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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001543-MR

ALAN LEE WETZEL — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 09-CI-01433

MELISSA D. WETZEL (NOW MALONE) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Alan Lee Wetzel appeals from the Bullitt Family Court's entry of its new order of August 9, 2012, following the parties' motions to alter, amend, or vacate the original order of April 2, 2012. In the new order, the court modified its prior order wherein Melissa Wetzel paid Alan child support. The modification ordered that neither party would pay child support, that the children

would attend Bullitt County schools, and that the original date of exchange of the children would continue to be in effect. Finding no error, we affirm.

The parties were married for almost ten years when they separated in May 2009. Through mediation, the parties reached an agreement settling their issues. The parties agreed that neither party would move more than thirty miles from Shepherdsville, Kentucky, that Melissa would pay the cost of the children's private school attendance, and that there would be no child support paid for the parties' three children. On February 1, 2010, the trial court entered a decree of dissolution of marriage which incorporated the mediated agreement.

On August 31, 2011, Melissa filed her original motion seeking financial help from Alan for such items as non-school-related expenses for the children. Alan responded with his own motion requesting the court to reevaluate child support if the court was inclined to modify the agreement. On January 25, 2012, Alan moved the court to review the parenting time schedule of the parties. A hearing was set for February 21, 2012, with notice to the parties that the hearing would also address the issue of whether the children should continue to attend private school.

At the hearing on February 21, 2012, both parties submitted documentation concerning their gross income for purposes of calculating child support. Alan introduced a list of expenses for the condominiums that he owned and rented. He testified that he had $28,000 in expenses. In addition, Alan testified that he was unable to work full time due to the agreed parenting schedule;

in order to work full time Alan needed a Sunday-to-Sunday schedule. Alan testified that he had no other income other than stated in his testimony. He acknowledged that without notice to Melissa, he had moved to Oldham County, Kentucky.

The court entered its order of April 2, 2012, setting child support whereby Melissa would pay Alan $916.25 per month, effective as of the time she ceased payment of the children's private tuition. The court reserved ruling on changes in parenting time and the children's enrollment in private school.

On April 4, 2012, Melissa filed a motion to alter, amend, or vacate the April 2, 2012 order. Melissa's motion addressed child support and argued that at the hearing Alan had provided a summary of alleged expenses for his two rental units, which neither Melissa nor counsel had ever seen. Melissa argued that this summary was for tax purposes and that this would differ from gross income used to determine child support. In addition, Melissa argued that since Alan moved to Oldham County, he then had a third rental property which should be accounted for and that he failed to inform the court that he was the beneficiary of a trust.

Alan also filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion arguing that the amount of child support was insufficient to support the children in both households and that the court incorrectly factored in the timesharing arrangement into the amount of child support. Alan also requested the court to clarify the ruling on the children's education. Alan objected to Melissa's motion requiring him to provide additional proof that would support his expense

claim, but acknowledged "If Petitioner wishes to allege that the Court did not base its determination on proper evidence, that is one thing" and that the court could review that issue.

The court entered an order setting a hearing on the competing motions to alter, amend, or vacate its original order. The court informed the parties that in the three-hour hearing, the school issue and Alan's move would be addressed. Additionally, the court instructed Alan to provide Melissa with all documents relating to his rental units expense deductions from income and any income he received as a beneficiary to a trust.

The court held a three-hour hearing on July 10, 2012, wherein Melissa called multiple witnesses and submitted more documentation to the court regarding the court's determination of child support. At the hearing, Alan acknowledged that the some of the expenses claimed were not for rental property but were for his private residence. Alan acknowledged that he had obtained $101,000 from his trust, but claimed that this was a loan. He also admitted that he was a beneficiary to his deceased mother's life insurance policy. The court at the end of the time allotted advised the parties that the court had another hearing scheduled, but if they wished additional time, the parties could motion the court. No motions for additional time were filed.

