

RENDERED: OCTOBER 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000516-ME

IAN MICHAEL ALBRIGHT

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE SHEILA N. FARRIS, JUDGE
ACTION NO. 16-CI-00528

TICEY LYNN ALBRIGHT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT, AND STUMBO, JUDGES.

JONES, JUDGE: Appellant, Ian Michael Albright, appeals from orders of the Henderson Circuit Court concerning the custody of his and Appellee's two children, the amount of child support he is to pay Appellee, and various issues concerning his and Appellee's marital property. After review of the record, we AFFIRM.

I. BACKGROUND

Ian Michael Albright (“Father”) and Tacey Lynn Albright (“Mother”) married in 2009. During the course of their marriage, the parties had two daughters. In August of 2016, Mother filed a petition for dissolution of marriage. Along with her petition for divorce, Mother filed a *pendente lite* motion seeking – among other things irrelevant to this appeal– an order granting the parties joint custody of their children, an order establishing a specific parenting schedule, and an order requiring Father to pay child support. Father moved for *pendente lite* relief on September 27, 2016. In his motion, Father requested that the trial court set a right of first refusal with respect to parenting time, set an order requiring the parties to disclose the location of the children’s whereabouts at all times, and to set a schedule allowing him to share at least equal parenting time with the parties’ two children.

A temporary agreed order concerning parenting time was entered on October 7, 2016. Therein, the parties agreed to: a “right of first refusal” where either parent would allow the other parent to have additional time with the children if the parent planned to be away from the children for six hours or more during his or her scheduled time; allow Father to have the children every day when he got off work while Mother was working; allow Father to have the children overnight on Tuesdays; allow Father to have parenting time every other weekend; and to disclose the location of the children’s whereabouts at all times. Additionally, the parties temporarily agreed that Father should pay child support of \$900 per month.

The parties appear to have had some issues cooperating with the temporary order, as Father filed a motion to hold Mother in contempt on January 25, 2017, for failure to abide by the right of first refusal.

Following the temporary order described above, the parties were unable to come to a permanent agreement regarding parenting time. An evidentiary hearing was held on February 8, 2017. Prior to the hearing, the parties stipulated to the following: that they would share joint custody of their children; each would receive their respective vehicles; Mother would be restored certain items of personal property; each would retain their bank accounts; and Mother would receive one-half of Father's retirement account as of the date of the decree. Additionally, the parties stipulated that Father would pay Mother \$4,000 in exchange for his retention of the marital residence. The remaining issues before the court included: parenting time, Mother's Gibbs bank account, allocation of 2016 tax refunds, calculation of child support, damage caused to Mother's piano, damage caused to the parties' marital residence, and payment of attorney fees and costs.

Both parties and their mothers testified at the hearing. During his testimony, Father expressed his desire that he and Mother have equal parenting time with their children. He stated that, since his and Mother's separation, he believed he had spent more time with the children than Mother had due to Mother's work schedule. Father indicated that he wished for more overnight visitation time with the children because he felt that the children benefitted from

having him tuck them into bed at night. While Father acknowledged that his new work schedule would require the children to wake up at 5:00 a.m. if they stayed the night with him so that he could return them to Mother's home before he went to work, he noted that the children's paternal grandmother had expressed her willingness to watch the children after he left for work and to take them to school in the morning. Additionally, Father took issue with the fact that Mother paid a babysitter \$90 per week to watch the parties' youngest child while Mother was working when the paternal grandmother had volunteered to babysit the children for no charge. Father further stated that, while he was willing to pay Mother the \$4,000 in exchange for him retaining their marital residence, he would like to be able to make monthly payments to Mother as he was currently unable to pay her the balance in full.

Mother acknowledged that her current work schedule did often cause her to have less time with the children, as she frequently would not get off work until around 7:00 p.m. However, she stated that she was soon to begin new employment where she would have a fixed 8:00-5:00 schedule and would not work weekends. Mother noted that before she and Father had separated, she stayed at home with the children during the day and was their primary caregiver. Mother indicated that she wanted the parenting schedule to stay as it was – with Father having the children at least once a week and every other weekend. She expressed concern with Father's new work schedule and did not want the children to have to wake up so early. While Mother was aware that the paternal grandmother had

offered to babysit for free, she stated that she preferred taking the children to their current babysitter. Mother indicated that the paternal grandmother had been late to return the children to her at least once. Further, Mother stated that she liked to be the one to drop the children off at school in the mornings.

