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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000876-ME

GREG DART — APPELLANT

v.

APPEAL FROM PULASKI FAMILY COURT
HONORABLE WALTER F. MAGUIRE, JUDGE
ACTION NO. 10-CI-00907

LAUREN COMBS — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Greg Dart appeals both the Pulaski Family Court's findings of fact, conclusions of law, and order of custody, and its order denying his motion to amend the custody order. Greg argues that the family court erred in its calculation of his child support obligation, assignment of medical expense, and denial of parenting time. In addition, Greg argues that the family court erred in

denying his post-trial motion to amend the custody order by removing the "final and appealable" designation. After careful review, we affirm in part, reverse in part, and remand.

FACTS

This case has a long, contentious history concerning the legal responsibility of the biological father. Greg and Lauren Combs met in 2008 and had a one-month relationship. They met in Ohio where Greg was doing remodeling work on the home of Lauren's grandmother. Greg is a resident of Ohio but Lauren has been a resident of Kentucky since 2005. They were never married or lived together. After the relationship was over, Lauren discovered in October 2008 that she was pregnant. Their son, G.L.D. (hereinafter "GLD"), was born June 26, 2009.

Greg did not attend the child's birth or any prenatal events or pay any medical expenses for the birth. He did not tell his family about the baby until two months after his birth. Upon learning about the child, Greg's mother wanted a paternity test. The parties procured a paternity test from the internet. The test results were 99.997% that Greg was the father of GLD.

With regards to Greg's interaction with GLD, between August 2009 and May 2010, he visited with GLD approximately 14 times with an average visit of 45 minutes. Lauren initiated all the contacts and drove the child to Ohio for the

visits. Several times Greg did not appear for a visit. Additionally, on January 2, 2010, GLD had eye surgery but Greg chose not to be present or provide any financial assistance.

The last contact Greg had with GLD was on May 23, 2010. Since that date Lauren has asked Greg if he would like to spend time with GLD including his birthdays and Christmases. Greg declined. Greg insisted that if he could not spend time alone with GLD, he did not want to see him. Lauren, however, believed that unsupervised visits were not in GLD's best interest since the child did not know Greg. Further, she was concerned about Greg's ability to care for the child. Lauren also knew that during her pregnancy, Greg had been involved in two separate criminal misdemeanor actions in Ohio in which he was convicted of phone harassment and pled guilty to assault on a girlfriend. Greg countered that Lauren was being vindictive and had stalked his girlfriend.

Although a complete lack of clarity existed with regard to the amount of Greg's income, it is not disputed that he was self-employed in the construction business in a company named G.L. Dart Construction, Inc. Lauren was unemployed

during the history of this case but attended school and graduated from the University of Cumberland with Bachelor of Science in communication arts. At the time of the hearing, although she was not working or attending school, she planned

to continue in school and get a business degree. Lauren opined that her starting annual salary in such a job would be between $20,000 and $35,000. Lauren's parents have been the complete financial support for Lauren and GLD. The only financial assistance Lauren received from Greg was the purchase of a playpen, some clothes, and $300.

On June 23, 2010, Lauren filed a petition for sole custody of GLD and sought child support plus supervised visitation for Greg. In his response to the petition, Greg stated, notwithstanding the results of the earlier paternity test, that he did not have sufficient knowledge to admit that he was GLD's biological father, and therefore, requested a paternity test. However, if he was determined to be the father, Greg moved for joint custody and payment of child support according to the child support guidelines. On July 26, 2010, Lauren filed a motion for temporary sole custody of GLD during the pendency of the action because it was in the child's best interest. The family court granted both Greg's motion for paternity testing and Lauren's motion for temporary sole custody.

Following his request for a paternity test and the order for the same, Greg did not appear for scheduled paternity tests. Lauren filed motions for Greg to comply with the paternity order, and later, a show cause motion as to why Greg should not be held in contempt for failure to comply with paternity testing. Yet, by the time the show cause motion was heard, Greg had complied with the paternity

testing, and the family court passed on the motion for contempt but granted Lauren attorney fees in the amount of $500. This paternity test, as well as one the parties took independently, showed that Greg was the father of the child with at least 99.99% degree of certainty.

Next, in May 2011, Lauren filed motions for child support and payment of medical expenses for the child. With regard to health expenses, Lauren provided health insurance for GLD. This monthly expense was $146.02. She also made available copies of GLD's medical bills, which totaled $4,817.77. A hearing on the motions was held on May 13, 2011. The family court ordered Greg to provide full disclosure of his income pursuant to the Kentucky Family Court Rules and set a hearing for May 27, 2011, on the issue of temporary support.

