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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000878-ME

JON-MARK FRENCH APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE STEPHEN M. JONES, JUDGE
ACTION NO. 06-CI-00790

REBECCA FRENCH (NOW PAUL) APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE AND KRAMER, JUDGES.

ACREE, JUDGE: Appellant, Jon-Mark French, appeals the February 27, 2018, order of the Laurel Family Court modifying timesharing. Finding no manifest injustice, we affirm.

FACTS AND PROCEDURE

Jon-Mark (Father) and Rebecca French (Mother) married in 1999. Two children, a boy and a girl, were born of the marriage. Both were little more than toddlers when the parties' divorce decree was entered in 2007.

The decree incorporated a settlement agreement that awarded joint custody with near equal timesharing, no primary residential parent, and no child support. The arrangement worked for many years until the children reached adolescence. Father's relationship with the parties' son, J.F., became strained. Now emancipated and living with Mother, J.F. is not a subject of this appeal. However, the parties' daughter, T.F., born in 2003, remains the subject of the custody and timesharing dispute between the parties.

Concerned about T.F.'s relationship with Mother, Father arranged counseling for T.F. with Therapeutic Solutions and one of its counselors. Mother was neither included nor informed of the counseling sessions. The counselor made recommendations less favorable to Mother and more favorable to Father. Father used these recommendations to pursue a change in the custody arrangement.

The procedural history is more complex, but it is enough to say both Father and Mother moved for sole custody or, alternatively, for more timesharing.

Prior to hearing these motions, the family court ordered Father, Mother, and the children to engage in counseling at Intrust Healthcare. The social

worker there recommended granting Mother additional timesharing with T.F. and noted his concern about the lack of reconciliation between Father and J.F.

The court held a hearing on the pending motions on February 6, 2018. Nothing worthy of note was atypical about this proceeding. On March 8, 2018, the family court ruled that the parties shall continue to have joint custody of T.F., but modified timesharing to allow Mother more time with T.F.

Father timely appealed.

STANDARD OF REVIEW

Standards for modifying custody and timesharing are succinctly stated in *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). "[A]fter two years from the date of the custody decree, the standard [for modifying custody] reverts to review of the best interests of the child, either under KRS 403.270 or KRS [403.340(3)]." *Id.* at 767. "Visitation, [or timesharing] . . . can be modified upon proper showing, at any time . . . pursuant to KRS 403.320" based on the best interests of the child. *Id.*

A party who complies with our rules of appellate procedure is entitled to review under the above standard. When a party chooses to disregard or deviate from our rules, a different standard may apply. As explained below, the judicial grace of substantial compliance will save an appeal from dismissal almost always. But, it will not save a rule violator from all sanctions. In cases like this, in which

non-compliance with our rules does not prejudice or cause harm to the opposing party, a permissible sanction is to review the case for manifest injustice only.

ANALYSIS

We regret having to address, yet again, an attorney's failure to comply with rules of appellate procedure. In this case, Father failed to comply with several sections of our rule governing the preparation of briefs, CR 76.12.

Section (4)(c)(i) and (ii) of that rule requires an appellant's brief to begin with an "INTRODUCTION" followed by a "STATEMENT CONCERNING ORAL ARGUMENT." Father's brief begins with his "POINTS AND AUTHORITIES." And his "POINTS AND AUTHORITIES" section does not conform to the requirements of the rule's section addressing that part of the brief, CR 76.12(4)(c)(iii).

In fact, Father violates section (4)(c)(iii) in several ways. A proper "POINTS AND AUTHORITIES" section is like a table of contents. It is supposed to "set forth, succinctly and in the order in which they are discussed in the body of the argument, the appellant's contentions with respect to each issue of law relied upon for a reversal, listing under each the authorities cited on that point and the respective pages of the brief on which the argument appears and on which the authorities are cited." CR 76.12(4)(c)(iii). Father's "POINTS AND AUTHORITIES" lists two statutes and five cases. He does not set out any

argument for appellate relief. He does not associate any of his seven authorities with any ground for reversal. He does not even identify the pages of his brief on which the two statutes and five cases may be found.

