudiced the circuit court in this proceeding.

Accordingly, we conclude that the circuit court properly denied Pointer's motion to reduce child support.

For the foregoing reasons, the orders of the Nelson Circuit Court are affirmed in Appeal Nos. 2011-CA-001597-ME and 2012-CA-000116-ME.

ALL CONCUR.

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