Prior to the May 2011 hearing, Greg provided income tax cover sheets from 2006, 2007, and 2008, which indicated a cumulative loss for these years of $150,000. He presented "pay stubs" from his employment, G.L. Dart Construction, Inc., indicating that he was paid $15.00 per hour. Using these figures, Greg proposed that the family court establish his child support at $662.01 per month. But since Greg did not provide complete information about his income tax and schedules documenting his profit and loss from his company, Lauren objected to the proffered child support amount. The family court passed on establishing child support until Greg produced additional income information.

Before the rescheduled hearing of August 10, 2011, Greg made a motion for joint custody, visitation, and the award of the income tax exemption for GLD. However, Greg failed to appear at the hearing without notice to anyone including his attorney. The family court scheduled another hearing for September 14, 2011, predicated upon further discovery. Next, Greg failed to appear at a deposition scheduled at the offices of Lauren's attorney because he was too busy but offered to attend a deposition on the following Saturday or Sunday at his tax lawyers' offices in Ohio.

At the September 14, 2011 hearing, Lauren asked for a continuance on the child support issue since Greg had attended one deposition on August 1, 2011, but not provided income information since then necessary to establish child support. The family court granted the continuance and denied Greg's earlier motion for joint custody. Additionally, the family court ordered Greg to produce his complete tax returns and pay Lauren's attorney fees in the amount of $500.

Greg then attended a second deposition on March 16, 2012. At the first deposition in August 2011, he had testified that his gross income ranged from $750,000.00 to $1,000,000 per year but only provided cover sheets for the 2006, 2007, and 2008 returns. These returns showed a net loss of approximately $150,000. Although Greg agreed to submit his profit and loss schedules for these

years and gross profit and expenses for 2010 and 2011, he never provided the documentation.

At the second deposition in March 2012, Greg was again asked to provide appropriate tax documents for the purposes of establishing child support, but he failed to do so. Greg testified that because he was under investigation by the Internal Revenue Service (hereinafter "IRS"), he could not release the documents because the IRS prohibited him from doing so. However, Greg was unable to provide a letter from the IRS substantiating this prohibition. Rather, he provided a letter from his tax attorney, dated May 31, 2012, that stated his 2008 and 2009 returns were under audit, which should be completed in 30 to 60 days. Nonetheless, the 2010 and 2011 returns were not under audit.

The attempt to get an accurate picture of Greg's income to establish child support continued. Ultimately, in July 2012, Greg provided a copy of his tax return for 2008. He never provided a complete copy of his 2006 or 2007 returns and gave no information about his 2009 return. Eighteen days prior to the final hearing (March 12, 2013), Greg filed a copy of his 2010 tax return. Additionally, at the March 12th hearing, Lauren presented a certified document from an Ohio court handling Greg's criminal action. The document showed that Greg's criminal counsel informed the Ohio court that Greg had a gross income of $1,200,000 per year for a number of years.

On the morning of the final hearing (March 12, 2013), Greg faxed Lauren a two-page document purporting to show comparative income, including expenses from the employment, for 2008, 2009, 2010, and 2011. The document indicated that his net profit for those for those years was as follows:

2008 - $ 100,546
2009 - $ 61,785
2010 - $ 66,904
2011 - $251,594[1]

Further, Greg stated that although he had not filed returns for 2011 or 2012, his income for 2012 would be $100,000. He also testified that his gross income for 2011 was $2,485,185. Greg provided information about other assets that included the purchase of a night club and a home valued at $435,000.

At the conclusion of the March 12, 2013 hearing, the family court judge made various findings, conclusions, and orders from the bench. The family court awarded Lauren sole custody of GLD and stated that Greg could have reasonable visitation after he received a parental assessment with a psychologist and re-noticed the family court about obtaining parenting time.

The family court noted that Greg's income, for the purposes of establishing child support, was unknown but based on the testimony provided, the family court ordered him to pay $3,000 per month in child support. Further, the

[1] $251,594 - $31,617 (Projected Schedule A Deductions) = $219,978 (Estimated 2011 Taxable Income).

family court assessed an arrearage at $1,500 per month from the date of GLD's birth (June 26, 2009) until April 1, 2013.

The family court judge based the child support amount on the fact that Greg had significant assets including his home, a night club, and a business; that he had the ability to pay reasonable support; that the child was entitled to live his father's lifestyle; and lastly, because Greg failed to provide evidence of his income, the family court was compelled to establish child support in a reasonable manner.

Finally, the family court ordered that Greg pay the birthing expenses of GLD as set forth in Lauren's motion. The family court then assigned the task of drafting the findings of facts, conclusions of law, and custody order to Lauren's counsel.

On April 12, 2013, the family court held another hearing. The motion of Greg's attorney to withdraw from further representation of his client was granted and Greg was provided 60 days to obtain new counsel. In addition, an order styled "Findings of Fact, Conclusion of Law and Order of Custody" was tendered. The family court judge signed that final order on April 12, 2013. The order was entered on April 19, 2013.

