

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000251-ME

CODY TABIAHA GILL

APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE CLINT J. HARRIS, JUDGE
ACTION NOS. 16-CI-00312 & 18-CI-00290

JAYLYNN OSCENANDA CHANTEY GILL
(NOW SAYLOR)

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; NICKELL¹ AND L. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: Cody Tabiaha Gill appeals the Clay Circuit Court's
order denying his motions for equal parenting time and the finding that the trial
court did not have jurisdiction to allocate the income tax exemptions for his

¹ Judge C. Shea Nickell concurred in this opinion prior to being sworn in as a Justice with the Supreme Court of Kentucky. Release of this opinion was delayed by administrative handling.

dependent children. For the following reasons, we reverse in part and render the income tax exemption issue moot.

BACKGROUND

Appellant, Cody Tabiaha Gill, and Appellee, Jaylynn Oscenanda Chantey Gill (now Saylor), were married on January 30, 2014. They had one child, M.G., during the marriage. On December 15, 2016, Jaylynn filed for dissolution of the marriage, in civil action number 16-CI-00312. Cody and Jaylynn reached an agreement, which was memorialized in the findings of fact, conclusions of law, and decree of dissolution of marriage entered on March 15, 2017. In that agreement, the parties agreed to share joint custody of M.G., with Jaylynn being designated as the primary custodian, and Cody receiving parenting time every Thursday at 6 p.m. until each Sunday at 6 p.m. The agreement also set forth holiday and school break parenting time, as well as child support and the allocation of the dependent child tax exemption.

Following their divorce, Cody and Jaylynn had another child, L.G. On October 9, 2018, Cody filed a motion to reopen the prior dissolution case, along with a motion to amend the prior agreement requesting the trial court to award joint custody and equal parenting time of the parties' two children and allocate the dependent child tax exemptions. The trial court requested Cody file a separate petition as to L.G. and ordered both cases to be heard on January 4, 2019.

Cody filed a petition for custody as to L.G., in civil action number 18-CI-00290. Cody also filed a motion for sole custody or, in the alternative, joint custody and equal parenting time as to L.G. Cody filed a similar motion as to M.G. and requested to receive all income tax exemptions and deductions. In addition, Cody filed a motion to consolidate the two cases, which the trial court granted. Jaylynn responded and objected to Cody's other motions.

At the January 4, 2019 hearing, the trial court addressed the pending issues. First, the trial court reviewed the parties' original March 2017 decree in which the parties agreed that Cody would claim M.G. as a dependent the first year following the divorce. After the first year, if Jaylynn became employed for six consecutive months, the parties would alternate with Cody claiming the exemption in the odd-numbered years and Jaylynn in the even-numbered years. Cody requested that he be allowed to claim M.G. as a dependent every year, but the trial court held the matter was already decided pursuant to the March 2017 decree and it had no way to order that Cody be able to take the tax exemption for M.G. every year. As to the tax exemption for L.G., the trial court held it did not have jurisdiction to determine "income tax return matters." Next, as to parenting time, the trial court asked the parties what had changed in the lives of Cody, Jaylynn, and M.G. since the March 2017 Decree. Cody claimed M.G. was involved in extracurricular activities. Additionally, they now had another child and Cody

requested the children be together for the parents' timesharing. Further, Cody noted Kentucky's law changed regarding the stance on equal parenting time since entry of the original decree. The trial court held Cody could not request a modification in parenting time of M.G. without a change in circumstances and denied his motion. As to the parenting time of L.G., the trial court questioned how her situation was different from her sister's. Cody said he wanted equal parenting time, including additional time on Thursdays. Meanwhile, Jaylynn was content with the current schedule. The trial court decided that Cody's parenting time of L.G. would mirror his parenting time of M.G. As to holiday time, the trial court ordered the parties to follow the Clay County guidelines. On January 18, 2019, the trial court issued a written order setting forth these rulings. Cody then filed this appeal.

ANALYSIS

As an initial matter, we note that Jaylynn failed to file an appellee brief. Under CR² 76.12(8)(c), a range of penalties may be levied against an appellee for failing to file a timely brief. *St. Joseph Catholic Orphan Society v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). The Court may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the

² Kentucky Rules of Civil Procedure.

appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). Granted, while a party's failure to file a brief may be taken as a confession of error, such a sanction is usually inappropriate in appeals involving child custody, support, or visitation. *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky. App. 2014). Because this is an appeal involving child custody, support, and visitation, we do not take Jaylynn's failure as a confession of error, although we do accept Cody's statement of the facts and issues as correct.

For his appeal, Cody claims two errors. First, he argues the trial court had jurisdiction to allocate the "tax exemptions" and should have issued a ruling. Second, Cody claims the trial court's findings regarding parenting time of M.G. and L.G. were not supported by substantial evidence and, thus, the trial court's findings were clearly erroneous, as they disregarded the statutory presumption of equal parenting time.

