RENDERED: OCTOBER 4, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000293-ME

P.L.U. APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 13-J-00163

A.D.H. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND SPALDING, JUDGES.

COMBS, JUDGE: This matter arises out of motions filed by the Appellant, P.L.U. (Father), *pro se*, to modify custody and child support. Finding no error, we affirm.

We limit our discussion of the record to the issues before us. The parties are the parents of one minor child born in 2012. By an order entered on December 11, 2013, the McCracken District Court awarded the Appellee, A.D.H. (Mother), sole custody, having found that the parties disagreed on every aspect of

raising the child and that a joint arrangement would be toxic to the child. The court ordered that Father have standard visitation in accordance with the McCracken County schedule and that he pay $407.00 per month in child support.

On July 25, 2018, Father, *pro se*, filed a motion to modify custody in which he requested joint custody and "50/50" timesharing. On September 14, 2018, he filed a motion to modify his child support obligation.

The matter was heard on January 7, 2019. By an order entered on February 11, 2019, the McCracken Family Court noted that Mother had previously been awarded **sole** custody due to the parties' inability to communicate and cooperate for their son's sake. The court found that since its earlier determination, the parties' communication and parenting relationship had improved. The court made detailed findings of fact as set forth in numerical paragraphs 1-5 of its order as follows:

> 2. The father filed the motion and requests joint custody and an equal timesharing schedule. He testified that he wants to be involved in major decision-making about the child and that he has worked tirelessly to improve the co-parenting so that he may enjoy more time with his son. He testified about the improvements in the relationship with the mother. He testified about the strong relationship and bond that he shares with his son. He has maintained a stable residence and married a wonderful woman and stepmother to [the child]. The father testified about an incident when [the child] came to his home and talked about getting a wedgie from his new stepfather. Instead of calling the mother to ask about the situation, he contacted law enforcement, which resulted

in the child having to be interviewed by police officers, social workers and PASAC. The matter was resolved and he has no ongoing concerns about the step-father, but he testified that he believes his course of action was reasonable. He also records every conversation and interaction that he has with the mother and plans to continue to do so. He believes this is reasonable and testified that doing so keeps his behavior in line.

3. The mother testified and agreed that the coparenting relationship has improved, in large part to [the father's wife] becoming involved. She disagrees that they are able to coparent without stress and conflict. She testified about the father's ongoing "narcissistic and odd behavior", such as recording every single conversation and interaction they have. . . . The mother expressed frustration about the way the father handled the "wedgie incident". The Court finds that the father could have resolved this issue with a simple telephone call to the mother and that involving law enforcement and other state agencies was unnecessary. The mother also expressed concern that the father is always late. She gave examples of the child's sporting team having to sit out and take a penalty because [the child] was not there yet. She is concerned about the father getting the child to school on time. . . .

. . . .

5. The Court believes that the father is well-intentioned, however, the Court is concerned that [Father] is an incredibly unreasonable person who justifies his behavior and does not appreciate the impact of his statement or actions on others. [Father] claimed that others have stated that he acts like he might be "on the spectrum", which the Court finds to be an accurate observation. All this said, the Court believes that he has [the child's] best interests at heart and that he is capable of participating in and making reasonable contributions and decisions about [the child's] life.

The court found that it is in the child's best interest for the parents to share joint custody. With respect to timesharing, the court determined that:

> [I]t is in the best interest of [the child] to maximize the amount of time that he can spend with both parents. The Court also finds that the child needs a predictable and consistent routine. Due to the ongoing conflict between the parties, the Court desires to minimize the number of exchanges between the parties. The Court does not consider alternating a week to week schedule, as the parties are still not able to coparent and exchange information in the way necessary to use this schedule. Also, the Court believes that being away from the mother for 7 days at a time would be difficult for the young child. The Court finds that it is in [the child's] best interest for his alternating weekends with his father to be extended. The father shall have timesharing every other weekend from Friday after school until Wednesday morning when he takes the child to school. He shall also have the child every Tuesday after school until 8:00 PM.