The trial court entered its findings of facts, conclusions of law, and decree of dissolution on February 21, 2017. Therein, the trial court awarded joint custody to the parties and designated Mother as the primary custodian. The court noted that while Father testified he would like to have the children overnight during the school week, Father's work schedule would require the girls to wake up unnecessarily early or find childcare and transportation before school in the mornings. Accordingly, the court ordered that Father would have parenting time on alternating weekends from Friday to Sunday and Tuesdays and Thursdays until 7:00 p.m. While the trial court acknowledged that Father would prefer the children's paternal grandmother babysit the children when needed, the court concluded that it was appropriate for the children to continue going to a private babysitter, per Mother's wishes, as it was work-related childcare. Additionally, the trial court ordered that Father pay \$935 per month in child support and be responsible for 70% of child care costs. Father was ordered to pay Mother the \$4,000 for her interest in the marital residence within 90 days.

On March 1, 2016, Father filed a motion to alter, amend, or vacate and for relief on grounds of mistake. Therein, Father expressed his belief that the trial court's order was not supported by sufficient evidence. To support this

contention, Father summarized the testimony given by Mother, the paternal grandmother, and himself at the evidentiary hearing. Father argued that the trial court erred by failing to order that he have parenting time during the week when Mother was at work and failing to reinstate the right of first refusal for childcare. Additionally, Father contended that there was no logical explanation for the trial court to determine that the children should be watched by a private sitter rather than by their paternal grandmother. Father further noted that the trial court's order did not accurately reflect his and Mother's agreement pertaining to taxes and did not address his motion to hold Mother in contempt for violating the right of first refusal. Father concluded his motion by noting that, if the trial court altered parenting time per his request, it should also alter child support to reflect that change. On March 15, 2017, Mother moved the court to enter an order requiring she and Father to meet at a neutral location to exchange their children.

A hearing on the motions was held on March 20, 2017. At the hearing, the trial court ordered the parties to meet at the Kentucky State Police Post to exchange the children for purposes of parenting time. On March 22, 2017, the court entered a written order, which modified its February 21, 2017, order so as to allow Father to claim the parties' oldest child on his taxes. The trial court denied Father's motion to alter, amend, or vacate in all other respects. Father filed a notice of appeal on March 27, 2017.

On March 28, 2017, Father filed a motion with the trial court requesting modification of parenting time, an order indicating that the parties'

oldest child was to continue her education at Holy Name School, and an order requiring the parents to share the costs of tuition at that school. In his motion, Father indicated that his work schedule had again changed, making it so that he now did not have to be at work until 8:00 a.m. and the children could have overnights with him during the week without disrupting their sleep schedule. He additionally stated that Mother had expressed her intent to remove the oldest child from Holy Name School, a decision that Father believed was against the child's best interests. On April 3, 2017, Mother responded to Father's motion. In addition to asking the trial court to deny the motion, Mother requested that Father be ordered to pay her attorney fees in defending the motion and suggested that sanctions should be imposed on Father. The trial court declined to hear Father's motion because the matter was currently on appeal to this Court, as is reflected on a docket order of May 7, 2017.

II. STANDARD OF REVIEW

“Our review of the findings of fact of a family court is limited to the determination of whether they are clearly erroneous.” *Hempel v. Hempel*, 380 S.W.3d 549, 551 (Ky. App. 2012) (citing CR¹ 52.01; *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004)). Findings of fact are clearly erroneous if they are “manifestly against the weight of evidence.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967) (citing *Ingram v. Ingram*, 385 S.W.2d 69 (Ky. 1964); *Craddock v. Kaiser*, 133 S.W.2d 916 (Ky. 1939)). A trial court's determination regarding custody decisions

¹ Kentucky Rules of Civil Procedure.

will not be disturbed absent a finding that the court abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). “Similarly, this Court’s review of child support awards is governed by the abuse of discretion standard.” *Penner v. Penner*, 411 S.W.3d 775, 779 (Ky. App. 2013). “The test for an abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound reasonable principles.” *Id.* at 779-780 (quoting *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004)). As to the trial court’s rulings with respect to questions of law, we review those *de novo*. *Manning v. Lewis*, 400 S.W.3d 737, 740 (Ky. 2013) (citing *Kentucky Pub. Serv. Comm’n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 376 (Ky. 2010)).

III. ANALYSIS

On appeal, Father argues that the trial court’s decisions concerning parenting time, child support, and child care were in error. Additionally, Father contends that the court erred in requiring him to pay Mother her interest in the marital property within 90 days, erred in failing to rule on his motion to hold Mother in contempt, and erred in finding that it lacked jurisdiction to rule on the motion he filed with trial court subsequent to his filing a notice of appeal with this Court.

Father first contends that the trial court’s decisions as to parenting time were in error as they were unsupported by substantial evidence. Specifically, Father takes issue with the fact that the trial court did not order equal parenting time, did not allow him to have overnight visitation with the children during the

week, and did not reinstate provisions of the parties' temporary parenting time order, such as the provision that Father would watch the children during the week while Mother was still at work and the right of first refusal. Father essentially argues that the weight of the evidence as applied to the best interest standard supported his position – that he be given equal parenting time with the children. He argues that his position is further supported as the trial court made no findings that overnight visits with the children during the week would endanger the children's physical, mental, moral, or emotional health.