First, as to the "tax exemption" issue, Cody uses this phrase in his brief, although the trial court's order refers to "income tax return matters." This is an important distinction because, in 2018, the Tax Cuts and Jobs Act eliminated the income tax exemption for dependent children. *See* PL³ 115-97, 2017 HR 1, Budget Fiscal Year, 2018, 131 Stat 2054. Thus, a person is no longer able to

³ United States Public Laws.

reduce their taxable income by a dependent child tax exemption. Parents may claim a “child tax credit” for qualifying children and this may be part of a general dispute of “income tax return matters” between the parties. Without more information of the disputed tax return matters, however, this Court cannot rule. In case pre-2018 tax return matters are pending with the parties, we will address the allocation issue.

Cody claims the trial court erred when it held it did not have jurisdiction to hear the “tax exemption” issue and, thus, the trial court did not make sufficient findings. In its order, the trial court held:

The issues as to tax returns will remain the same as in the parties’ separation agreement concerning (M.G.) but as to (L.G.), the Court finds that the Court does not have jurisdiction so as to determine income tax return matters and makes no ruling as to which party shall claim (L.G.) for any tax benefit.

Traditionally, in Kentucky, the trial court had jurisdiction to rule on the allocation of dependent child tax exemptions. For instance, in *Hart v. Hart*, 774 S.W.2d 455, 457 (Ky. App. 1989), the Court noted that, while some states interpret the United States Code to preclude state courts from considering the exemption issue, other state courts decide they can allocate the exemption and may require the custodial parent to execute the necessary written waiver of their right to make the claim. In *Hart*, the Court asked what effect 26 U.S.C. § 152(e) had on the trial court’s ability to allocate income tax exemptions. (Under 26 U.S.C. §

152(e), the custodial parent gets the tax exemption unless they waive their right to make the claim.) The Court concluded that a trial court can allocate the exemption because Congress did not expressly prohibit state courts from this when it enacted the Code, and state courts traditionally decide such issues. *Id.*

The reasoning behind *Hart* was confirmed in *Marksberry v. Riley*, 889 S.W.2d 47, 48 (Ky. App. 1994). “[T]he law is well-settled following our decision in *Hart* . . . that a trial court has the authority to allocate the tax exemption between the parties. The court is to maximize the benefit of the exemption and has a broad discretion in doing this.” *Id.* The following year, in *Pegler v. Pegler*, 895 S.W.2d 580, 581 (Ky. App. 1995), the Court confirmed once again that a trial court has discretion to allocate the tax exemption between spouses, despite 26 U.S.C. § 152(e), which permits the deduction to be taken by the custodial parent. Most recently, the Kentucky Supreme Court explained that the trial court can order the “custodial parent” to sign a waiver of the exemption, although the trial court cannot “award the exemption like a piece of property” by its order. *Adams-Smyrichinsky v. Smyrichinsky*, 467 S.W.3d 767, 784-85 (Ky. 2015).⁴

Here, the trial court would have had jurisdiction to allocate the tax exemption between Cody and Jaylynn as to their youngest child, L.G., and to

⁴ The Kentucky Supreme Court used the term “custodial parent” because the IRS uses that term. However, in Kentucky, a “custodial parent” is what the courts call the “primary residential parent.” *Adams-Smyrichinsky*, 467 S.W.3d at 781 n.12.

modify the allocation as to their oldest child, M.G. However, because the tax laws recently changed and dependent child tax exemptions have been eliminated, this issue appears to be moot. If other “tax return issues” not addressed by the parties are in dispute, they will need to be raised in the trial court.

As to the second issue regarding parenting time, Cody admits he did not properly preserve this issue but requests appellate review under CR 52.03 or CR 61.02. Instead, we review this issue pursuant to *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011), which held that a litigant should not be prohibited from asking for appellate review when the trial court did not make specific findings of fact. We will first address Cody’s argument for equal parenting time of his youngest child, L.G., followed by Cody’s argument for equal parenting time of M.G.

In its order, the trial court found that Cody should have joint custody of L.G. and his time with L.G. would be the same as his time with M.G., which is every Thursday at 6 p.m. until Sunday at 6 p.m. Cody argues that the trial court should have presumed he was entitled to equal parenting time of L.G., pursuant to KRS 403.270(2), and that Jaylynn did not rebut this presumption.

The trial court did not include any findings in its order of how Jaylynn overcame the presumption of equal parenting time or if the relevant factors under KRS 403.270(2) were considered. KRS 403.270(2) provides:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and . . . there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent . . . has with the child and is consistent with ensuring the child's welfare. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents . . . as to his or her custody;
- (b) The wishes of the child as to his or her custodian . . .
- (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (d) The motivation of the adults participating in the custody proceeding;
- (e) The child's adjustment and continuing proximity to his or her home, school, and community;
- (f) The mental and physical health of all individuals involved

Under this statute, the court should presume the parents get equal time with their child. And, if a deviation from equal time is needed, the court should consider the factors outlined above.