Father also fails to comply with CR 76.12(4)(c)(v). Coincidentally with his failure under CR 76.12(4)(c)(iii) to set forth the arguments in the "POINTS AND AUTHORITIES" section, the three argument sections appearing on pages 6, 9, and 14, do not "conform[] to the statement of Points and Authorities[.]" CR 76.12(4)(c)(v). More significantly, none of these three argument sections includes "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." *Id.*

Father did not comply with CR 76.12(4)(c)(vii). That section of the rule requires that "[t]he first item of the appendix shall be a listing or index of all documents included in the appendix." CR 76.12(4)(c)(vii). We found the appendix index attached as the second page of the brief. Having located that index, we see that it further fails to comply with the requirement that "[t]he index shall set forth where the documents may be found in the record." *Id.* Appellant violates this section of the rule in a third way, by failing to "place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." *Id.* Father chose as the first item of the index a

copy of KRS 304.340 instead of the order from which the appeal is taken. We found that order under the third of eighteen tabs.

Additionally, the text of a brief "shall be double spaced . . . ." CR 76.12(4)(a)(ii). Much of the brief is single-spaced, noticeably pages 8 through 13, in violation of this rule.

Finally, CR 76.12(6) requires the attorney preparing the brief to certify that, at the time the brief is filed, "the record on appeal has been returned to the clerk of the trial court or that it was not withdrawn by the party filing the brief." CR 76.12(6). Appellant's certificate says that the record "will be returned" and not that it has been returned. Although this may seem a minor deviation from the rule, "records in the hands of the clerk are the records of the court." *Ex parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978) (quoting *Summers v. City of Louisville*, 140 Ky. 253, 130 S.W. 1101, 1102 (1910)). And "whatever belongs to the courts belongs to the public. In a fundamental sense we are only trustees . . . ." *Id.* at 625. We trust attorneys who engage in appellate advocacy as temporary custodians of these important records. It is not too much to expect them to assure this Court that they have returned the records to the proper trustee. For that reason, the certification requires the lawyer's oath that the records have already been returned, not merely a promise they will be returned in the future.

What is the consequence for violating these appellate rules? Fortunately for Father and others who find the rules challenging, inconvenient, or annoying, compliance with procedural rules in the appellate courts, like horseshoes and hand grenades, need not be precise to be effective, at least in obtaining some kind of review. Substantial compliance is firmly entrenched in our procedural jurisprudence. *Ky. Farm Bur. Mut. Ins. Co. v. Conley*, 456 S.W.3d 814, 818 (Ky. 2015). And, some members of the bar have shown no reluctance to embrace this judicial leniency when presenting appeals to this Court, confident that dismissal is highly unlikely. *Id.* ("appropriate sanction for the violation of a rule is *not* automatic dismissal").

Still, says the Supreme Court, "where a[n advocate's] procedural misstep is appreciably serious, dismissal may be the appropriate remedy." *Id.* (citing CR 73.02(2)(a) ("Failure to comply with other rules relating to appeals . . . is ground for . . . dismissal of the appeal . . . ."). Not to worry, however. If an appellant names and timely notices the proper parties, sufficient harm to dismiss an appeal is virtually never to be found. This is because whether that procedural misstep is "appreciably serious" *enough* depends on "*the harm caused* and the severity of the defect, as determined on a case-by-case basis." *Id.* (citation omitted) (emphasis added)). The key phrase here is "the harm caused."

"The harm caused" refers to any harm or prejudice caused "to the parties." *See id.* (citing *Flick v. Estate of Wittich*, 396 S.W.3d 816 (Ky. 2013) (clerical error in naming parties to an appeal did not prejudice the parties); *Crossley v. Anheuser-Busch, Inc.*, 747 S.W.2d 600 (Ky. 1988) (a tardy prehearing statement properly served did not result in harm to the parties)). Other potential for harm caused by the routine application of substantial compliance is rarely addressed in our opinions.