At the hearing Greg's counsel, besides withdrawing from the case, also advised that Greg, who was not present at the hearing, had instructed him to

object to all of the contents of the order and to its entry. Counsel did not file any specific objections to the findings, conclusions, or order. Greg's counsel obliquely mentioned the possibility of withholding the entry of the judgment while his former client found substitute counsel. The family court judge noted that Greg had ample time to secure other counsel since the March 12th hearing was held and denied the request to withhold entry of the final order.

Greg's new counsel entered his appearance for Greg on May 6, 2013, and made a motion to amend the order of custody. In the motion, Greg asked for the "final and appealable" designation to be removed. Based on his previous attorney's withdrawal on the same date the order was tendered, Greg argued that he was denied the opportunity to file specific objections and the procedural opportunity to file a motion to alter, amend, or vacate. On May 10, 2013, the family court denied the motion to amend the order of custody.

Greg is now appealing both the custody order and the denial of his motion to amend the custody order. On appeal, Greg maintains that the family court abused its discretion when it denied him timesharing [sic]; that the family court abused its discretion when it ordered him to pay $3,000 per month in child support and assessed an arrearage at $1,500 per month; that the family court erred when it ordered Greg to pay the birthing expenses since the amount should have been apportioned equitably between the parties; and finally, the family court

abused its discretion by denying his motion to amend the order of custody by removing the designation "final and appealable."

Lauren counters that the family court did not abuse its discretion in the award of custody or visitation since Kentucky Revised Statutes (KRS) 403.290 permits the family court to seek the advice of professionals in the determination of custody and visitation issues; that the family court did not abuse its discretion in the child support order since it was supported by the facts and applicable law; that the amount ordered for the payment of birthing expenses was proper; and, that the family court acted properly in denying Greg's motion to amend the order of custody. We now address each argument of error.

ANALYSIS

We begin our analysis with Greg's argument that the family court erred when it denied his May 6, 2013 motion to amend the order of custody; the order of custody had been entered on April 19, 2013. Without citing any statutory or case law, Greg complains that, based on his counsel's withdrawal and the family court entry of the final custody order, he was unable to specifically object to the order of custody.

Although Greg's counsel did not specifically reference a civil rule when filing the "motion to amend," the pertinent authority was Kentucky Rules of Civil Procedure (CR) 59.05. A motion to alter, amend or vacate a judgment under

CR 59.05 "shall be served not later than 10 days after entry of the final judgment." Since the judgment was entered on April 19, 2013, the filing on May 6, 2013, was more than 10 days after the final judgment's entry, and hence, not timely. The family court properly dismissed his motion to amend the order of custody.

Next, we consider the three additional issues for which Greg maintains that the family court's decision was improper. First, regarding child support, he argues that the decision was contrary to the facts presented at trial, contrary to the law, and otherwise an abuse of discretion; that the decision regarding Greg's parenting time was an abuse of discretion; and finally, that the family court's decision that Greg was solely responsible for the payment of birth expenses was improper.

On appeal, our review of the family court's findings is bound by the clearly erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Under this standard, findings of fact are clearly erroneous only if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). And "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." CR 52.01; *Reichle*, 719 S.W.2d at 444. If the findings of fact were not clearly erroneous, our remaining task is limited to determining if the family court abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Further, appellate review of questions of law is

de novo. *Revenue Cabinet v. Comcast Cablevision*, 147 S.W.3d 743 (Ky. App. 2003).

Immediately, we note a procedural concern involving these issues, that is, whether the issues have been properly preserved for our review. Generally, the role of an appellate court is to review errors made by trial courts. Since no specific objections were filed by Greg to highlight errors with the findings, the family court did not have an opportunity to ascertain whether its findings were in error. Thus, there is no potential error for our review. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Below is the paragraph from Greg's brief, which discusses preservation of the issue of parenting time:

> This issue was preserved by the general objection to the entry of the custody order, made by Appellant's counsel at the April 12, 2013 hearing at which the final custody order was entered. Additionally, the Appellant was denied an opportunity to make this objection more specific and to file same in timely fashion under the appropriate civil rules because of the trial court's summary dismissal of Appellant's motion to amend the custody order.

Greg's brief, page 22. Similar statements about preservation preceded the sections of the brief discussing child support and birth expenses.

First, we consider Greg's suggestion that the issues were preserved based on the general objection to the entry of the custody order made by his

counsel at the April 12, 2013 hearing. Notably, a reviewing court will not consider any argument on appeal that has not been preserved in the trial court. *Brown v. Commonwealth*, 416 S.W.3d 302, 310 –11 (Ky. 2013). This question is implicit in every review.

In order to review the findings in a family court decision, it is necessary for us to know the portion of the finding or findings that is disputed. In cases where a party challenges the findings of a trial court, CR 52.01, CR 52.02, and CR 52.04 are implicated. These civil rules provide an opportunity for a litigant to bring to light the finding or findings that are problematic.