“[I]n the absence of an agreement between the parties, the trial court has considerable discretion to determine the living arrangements which will best serve the interests of the children. Furthermore, joint custody does not require an equal division of residential custody of the children.” *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000) (citing *Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993)). There is no indication that the trial court made its decision to decline Father's request that he be allowed overnight visitation with the children during the week arbitrarily. During the evidentiary hearing, Mother expressed her concern that, if the children were to stay the night with Father during the week, they would have to wake up by at least 5:00 a.m., which she thought was too early for them. The trial court found that this concern was valid, as it expressed in its original order. While Father offered alternatives to waking the children up at 5:00 a.m. – that the children's paternal grandmother could come to his home to watch the children, or that his girlfriend could spend the night at his place and stay with the

children – Mother expressed trepidation towards both of those alternatives. The trial court’s agreement with Mother’s concerns was within its discretion. As to Father’s contention that the trial court should have reinstated the temporary parenting time order, “the trial court may consider whether continuation of a shared custody arrangement would be in the best interests of the children. On the other hand, the trial court was not obligated to continue the temporary shared custody arrangement which [the parties] had been following.” *Id.* at 525. As noted above, there is some indication in the record that the parties were having issues abiding by the temporary order – Father had filed a motion to hold Mother in contempt for failing to follow the right of first refusal; Mother mentioned in her testimony that Father had likewise failed to abide by it. The trial court’s decision to leave out certain provisions contained in the temporary order from the its final order was within its discretion.

Father continues to argue on appeal that child support should be based on parenting time. He contends that, because the trial court erred in its determination of how parenting time should be divided it likewise erred in setting child support. As noted above, we do not find that the trial court abused its discretion in deciding parenting time. Further, while a trial court is *permitted* to deviate from the child support guidelines based on a time-sharing arrangement, it is by no means required to. *See McGregor v. McGregor*, 334 S.W.3d 113, 118 (Ky. App. 2011); *Penner v. Penner*, 411 S.W.3d 775, 783 (Ky. App. 2013). In setting child support, the trial court generally followed the child support guidelines. The

only deviation from the guidelines was in Father's favor, and was supported by reasoning. We cannot find that the trial court abused its discretion in so doing.

Additionally, Father argues that the trial court erred in permitting Mother to continue to send the youngest child to a private babysitter, which costs \$90 per week, when the children's paternal grandmother had volunteered to babysit them at no charge. The trial court noted that Mother was utilizing the private babysitter to provide childcare during Mother's scheduled parenting time, while Mother was at work. Therefore, the trial court concluded that the payments constituted a work-related childcare expense. Under KRS² 403.211(6), costs of "reasonable and necessary" work-related child care expenses shall be allocated between the parties. Here, the court found that the child care was necessary because of Mother's employment. Father testified that he had no issues with the babysitter Mother used, except for the fact that she charged a fee for her services. Father may prefer the free child care option, but it is not unreasonable of Mother to choose instead to continue utilizing the private babysitter. The trial court did not act unreasonably in finding that it was appropriate for Mother to choose the person to watch her children while she is at work.

Next, Father argues that the trial court erred in ordering him to pay Mother the \$4,000 he owes to her within 90 days after entry of the order. Father contends that the trial court should have allowed him to make monthly payments on the amount, spread out over the course of one year. Father contends that the

² Kentucky Revised Statutes.

trial court's decision to have him make the payments within three months, rather than one year, was against the weight of the evidence. However, while Father did testify that he would like to make monthly payments, he did not, as his brief states, testify that he would be unable to pay Mother the amount unless the payments were spread over one year. Father did not present evidence indicating that he would not be able to make the payments to Mother within the time frame set by the court, either at the evidentiary hearing or in his motion to alter, amend, or vacate. Accordingly, we cannot agree with Father that the trial court's order is against the weight of the evidence.

Father's final contentions of error are that the trial court erred in failing to rule on his motion to hold Mother in contempt and in finding that it lacked jurisdiction to rule on his motion requesting the trial court to modify parenting time and issue an order indicating that the parties' oldest child should remain at Holy Name School, with tuition paid by both parents. However, as noted by Father, the trial court did not rule on either of these motions. "We do not have jurisdiction for claims that do not arise from a final and appealable order." *Collins v. Kentucky Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. App. 2012) (citing CR 54.01).

IV. CONCLUSION

Based on the foregoing, we AFFIRM the order of the Henderson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Austin P. Vowels
Henderson, Kentucky

BRIEF FOR APPELLEE:

Susie H. Moore
Henderson, Kentucky