With respect to child support, the court explained that determining Father's income was a greater challenge than Mother's because Father is "grossly underpaid by his work." Father is co-owner of a business which he helped create. He is the software developer, and his partner handles the finances and business aspects. The business is located in a duplex where both partners also reside. Father testified that his salary is $100.00 a week and that the business pays "for all expenses, including mortgage, utilities, telephone, car insurance, food, etc." The business pays the Father's wife $10.00 per hour for her work. The court also found that:

> The father claims that his goal is to earn $10 million per year and that his low salary is a necessary startup cost for his company. . . . The father presented a witness that he hired to assist him in communicating with the mother and that he paid $500 to appear in Court. The father having the resources to hire a communication "expert" (the Court did not find this witness to be an expert for Court purposes) is not consistent with his testimony about his income. He also testified that [the business] pays his $400 per month child support obligation as a "loan" with no payback terms in effect. The father's partner and CFO of [the business] testified that the father's replacement value to the company would cost six figures and that [Father] could likely obtain employment earning $52,000.00 per year. For purposes of calculating child support, the Court imputes this income for the father and then deviates from the Guidelines due to the father's timesharing that exceeds that through the typical standard schedule. Pursuant to the guidelines, the father shall pay the mother **$500.00** monthly, effective February 1, 2019. . . .

The court also ordered that Father pay a portion of Mother's attorney's fees. The court found that Father's multitude of pleadings and litigation efforts, *pro se*, caused Mother to incur significantly higher attorney's fees than the typical custody case. The court also observed that even if an attorney had practiced the case in such an "outrageous manner," it would have awarded attorney's fees. Therefore, the court directed Father to pay $1,500 to Mother's counsel, Joe Roark, Esq., within 90 days.

On February 22, 2019, Father filed a Notice of Appeal to this Court from the order of February 11, 2019.

Father first argues that the court made insufficient findings of fact in stating that he wrongly reported suspected abuse to the authorities without attempting to communicate with Mother first. He devotes more than four pages of his brief to re-hashing the "wedgie incident." The court simply found that Father could have resolved the matter with a telephone call to Mother and that involving law enforcement and other agencies was unnecessary.

With respect to timesharing, Father contends that the trial court abused its discretion, making an erroneous finding of fact and insufficient findings as to why it did not order equal parenting time.

> An appellate court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion or were clearly erroneous in light of the facts and circumstances of the case. Whether the proper law was applied to the facts is reviewed *de novo*. The test is not whether we would have decided the issue differently, but whether the findings of the trial court were clearly erroneous or an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Hudson v. Cole, 463 S.W.3d 346, 350 (Ky. App. 2015) (citations and internal quotation marks omitted).

KRS[1] 403.340(6) provides that:

[1] Kentucky Revised Statutes.

> Subject to KRS 403.315[2], if the court orders a modification of a child custody decree, there shall be a presumption, rebuttable by a preponderance of evidence, that it is in the best interest of the child for the parents to have joint custody and share equally in parenting time. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare.

In the case before us, the trial court determined that it was in the child's best interest to maximize the amount of time that he can spend with both parents. However, the court deviated from the presumption of equal parenting time due to ongoing conflict between the parties. Thus, the court desired to minimize the number of exchanges between the parties. The court considered that being away from the mother for seven days at a time would be difficult for the young child but that it would be in his best interest to extend his alternating weekends with Father. The trial court carefully and properly applied the statute in making its ruling, and its findings are amply supported by substantial evidence. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003). We find no error.

---

[2] KRS 403.315 is entitled, "Presumption that joint custody and equally shared parenting time is in best interest of child inapplicable if domestic violence order entered against a party[.]"

Next, Father contends that the trial court made an erroneous finding of fact regarding his income. Father contends that "nowhere in the record does the testimony of Mr. Johnson [his business partner] state that [Father] could likely find employment making $52,000/year." He adds that "other than a misquote from Mr. Johnson and pure speculation by the court," there is no evidence that would warrant an imputed annual income of $52,000.00.