Based on the testimony elicited at the July 10, 2012, hearing, the court modified its original April 2, 2012, order. The court concluded that Alan had been untruthful with the court concerning his income and economic issues. Melissa

conclusively showed that Alan claimed as rental property expenditures items which were actually personal expenditures, including a Christmas tree purchased at Lowe's which was claimed as a lighting expenditure. Alan claimed a fish oil supplement as a product to repair air conditioning units. He failed to inform the court that he was a beneficiary of a trust and the probable existence of a life insurance policy on his deceased mother where he is the beneficiary. While Alan testified that the corpus of the trust had been exhausted when it was used to purchase the home where he now resides, the court declined to accept this explanation given his untruthfulness surrounding economic issues.

The court acknowledged that it had no reasonable way to calculate the income of Alan given his attempt to hide income and assets. He reported income of $52,399.87 in wages in 2011 and no income from his rental properties. At the February hearing Alan attempted to pass off $15,500 of his income as expenses on rental property when that was money spent on his new home. The court concluded that Alan's income was equal to that of Melissa's after the trust was accounted for and the fraudulent expenditures were calculated as a part of his gross income. The parties equally divide the time with the children. Thus, the court ordered that neither party would pay child support.

Additionally, the court ordered that the original parenting schedule be enforced as only Alan's testimony was submitted concerning his inability to work full time with the schedule and the court found him to be an unreliable witness. The court concluded that Alan deliberately chose to violate the agreement he made

with Melissa in terms of remaining within thirty miles of Bullitt County, the home of the children. He explained to the court that he wished the children to attend Christian Academy of Louisville ("CAL") at South English Station Road and he moved to be closer to the school. The children had previously attended CAL at Rock Creek Drive in Louisville which is closer to Bullitt County than the other location of CAL. His plan substantially increased the time Melissa would have to drive the children while decreasing the amount of time he drove. Melissa did not wish to pay the tuition to CAL, which was more than $10,000 annually for each child and desired to place the children in public school in Bullitt County.

The court noted that there was no evidence presented that the Bullitt County schools were inadequate to meet the needs of the children. The Bullitt County schools were closer to the maternal grandparents, who had been the parties' preferred help with the children. Should the children get sick at school or need transportation when the parents were at work, the grandparents provided care. The parties had previously agreed that Bullitt County would be the home of the children. Thus, the court ordered that the children shall attend Bullitt County schools. It is from this order that Alan now appeals.

On appeal Alan presents five arguments, which he contends necessitate reversal. First, the trial court erred by considering new evidence and testimony on Melissa's motion to alter, amend, or vacate. Second, the trial court committed an error by ruling on issues not properly presented before the court. Third, the trial court erred in its calculation of child support. Fourth, the court

erred in deviating from the child support guidelines. Fifth, the trial court erred in ruling without allowing Alan the opportunity to present evidence or testimony on his behalf.

In response, Melissa argues that Alan failed to preserve his objections and thus the appeal should be dismissed. Additionally, Melissa argues that the trial court's determination is not clearly erroneous and the August 9, 2012, order should be upheld and Alan's misrepresentation on the expense report constituted fraud against the court. With these arguments in mind we now turn to our applicable standard of review.

At the outset we note, that "[a]s are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court." *Van Meter v. Smith,* 14 S.W.3d 569, 572 (Ky. App. 2000). "However, a trial court's discretion is not unlimited. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). We now turn to Alan's arguments.

First, Alan argues the trial court erred by considering new evidence and testimony on Melissa's motion to alter, amend, or vacate. We review the trial court's decision pursuant to CR 59.05 for an abuse of discretion. *See Gullion v. Gullion*, 163 S.W.3d 888, 892 (Ky. 2005). The test for an abuse of discretion is

whether the trial judge'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).

