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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002149-ME

JOHN STEPHEN TELEK — APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 00-CI-00155

SAMANTHA (DAUGHERTY) BUCHER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

LAMBERT, JUDGE: John Stephen Telek appeals from several orders entered by the Kenton Family Court regarding child support and custody arrangements between him and the mother of his child, Samantha Daugherty Bucher. Telek

[1] Senior Judge Edwin White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statues (KRS) 21.580.

claims the family court abused its discretion in entering these orders. Finding no abuse of discretion, we affirm.

The minor child, J.T., was born in 1997. The parties abided by informal child support and custody arrangements until 2000. Then, Telek initiated litigation to establish custody and support by court order. Custody and support determinations were made by agreed order at that time. Unfortunately, relations between the parties started to deteriorate in 2001.

By 2008, the parties had filed volumes of pleadings against each other. Telek insisted on increasing the custody arrangements to a 50/50 schedule, and Bucher complained that Telek was uncooperative and failed to timely pay his child support. In fact, Telek had been found in contempt on several occasions for failure to pay the court-ordered support. Due to the high degree of conflict between these parties, a guardian *ad litem* was appointed to represent the child in 2005. During the course of these protracted proceedings, three different judges presided over this matter.

Matters currently before this Court involve the amount of child support Telek must pay to Bucher, the custody arrangements between the parties, and the supervision and enforcement of court orders. Telek insists that the family court erred in its most recent assessments of these issues. We disagree, and thus, affirm.

In his first assignment of error, Telek contends the family court abused its discretion in not granting his motion to increase his parenting time to a

50/50 schedule. Citing KRS 403.270 and KRS 405.020, he states that equal parenting time between the biological parents in a custody dispute must be presumed as a matter of law.

A family court's custody determination will not be disturbed unless there is an abuse of discretion. *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008). "Abuse of discretion implies that the family court's decision is unreasonable or unfair." *Id.* (internal citation and quotation omitted). Upon careful review, we find no abuse of discretion in the family court's denial of Telek's motion to modify the custody arrangements in this case.

In making its August 8, 2008, custody determination, the family court found as follows:

> John Telek, the father, has repeatedly requested equal parenting time with [the minor child]. On November 28, 2000, Judge Douglas Stephens entered an order establishing joint custody and set forth specific parenting time for John. . . . That order awarded the parties joint legal custody and named the mother, Samantha Daugherty (now Bucher) as the primary residential parent. . . .
>
> Since that order there have been numerous attempts to resolve the parties' differences through counseling, mediation, and hearings, but unfortunately to no avail. Dr. Ed Connor at one point recommended joint legal custody with an alternating 3 day schedule for parenting time. However, that recommendation was based on many factors including continued therapy and mediation and, most importantly, the parties' ability to cooperate with each other. Over the years the parties have discontinued therapy, failed to mediate most issues and have shown an inability to cooperate on even insignificant issues. In fact, within the past year the

> hearings reveal a total lack of respect for each other and often [the minor child's] best interest. . . .
>
> The Court withheld issuing orders hoping the parties would recognize the need for them to cooperate for [the minor child's] sake. However, it has become painfully clear that the parties cannot and will not act in [the minor child's] best interest. Rather, they continue to place their lack of respect for each other and their need to control the situation over [the minor child's] needs and wants. . . .
>
> [Telek's] motion for shared parenting time is DENIED. The Court is aware that Dr. Ed Connor and the [guardian *ad litem*] have recommended shared parenting time with alternating parenting days. Dr. Connor suggested every 3 days, the [guardian *ad litem*] suggested every 7 days. The Court finds this would not be in [the minor child's] best interest nor would it resolve the basic problem between the parents – a lack of communication and cooperation. In fact, the Court believes this would cause more problems for [the minor child] than it would resolve.

Although denying Telek's motion to change the custody arrangements to a 50/50 schedule, the family court did grant Telek three additional weeks of "uninterrupted parenting time" during the minor child's summer vacation.