However, Father provides no references to the record as required by CR[3] 76.12(4)(c) regarding the testimony which he asserts that the trial court misconstrued. That rule provides as follows:

> The organization and contents of the appellant's brief shall be as follows:
>
> . . . .
>
> (iv) A "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal, with ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape recordings . . . .
>
> (v) An "ARGUMENT" conforming to the statement of Points and Authorities, with ample supportive references to the record . . . .

[3] Kentucky Rules of Civil Procedure.

Litigants who are proceeding *pro se* are required to follow the Kentucky Rules of Civil Procedure. *Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009). We decline to search the record to determine whether or not it supports a party's assertions. *Walker v. Commonwealth*, 503 S.W.3d 165, 171 (Ky. App. 2016). It is the **obligation of a party** to provide that information to the court.

In *McGregor v. McGregor*, 334 S.W.3d 113, 117 (Ky. App. 2011), this Court explained that:

> Kentucky Revised Statute ("KRS") 403.212(2)(d) allows a court to base child support on a parent's potential income if it determines that the parent is voluntarily unemployed or underemployed. The statute further provides that a "court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation." Rather, a parent's potential income must be based upon the parent's "employment potential and probable earnings level based on the obligor's or obligee's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community." KRS 403.212(2)(d).

Maclean v. Middleton, 419 S.W.3d 755, 775 (Ky. App. 2014), further provides that:

> [D]etermination of . . . earning capacity involves a finding of fact, which will not be disturbed unless clearly erroneous. CR 52.01. Due regard shall be given to the opportunity of the trial court to evaluate the weight of the evidence and the credibility of witnesses.

The trial court found that Father's testimony about his income was inconsistent with his having the resources to hire a so-called "communications expert." Again, we find no error.

Father also contends that the trial court failed to make sufficient findings in ordering him to pay a portion of Mother's attorney's fees. The trial court ordered him to pay the fee **directly to Mother's attorney.** However, the issue is not subject to appellate review because Father failed to name Mother's attorney as a party to the appeal. *Fink v. Fink*, 519 S.W.3d 384 (Ky. App. 2016) (attorney is an indispensable party to appeal where attorney's fee is ordered paid directly to attorney); *see Aisin Auto. Castings v. Rose*, No. 2007-CA-000825-WC, 2007 WL 3317545 (Ky. App. Nov. 9, 2007) (failure to name attorney as a party to the appeal is fatal to issue regarding attorney's fees but not to entire appeal). Therefore, we lack jurisdiction to review this argument.

Father's due process arguments are mis-founded. He contends that he was denied due process when the trial court denied his motions for attorney's fees and for default judgment without any findings of fact or law. "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02[4]." CR 52.01. Father also contends that he was denied due process when the court imputed his income,

---

[4] CR 41.02 is entitled "Involuntary dismissal; effect thereof[.]"

because no party alleged or pled that he was making $52,000.00 a year. However, Father opened that door and invited scrutiny when he himself filed a motion to modify child support.

Father next contends that the court made insufficient findings in that it did not find any material change in circumstance relating to his income in order to warrant an imputed income of $52,000.00 a year. However, we have already determined that the trial court did not err in its determination of Father's income for child support purposes.

Father argues that the trial court's findings do not exceed the threshold of a preponderance of the evidence necessary to overcome the presumption that equal parenting time is in the child's best interest. However, we have already determined that the court properly applied the statute and that its findings are supported by substantial evidence.

Father's final argument is that the trial court violated judicial canons in making statements in open court that it had a personal relationship with Mother's counsel and that Father was "a difficult person to work with." Our review reveals no violation whatsoever of any canon of judicial conduct.

We AFFIRM the order of February 11, 2019, of the McCracken Family Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

P.L.U., *pro se*
Paducah, Kentucky

BRIEF FOR APPELLEE:

Joseph B. Roark
Paducah, Kentucky