The trial court's order did not explain why equal parenting time was not applied, how Jaylynn rebutted the presumption of equal parenting time for

L.G., or why equal parenting time was not in the best interest of L.G. Instead, during the hearing, the trial court summarily concluded that “whatever (M.G.) gets, (L.G.) gets.”

Jaylynn did not dispute that Cody is as good a caregiver as her, but implied that Cody should be happy with the timesharing schedule because he gets more time than “most fathers get.” Right now, Cody has 72 hours per week with his children, while Jaylynn has 96 hours. This is not equal. The amount of time a child spends with a parent is important and, although the timesharing arrangement may appear close to equal, that does not negate the presumption of equal parenting time. Because we accept Cody’s statement of the facts and issues as correct, pursuant to CR 76.12(8)(c), and we conclude the trial court did not include findings of fact to support its ruling, we reverse the order as to the timesharing arrangement of L.G. On remand, if the trial court does not grant equal parenting time, findings of how this presumption was rebutted should be included in the trial court’s order, including why equal parenting time is not in the best interest of L.G.

As to M.G., Cody similarly argues the trial court disregarded the presumption of equal parenting time. However, the timesharing arrangement of M.G. issue is different than L.G.’s because M.G.’s schedule was originally agreed upon in the parties’ March 2017 decree. So, to increase his parenting time with M.G., Cody had to request the trial court to modify the decree.

At first, Cody's motion requested sole custody or, alternatively, joint custody with equal parenting time of M.G. At the hearing, however, Cody told the trial court he wanted equal parenting time, not a change in custody. The trial court granted Cody's request to modify the timesharing arrangement of M.G. to the extent that Cody would receive alternating weeks in the summer. However, Cody complains the trial court denied his request for equal parenting time otherwise and incorrectly applied a change in circumstances standard instead of the best interest of the child standard.

Generally, the decision to modify timesharing is reserved to the sound discretion of the trial court. *Williams v. Frymire*, 377 S.W.3d 579, 589-90 (Ky. App. 2012). We will not disturb the trial court's ruling absent an abuse of that discretion. *Id.* at 589. With that said, the application of the appropriate legal standard in a given case is a question of law we review *de novo*. *Walker v. Blair*, 382 S.W.3d 862, 867 (Ky. 2012).

Cody contends the trial court applied the wrong standard when it failed to consider the best interests of the child. Cody's initial styling of his motion for a change in custody or, in the alternative, for joint custody with equal parenting time may have led to the trial court's decision, so we turn to the well-known case of *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), for guidance.

In *Pennington*, the Kentucky Supreme Court clarified the distinction

between modification of custody and modification of visitation/timesharing. Custody refers to the decision-making authority for the child and is either sole, joint, split, or shared. If custody is modified, it changes from one type (e.g., sole) to another (e.g., joint). Timesharing, on the other hand, is the amount of time a child spends with a parent.

Here, Cody and Jaylynn have joint custody of M.G. Even though Cody requested a change in custody in his motion, he was really seeking modification of the timesharing arrangement, not the custody arrangement. So, Cody was asking the trial court to consider what is in the best interest of M.G. as to what extent she spends time with him, not that he become the sole decision-maker. “[C]hanging how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree.” *Id.* at 767.

Pursuant to *Pennington*, a motion to modify timesharing is controlled by KRS 403.320(3). *Id.* at 769. That statute provides that a trial court “may modify an order granting or denying [timesharing] whenever modification would serve the best interests of the child[.]” KRS 403.320(3); *see also* KRS 403.270(2) (identifying factors to evaluate the child’s best interest). Because Cody was seeking to modify timesharing, not custody, he was only required to show that modification of the parties’ parenting schedule would serve the best interests of the children. He was not obligated to identify and prove a change in circumstances,

which is the standard when seeking to modify a custody arrangement.

Accordingly, we reverse the order denying Cody's motion to modify the timesharing arrangement of M.G. On remand, the trial court should evaluate Cody's motion for modification pursuant to KRS 403.320(3) and KRS 403.270(2) and make specific findings of fact.

This opinion is not to be construed as a ruling on the merits, as the trial court remains the finder of fact and determines the weight of the evidence, including the credibility of witnesses. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). As the party seeking modification of the timesharing arrangement, Cody bears the burden of proving that an increase in his timesharing with M.G. is in the child's best interest. *Pennington*, 266 S.W.3d at 769.

CONCLUSION

For the foregoing reasons, we reverse the Clay Circuit Court's order as to paragraph 9 regarding the timesharing of L.G. and M.G. On remand, the trial court shall issue findings of fact regarding how the presumption of equal parenting time of L.G. was rebutted. As to M.G., the trial court should evaluate Cody's motion to modify timesharing under the best interest of the child standard.

The allocation of the dependent child tax exemption issue is rendered moot given the elimination of these exemptions with the 2018 change in tax laws.

Any remaining issues regarding income tax return matters will need to be presented to the trial court for further evaluation consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Brittany N. Riley
London, Kentucky