In all actions tried upon the facts without a jury, the trial court must find the facts specifically and state separately its conclusions of law. CR 52.01. That is the situation herein. A primary reason for this provision is to have a record, which demonstrates the basis of a trial court's decision, so that an appellate court may more readily understand the former's view of the controversy when it conducts its appellate review. *Reichle*, 719 S.W.2d at 445.

A general objection to the entire order of custody, as proffered by Greg, is not sufficient to preserve issues for review. If such objections were permitted, they would swallow the purpose of preserving issues for review. A blanket objection to an entire order, in essence, necessitates that an appellate court determine, rather than review, the findings of a trial court. Equally troubling is that

if litigants were allowed to proffer a general objection to an entire order, trial courts would not be permitted to address the efficacy of their findings prior to appellate review.

Both trial courts and litigants are guided by the civil rules in amending or making new findings. The Rules provide:

> Not later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

CR 52.02. Unfortunately, not only did Greg not make a motion for additional findings but also he made a general objection to the proffered findings rather than highlighting the findings that he disputes. Further, jurisdictionally, Greg had ten days from the date of the entry of the order to do so. The order was entered on April 19.

Significantly, however, Greg's argument that he was precluded from making such objections because of his attorney's withdrawal on April 12th is fallacious. The hearing was held on March 12, 2013, and therefore, Greg had from March 13 until ten days after the April 19th entry of the custody order to file objections *pro se* or obtain new counsel to do so. Withdrawal of an attorney does not establish an exception to the jurisdictional requirement of CR 52.02.

The second sentence in Greg's statement of preservation is itself an acknowledgement of his failure to preserve the issues. When Greg says that "the Appellant was denied an opportunity to make this objection more specific and to file same in timely fashion *under the appropriate civil rules* because of the trial court's summary dismissal of Appellant's motion to amend the custody order," it is an implicit recognition that certain civil rules must be followed to properly preserve issues about findings for review. (Emphasis added.) As we have previously held, the family court properly dismissed the motion to amend the order of custody because it was not timely.

Lastly, if Greg's argument is that the family court failed to make a finding on an essential issue of fact, then pursuant to CR 52.04, Greg must make a specific written request for a finding on that issue. As stated,

> [a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Moreover, as observed in *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982), the purported failure of the trial judge to make adequate findings is waived unless this failure was brought to the court's attention. The record shows that Greg did not make a motion for more definite findings of fact pursuant to CR 52.04. Indeed, "[f]ailure to bring such an omission to the attention of the trial

court by means of a written request will be fatal to an appeal." *Vinson v. Sorrell*, 136 S.W.3d 465, 471 (Ky. 2004) (citing *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982)). Therefore, we are precluded from review of the findings herein because of the failure to preserve the disputed issues for our review.

While we are prevented from reviewing Greg's issues for clear error because of failure to preserve, *de novo* review of legal issues is always allowed. Under *de novo* review, we owe no deference to the trial court's application of the law to the established facts. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

With regard to the payment of birthing expenses, the family court ordered that Greg pay the medical expenses, not paid for by insurance, for the birth of GLD. It noted that the amount was $4,425.77 and that the physician billing was $392.00. A review of Lauren's affidavit, however, indicates that $4,425.77 was for GLD's eye surgery some six months after his birth.

Under KRS 406.011, Greg is liable for the expenses related to GLD's birth "for the reasonable expense of the mother's pregnancy and confinement." Thus, the family court properly held that Greg was responsible for the uninsured part of the $392.00 birthing expense. However, with regard to other medical expenses, KRS 406.11 also provides that "[t]he father of a child which is or may be

born out of wedlock is liable to the same extent as the father of a child born in wedlock[.]"

Since Greg is liable as much as any other father for the payment of extraordinary medical expenses, the family court incorrectly applied the law to the expense for the eye surgery. Turning to KRS 403.211(9), the appropriate legal amount for which parents are responsible with regard to extraordinary medical expenses is provided.

> The cost of extraordinary medical expenses shall be allocated between the parties in proportion to their combined monthly adjusted parental gross incomes.

Thus, the family court inappropriately applied the law herein. We conclude that Greg is responsible for the eye surgery pursuant to his proportion of the child's support. The child support worksheet attached to the family court's order of custody determined that Greg's proportion of the parties' combined monthly adjusted parental gross incomes was 83%. Consequently, Greg is responsible for 83% of the uninsured portion of GLD's $4,425.77 medical expense for the eye surgery. We reverse the family court's decision on this issue and remand with instructions to so order.

CONCLUSION

For the foregoing reasons, the Pulaski Family Court's "Findings of Fact, Conclusions of Law, and Order of Custody" is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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