Telek argues on appeal that the family court's order must be set aside because it fails to make any findings of fact to support its deviation from the recommendations of a custody evaluator and the guardian *ad litem*. This is simply false. As set forth above, the outdated recommendation of the custody evaluator (made in 2000 when the child was a toddler) was no longer viable because it was premised on the satisfaction of many conditions that were never met. The order further explained that increasing the father's parenting time at this juncture was not

in the minor child's best interest due to the high degree of conflict between the parties.

Telek claims he should not be "punished" for the parties' inability to communicate or cooperate because he shares no blame for the situation. The family court's order indicates otherwise. Upon review of this record, we hold that the family court's finding on this issue is not clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). As implicitly noted in the family court's order, Telek's repeated litigation seeking to gain equal parenting time is counterproductive in the absence of any demonstration by Telek that he is willing to cooperate with or respect Bucher for the sake of their child. It has long been established that cooperation and communication between the parents is essential to facilitating a successful shared parenting arrangement. *See Squires v. Squires*, 854 S.W.2d 765, 769 (Ky. 1993); *Gertler v. Gertler*, __ S.W.3d __, __ (Ky. App. 2010). As these conditions are not present here, we discern no abuse of discretion in the family court's denial of Telek's motion to increase his parenting time to a 50/50 custody sharing arrangement.

Telek also appeals the granting of a right of "first refusal" to Bucher in an order entered on July 14, 2008. According to this order, Telek was to have visitation every other weekend with the minor child during the summer of 2008. However, Bucher was to be given the "right of first refusal, whenever [Telek was] going to be away from the child for more than one hour." Telek claims that not

giving him a corresponding right of first refusal whenever the child was with Bucher was unfair and in violation of his constitutional right to equal protection under the law.

As explained by Bucher, this provision was enacted due to the fact that Telek had left the then ten-year-old child unsupervised that summer. As Bucher was available during this time, the family court felt that a right of first refusal to her during times when Telek was unavailable to supervise the child was reasonable. Nothing in this determination reflects any arbitrary or unequal treatment of Telek. Telek's constitutional argument is without merit.

Telek next argues that the family court committed reversible error when it denied his motion to reduce his child support obligation without first preparing a child support worksheet and making specific findings regarding the parties' current incomes. "As 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). After careful review of this record, we hold that there was no abuse of discretion in the family court's failure to prepare a child support worksheet or to make findings regarding the parties' current incomes in this case.

As argued by Telek, KRS 403.211(2) provides that the child support guidelines set forth in KRS 403.212 "shall serve as a rebuttable presumption for

the establishment or modification of the amount of child support." However, once a child support obligation is established, modification may occur "only upon a showing of a material change in circumstances that is substantial and continuing." KRS 403.213(1).

In this case, the family court found that Telek had been ordered in 2001 to pay, pursuant to the guidelines, $883.08 per month based on Telek's ability to earn $50,000.00 per year as a self-employed contractor with over twenty years of experience. This child support was later reduced in 2002, by agreement of the parties, to $520.00 per month. As there was no showing of a material change in circumstances, the family court concluded that a modification of the current figure was not warranted.

Telek argues that the $50,000.00 of income imputed to him back in 2001 was erroneous. However, that order is not currently before the court. He further argues that the $520.00 per month figure established by an August 12, 2002, agreed order is not supported by substantial evidence. That order is also not before this Court. Rather, the pertinent question to this appeal is whether Telek presented any evidence demonstrating that a material change of circumstances occurred since the entry of the 2002 order. We agree with the family court that no such showing was made. Without a showing of a material change in circumstances, preparation of a child support worksheet and findings regarding the parties' current incomes are not necessary. Telek's argument to the contrary is without merit.

Telek next contends that the family court erred in entering a contempt order against him. On October 31, 2008, the trial court held Telek in contempt for violating the family court's previous order setting guidelines for telephone contact with the minor child. Telek was sentenced to three days in jail, with the sentence being conditionally discharged for a period of two years, provided that Telek did not violate any further court orders.