Alan relies on *Gullion* in support of his argument, wherein the Kentucky Supreme Court stated, "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." *Id.* at 893. However, the Kentucky Supreme Court further explained *Gullion*:

> CR 59.05 authorizes the trial court to "alter or amend a judgment, or to vacate a judgment and enter a new one" on a motion properly filed by a party within ten days after entry of a final judgment. Recognizing the scope of the power accorded trial courts by CR 59.05, this Court has stated that "a trial court has 'unlimited power to amend and alter its own judgments.' " *Gullion v. Gullion*, 163 S.W.3d 888, 891–92 (Ky.2005) citing *Henry Clay Mining Co. v. V & V Min. Co*., 742 S.W.2d 566 (Ky.1987). In *Gullion*, we cited favorably the four grounds recognized by the federal courts in construing the federal counterpart, Federal Rule of Civil Procedure 59(e):
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> > 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.

> 163 S.W.3d at 893, citing Federal Practice And Procedure § 2810.1.

Bowling v. Kentucky Dept. of Corrections, 301 S.W.3d 478, 483 (Ky. 2009).

Sub judice we believe that Melissa provided the trial court with ample evidence regarding the necessity of preventing manifest injustice, namely that of fraud perpetrated on the court. As such, we decline to reverse on this ground.

As his second basis for appeal, Alan argues that the trial court committed an error by ruling on issues not presented in the CR 59 motion. We agree with Melissa that this issue was not properly preserved. Alan does not inform this Court where this matter was preserved. As recently discussed in *Hallis v. Hallis*, *infra* such a failure to abide by our procedural rules provides this Court with multiple options:

> Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky.App.1990).

Hallis v. Hallis, 328 S.W.3d 694, 696 (Ky. App. 2010).

We believe that even if this issue was properly preserved, reversal would not be necessitated. Both parties brought motions to alter, amend, or vacate, raising the issues of child support and school as addressed by the modification of the court's original order. Alan argues that the court should not have addressed the parenting schedule as this was not raised in the motions. We disagree.

First, "CR 59.05 may be used to dispute an order or judgment a party believes to be incorrect, and a trial court has "unlimited power to amend and alter its own judgments*." Gullion v. Gullion* at 891-92(internal footnotes omitted). Second, a court may without motion review its own judgment pursuant to CR 59.04. Accordingly, we decline to reverse on this ground.

Alan next argues that the trial court erred in its calculation of child support. In support of this argument, Alan states that the court deviated from the guidelines based on the equal parenting time. Our review of the matter shows that the court deviated from the guidelines based on the amount of the parties' combined income, as is proper per statute and is discussed *infra.* Alan also argues that the court incorrectly determined his income, which is a factual inquiry.

The question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See B.C. v. B.T.,* 182 S.W.3d 213, 219–20 (Ky. App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

Below, the trial court chose not to believe the testimony of Alan after Melissa presented evidence that he had been untruthful with the court regarding economic matters; this was the court's prerogative. Based on our review, we cannot say that the trial court's findings are clearly erroneous in light of the evidence presented by the parties *sub judice*.

As his fourth basis for appeal, Alan argues that the court erred in deviating from the child support guidelines. We see no error in the trial court's determination that deviation from the guidelines was proper given the parties' combined adjusted gross income. The combined parental income in this case exceeds the uppermost levels of the guideline tables. Pursuant to Kentucky Revised Statutes (KRS) 403.212(5), "[t]he court may use its judicial discretion in determining child support in circumstances where combined adjusted parental gross income exceeds the uppermost levels of the guideline table." *See also* KRS 403.211(3)(e). "As long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." *Downing*, 45 S.W.3d at 454 (citation omitted). After our review, we must conclude that the court's exercise of its discretion in this case was proper and, thus, does not necessitate reversal.

Last, Alan argues that the trial court erred in ruling without allowing him the opportunity to present evidence or testimony on his behalf. We agree with Melissa that this argument was not properly presented below. *Sub judice*, the trial court informed the parties that if they wished additional time, they simply had to

inform the court via motion. No motion was filed. Alan cannot now on appeal claim that he was unjustly denied an opportunity to present his case when he did not inform the court that he wished to do so. *See Fischer v. Fische*r, 348 S.W.3d 582, 587-89 (Ky. 2011) (discussing the long-held appellate rule of first presenting an issue to the trial court for consideration). Accordingly, we decline to reverse on this ground.

Finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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