For example, we have never considered any possible harm to the image of bench and bar caused by making "close enough" the standard when it comes to rules for lawyers. We seem to treat a professional advocate's actual failure to follow appellate rules as no more harmful than his Constitutionally-protected right to "criticize [such rules] and published court decisions [which we conclude] does not . . . undermine the public's confidence and respect for the judiciary." *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 957 (Ky. 1991).

Nor have we expressed concern about potential harm to the quality of appellate advocacy. We trust that substantial compliance will not invite mediocrity as acceptable practice in our appellate courts. We hope that trust is not misplaced.

And, our opinions do not express concern that accepting substantial compliance will erode the bar's respect for process and procedure. After all, why

should we presume lawyers will be less likely to obey our rules as written, simply because the courts have become less likely to enforce them as written?

We are optimistic that by *accepting* substantial compliance we are not *discouraging* strict, or at least stricter, compliance with our rules. However, some suspect that we are. At least in the case before us, our embrace of substantial compliance appears to have discouraged counsel from reading, or at least following, the basic requirements of CR 76.12. That failure to follow our rules justifies an appropriate sanction, less than dismissal.

In addition to the authorized sanction of dismissal under CR 73.02(2)(a), we may strike the brief pursuant to CR 76.12(8)(a). In fact, the scope of sanction is broader still. "Failure to comply with . . . rules relating to appeals . . . is ground for such action as the appellate court deems appropriate . . . ." CR 73.02(2). One acceptable sanction is "to review the issues raised in the brief for manifest injustice only, *Elwell v. Stone,* 799 S.W.2d 46, 47 (Ky. App. 1990)." *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). We do so in this case.

Father argues there were no changes in circumstances sufficient to justify a custody modification. We agree. Perhaps that is why the family court made no modification of the original custody order. Custody remains, as it has always been, joint custody between Father and Mother. The family court's order modified the parties' *timesharing arrangement*, not custodial status.

Clearly the family court considered the factors for modifying custody because both parties sought a custodial change – both sought sole custody. After analyzing the factors set out in KRS 403.340 regarding custody modification, the family court "ORDERED that the parties shall have equal joint custody of [T.F.]"

Rather than modifying custody, the family court revised timesharing. "[C]hanging how much time a child spends with each parent does not change the legal nature of the custody ordered in the decree." *Pennington*, 266 S.W.3d at 767. Father's arguments are all tied to statutes and standards relating to modification of custody. These are irrelevant here.

If we construed Father's argument as challenging the family court's grant of more time for Mother to spend with T.F., we would still find no manifest injustice. "[W]hen . . . visitation/timesharing modification is sought, the specific language of KRS 403.320(3) controls, which allows modification of visitation/timesharing 'whenever modification would serve the best interests of the child,' and specifically directs that a court 'shall not restrict a parent's visitation rights' unless allowing visitation would seriously endanger the child." *Id.* at 769. Father makes no reference to KRS 403.320 in his brief nor does he argue that the modification of timesharing was an abuse of the family court's discretion.

Nevertheless, we reviewed the record satisfactorily and confidently conclude there was no abuse of discretion in the family court's increase of

timesharing with T.F. in favor of Mother. Although Father's time with T.F. was reduced, it was not "restricted" as that term is used in KRS 403.320. "As used in the statute, the term 'restrict' means to provide [either] parent with something less than 'reasonable visitation.'" *Kulas v. Kulas*, 898 S.W.2d 529, 530 (Ky. App. 1995). Just because Father spends less time with T.F. than he did under the decree, the timesharing he now has is not "less than 'reasonable visitation.'" Pursuant to the order, Father has T.F. from Monday at 6:00 PM till Wednesday at 6:00 PM and every other weekend from Friday at 6:00 PM to Monday at 6:00 PM. (R. at 676). Summer timesharing and holidays were also equally divided between the parties.

CONCLUSION

Pursuant to the foregoing analysis, we affirm the February 27, 2018, final order of the Laurel Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Laura A. Phillips Barbourville, Kentucky	Rebecca French, *pro se* Corbin, Kentucky