"[W]e will not disturb a court's decision regarding contempt absent an abuse of its discretion." *Meyers v. Petrie*, 233 S.W.3d 212, 215 (Ky. App. 2007). "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

After careful review of these circumstances, we find no abuse of discretion in the family court's entry of this contempt order. A September 10, 2008, order of the family court set forth the following guidelines for telephone contact with the minor child:

> Phone visitations shall take place around 8:30 p.m. every evening that the parent has not seen and talked to the child. Each call shall last approximately ten (10) minutes. The call shall be private between child and parent. Mother and Father shall work in a flexible manner with each other to assure the phone visitations take place in a non-stressful environment for the minor child.

The family court found that Telek violated the above by repeatedly calling Bucher's home in a harassing manner on at least one occasion, calling

when he had already seen or spoken with the minor child, and talking with the child for a period in excess of ten (10) minutes on at least one occasion. Telek argues that holding him in contempt for the repeated calls was unfair since "there was no mention of the number of times dad should call when there is no answer." He further argues that holding him in contempt for talking to his child in excess of the time allowed by order or calling on days when he had already seen or spoken to the child is not reasonable. As noted by Bucher, Telek's phone behavior had been an ongoing problem and exceedingly disruptive to her and her family. The family court clearly agreed since it entered an order imposing the guidelines set forth above. There was nothing unreasonable or unfair in the family court's enforcement of its order.

Telek next contends the family court acted outside its authority in ordering the parties to "participate in binding arbitration." He claims that "binding arbitration" was set forth in the following provision of the family court's September 16, 2008, order: "The parties shall participate in Parenting Coordination with Dr. Jean Deters." Telek argues that such a requirement amounts to a delegation of the trial court's judicial function to a third party.

KRS 403.270(2) directs that courts shall determine custody of children "in accordance with the best interests of the child." In cases where "the child's physical health would be endangered or his emotional development significantly impaired," KRS 403.330(2) grants trial courts the authority to "order the local probation, another appropriate local entity, or if currently involved in the

case, the child welfare department to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out."

In this case, the parties were ordered to participate in a type of counseling service for parents who are unable to communicate or reach agreements regarding the day-to-day custody arrangements of their children. A parenting coordinator is assigned to help the parties work together to accomplish this task. In instances where the parties are unable to agree, the parenting coordinator will make a decision that is in compliance with the family court's orders. If either party should disagree with the parenting coordinator's determination, they may turn to the family court for a final decision.

Telek contends that participation in such counseling is a form of "binding arbitration" because he is required to abide by a parenting coordinator's decision during the time it takes to obtain a final decision from the family court. The guardian *ad litem* argues that the parenting coordinator is simply supervising the court's orders to ensure that their terms are carried out pursuant to the authority set forth in KRS 403.330(2). We agree with the guardian *ad litem* that requiring parties to participate in such counseling does not constitute an improper delegation of the family court's judicial function. *See Akers v. Stephenson*, 469 S.W.2d 704, 706 (Ky. 1970) (trial court has inherent authority to enforce its own orders). Rather, in a high conflict case such as this, the parenting coordinator merely assists the court by ensuring that the court's mandates are being carried out in a manner that serves the best interests of the child.

In his final argument, Telek argues that the family court acted outside its authority in ordering the parties to purchase *Family Wizard* software at a cost of one hundred dollars ($100) per year to each party. Telek contends that the software is unnecessary and not in the best interests of the child. The guardian *ad litem* argues that the software is a critical tool in assisting the court to supervise and enforce its custody determinations. Among other things, the software provides time-stamped documentation regarding the parties' communication, allows the guardian *ad litem* and the trial court to monitor the parties' communications, provides interactive family scheduling and information management, and provides secure storage of medical history and emergency contacts. In light of the high degree of conflict present in this case, we agree with the guardian *ad litem* that the family court was within its authority and discretion to order the use of this software. As set forth above, along with parenting coordination, the *Family Wizard* software assists the trial court in supervising its orders and reducing excessive litigation through the facilitation of effective communication between the parties.

Having been presented with no reversible error, we hereby affirm the orders of the Kenton Family Court.

ALL CONCUR.

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