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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000358-ME

J.M., FATHER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION EIGHT (8)
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 10-J-503321

A.D., MOTHER — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND THOMPSON, JUDGES.

COMBS, JUDGE: J.M. (Father) appeals from the order of the Jefferson Family Court that granted A.D.'s (Mother) petition to alter or amend a previous order. After our review, we vacate and remand.

Father and Mother were never married, but they had a child who was born on March 24, 2009. Soon after the child's birth, Mother and the child relocated to

Virginia. On April 7, 2010, a Virginia court granted joint custody of the child to Mother and Father, with Mother receiving "primary physical custody" and Father receiving regular visitation. On June 1, 2010, Mother filed a petition for child support in Virginia. That petition was transferred to Jefferson Family Court. On November 8, 2010, Jefferson Family Court entered an order setting child support at $521 per month, reserving the issue of arrearages. Mother filed a petition to have the child support order amended to include child care costs and arrearages.

On March 10, 2011, Mother served Father with interrogatories and requests for documents, to which Father did not respond. On April 20, 2011, Mother filed a motion to compel production of the documents along with a motion for a hearing to determine arrearages. On June 3, 2011, a hearing was held to determine the amount that Father owed in arrearages. Mother's counsel was present, but Mother attended telephonically; Father appeared, *pro se*. At the time of the hearing, Father had not produced any answers to interrogatories or documents that Mother had requested.

During the hearing, Father testified that he had sent Mother several payments for child support prior to incurring any court-ordered obligation. The court asked Mother if this contention was true, and she testified that she thought Father had sent approximately $1800 during a six-month period. Father testified that his calculations reflected that he had sent her approximately $6300. However, Father did not have documentation in the courtroom to support his calculation. Although this was information that had been requested and that the court had

previously ordered Father to provide, the court gave Father another fourteen days to turn in copies of the checks that he had written to Mother. On June 8, Father submitted photocopies of *check carbons* from his checkbook.

On August 11, 2011, the court entered an order in which it found that Father had failed to present sufficient evidence of support payments to Mother. However, it failed to make a determination of arrearages owed. Mother filed a petition to alter or amend the order in order to include arrearages. Father, who retained counsel subsequent to the order of August 11, filed a response to Mother's petition. Attached to the motion were photocopies of *cancelled* checks demonstrating that Mother had cashed the checks totalling $6,491.00.

The court entered an amended order on January 19, 2012. It found that Father's evidence was improperly submitted. The court credited Father with paying Mother $1800 and found the total arrearages to be $7580. Father now appeals from the order of January 19.

Father's two arguments can be summarized succinctly. Because the trial court erred when it did not consider his proffered evidence of prior payments, its calculation of arrearages was erroneous.

Family courts have broad discretion in matters regarding the evidence presented to them. *Jones v. Hammond*, 329 S.W.3d 331, 334 (Ky. App. 2010). Our standard of review is governed by Kentucky Rule[s] of Civil Procedure (CR) 52.01. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986) (The rule applies to child custody cases); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980) (CR 52.01

applies to domestic cases). It charges that in actions without juries, the trial court's findings of fact should not be reversed unless they were clearly erroneous. Clear error occurs only when there is not substantial evidence in the record to support the trial court's findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

In its first order, the trial court found that photocopies of check carbons were not sufficient proof that Father had paid Mother. It found that the actual cancelled checks would have been sufficient proof. Father argues that there is no conclusive law in Kentucky that deals with the sufficiency of check carbons as evidence. He further argues that it was reasonable for him – as a litigant acting *pro se* – to believe that the carbon checks were adequate.

We did not locate any Kentucky cases that deal with the admissibility of carbon copies of checks; however, the Supreme Court of Missouri has held that they constitute hearsay. *State v. Taylor*, 298 S.W.3d 482 (Mo. 2009). In that case, a murder defendant tried to admit a carbon copy of a check in order to prove that the victim had written it. The court held:

> The check is not admissible as a verbal act, because there is no evidence that [Victim] either completed or used the "check" as a legal document. It was not negotiated. There is no evidence that anyone received it, and there is no evidence of the purpose or circumstance under which [Victim] wrote it[.]

Id. at 498. The same reasoning applies here. The carbon copy of the check from Father's checkbook does not prove that he tendered the check to Mother or that she cashed it. It was not a negotiated document.

We agree with Father that our courts generally afford *pro se* litigants more procedural leniency than litigants who are represented by counsel. *See Miller v. Commonwealth*, 458 S.W.2d 453 (Ky. 1970). However, in this case, Father was first asked to produce the proof of payment in March 2010. Between the first request and the hearing, he was also ordered by the court to produce the documents at least twice. No doubt, if Father had complied with the discovery requests and the orders of the court, he would have had sufficient time to correct the documents.

Father argues, however, that he did provide the correct documents with his reply to Mother's petition to alter and amend the judgment. Kentucky Rule[s] of Civil Procedure (CR) 59.05 permits parties to file a petition to alter and amend the judgment. Normally, "[a] party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). However, under the particular circumstances of this case, we conclude that the trial court erred by not considering the copies of the cancelled checks totalling $6,491.00 – checks that allegedly have been signed and negotiated by Mother. Mother impliedly "opened the door" to this inquiry by filing the CR 59.05 motion.

Gullion continues the discussion of CR 59.05 at some length, noting the extraordinary nature of its use as a remedy to reconsider a judgment after its entry

and admonishing that it should be used "sparingly." *Id.* The *Gullion* court then analyzes four criteria under Federal Rule of Civil Procedure 59(e), the federal counterpart of our CR 59.05:

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. *Second,* the motion may be granted so that the moving party may *present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice.* Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law. [Emphasis added.]

Id. Pertinent to the case before us are criteria two and three.

This case is a very close call that invokes a weighing of the equities underlying the respective arguments of the parties. Evidence of the cancelled checks cannot really be considered to have been "previously unavailable" because of the recalcitrant, uncooperative attitude of Father not to produce checks that he later "found" only after retaining counsel. On the other hand, Mother represents that she received only $1800 in payments from him when in fact it appears that checks totalling $6,491 in payments were signed and cashed by her. If the family court does not consider this discrepancy, manifest injustice would clearly result. Arguably, neither party has completely "clean hands."

In light of the unique circumstances of this case, we are persuaded that justice would best be served if the family court, whose patience has been tried to

the extreme, were to review the checks belatedly submitted for the sake of avoiding manifest injustice. It will be within the sound discretion of the family court to determine the relevance of the checks – if any – as to the final amount of arrearages ordered.

Accordingly, we vacate and remand this matter to the Jefferson Family Court for a hearing as to the relevance of the checks and entry of an appropriate order.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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