IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

GRACE MARINI,

Appellant/Cross-Appellee,

v.

Case Nos. 5D17-1726
5D17-3479

STEVEN KELLETT,

Appellee/Cross-Appellant.

_____/

Opinion filed August 16, 2019

Appeal from the Circuit Court
for Seminole County,
Jessica J. Recksiedler, Judge.

Mark A. Skipper, of Law Office of Mark A. Skipper, P.A., Orlando, for Appellant/Cross-Appellee.

John A. Baldwin, of Baldwin & Morrison, P.A., Fern Park, for Appellee/Cross-Appellant.

EDWARDS, J.

The parties in this paternity and time-sharing case are Appellant/Cross-Appellee Grace Marini ("Mother") and Appellee/Cross-Appellant Steven Kellett ("Father"). They have spent a great deal of time and money on litigation because they are unable to reach any agreement on most aspects of each party's relationship with their son. In fact, it

seems that they only agree on two things. First, they both love their son. Second, they agree that the court-ordered time-sharing schedule is not in the best interests of the child because it requires a young child and one of his parents to travel three out of four weekends every month by plane between North Carolina and Florida at great expense and inconvenience to both parents and the child. We find that the trial court abused its discretion in establishing the aforementioned time-sharing and travel schedule.

We also find that the trial court abused its discretion in ordering the child's surname to be changed from that of Mother to Father's for the announced purpose of establishing a good father-son bond and to conform to certain traditions. The trial court also abused its discretion with regard to calculating the parties' relative financial situations for purposes of child support and allocation of expenses related to the child by: (1) considering each party's gross rather than net income, (2) overlooking the cost incurred by Mother for the child's and her own health insurance, (3) ordering a constant amount of monthly child support, retroactively, currently, and for the future, without considering that the amount of time the child spent with each parent in the past is different than it is presently and is different from what it will be in the future, (4) imputing income to Mother based upon full-time employment, when Mother could not be employed full-time given her travel obligations under the time-sharing scheme, (5) failing to properly consider the financial evidence presented, and (6) ordering Mother to pay $25,000 of Father's attorney's fees without making any findings of the parties' relative need and ability to pay. Further, in some respects, the amended final judgment departs from the trial court's oral pronouncements without explanation. We reverse the amended final judgment and remand for further proceedings to correct those rulings. On the other hand, we affirm

without further discussion those portions of the amended final judgment that determined: (1) Father is the child's natural, biological father, (2) an amended birth certificate shall be issued that identifies and documents Father as the child's father, (3) that permitting Mother to permanently relocate to North Carolina is in the child's best interests, and (4) that Father is entitled to reasonable time-sharing with the child, which may include extended time periods during summers, holidays, and some weekend visitation. We will set forth some factual background and then discuss each issue in turn. We recognize that the parties have made the trial court's already difficult job all the more so by their unwillingness to agree, failing to timely provide relevant evidence to the trial court, and failing to focus primarily on their child's best interests.

BACKGROUND FACTS

Mother and Father dated for a period of time in 2013, but never married each other. After they broke up, Mother advised Father that she was pregnant with his child. He in turn advised Mother that when his prior wife separated from him, he became very upset, exhibiting significant emotional problems and engaging in several episodes of dangerous behavior within a relatively short period of time. Mother, who became concerned by the news of Father's emotional problems and unsafe behavior, consulted a professional about how to balance ensuring the child's safety with permitting Father to have a relationship with their child. Mother determined that the proper balance would be to limit Father to short supervised visits at her house, initially twice but then later once per week.

Because Father did not find such limited visitation acceptable, he filed a petition to determine paternity, establish a time-sharing and parenting plan, and determine how the child's on-going expenses would be paid by each parent. Mother counter-petitioned,

seeking similar relief and also requesting the court's permission to move from Florida to North Carolina where her fiancé lived and where she had a firm offer for a good, well paying job. Father was permitted to amend his petition several times and added a request that the child's surname be changed from Mother's to his and that a new birth certificate be issued identifying Father as the child's father.

TIME-SHARING AND TRAVEL SCHEDULE

The standard of review for rulings on time-sharing and travel schedules is whether the trial court abused its discretion. *See Lewis v. Juliano*, 242 So. 2d 1146, 1148 (Fla. 4th DCA 2018). The trial court granted, on a temporary basis initially, Mother's request to relocate from Florida to North Carolina. The relocation was later approved on a permanent basis. The trial court found that Mother's concern about the child's safety, given Father's prior emotional problems and dangerous behavior was understandable and genuine; however, there was no actual need to so strictly limit Father's visitation. Initially, the court ordered that Father would have four consecutive nights each month with the child in North Carolina and four consecutive nights each month with the child in Florida, all unsupervised. All the travel between Seminole County, Florida and North Carolina was restricted to Allegiant Airlines.

At a later hearing, the trial court modified the time-sharing with Father to receive the first, third, and fourth weekends of each month, from Thursday to Monday, half of summer and Christmas breaks, Father's Day weekend, and alternating Thanksgiving and Easter holidays. The trial court suggested that the parties could reduce the travel expenses by having the child travel alone on the airplane, and simply having a flight attendant take him on and off the planes. The parties advised the trial court that this

travel schedule required purchasing at least six round-trip tickets each month at an expense of approximately $2700 each month and that the travel schedule was exhausting for the child as well as for the parents, especially when flight delays were taken into consideration. Both parties testified that the travel schedule was wreaking havoc on their employment status because of the time each had to miss from work. Finally, the parties advised the trial court that their son was too young to travel by himself on a plane and that the airline would not permit his solo travel until he was five years old.

After more hearings, the trial court again dealt with time-sharing and travel in an amended final judgment. All of Father's time-sharing would take place in Florida and all of Mother's would be in North Carolina. The amended final judgment provided a three-tier scheme for non-holiday visitation. For the first tier, until the child reaches the age of five, Father shall have six consecutive overnights with the child beginning on the first and third Monday of each month.[1] The second tier provided that when the child reaches five, but before he enters elementary school, Father will have time-sharing on the first, third, and fourth weekend of each month, from Thursday to Monday. The third tier provided that once the child enters elementary school, the Father will still have him the first, third, and fourth weekends of each month, but from Friday until Sunday evening.[2] The

[1] This schedule would require a total of six round-trip tickets each month: two round-trip tickets per month for the child and two round-trip tickets each month for Mother to drop the child off in Florida and two more round-trip tickets each month for either Mother or Father to take the child from Florida back to North Carolina.

[2] If somehow Mother and Father became convinced that it was appropriate to place a five-year old alone on an airplane six times a month, this schedule would require the purchase of three round-trip tickets each month. If Mother chose to accompany the son on the trip to Florida and Father chose to accompany the son on the return trip to North Carolina, then this travel schedule would require the purchase of a total of nine round-trip tickets each month.

amended final judgment also provided: the parents would each have visitation during one-half of the summer and Christmas breaks; the parents would alternate Thanksgiving and Easter holidays; the child would spend Mother's Day with Mother and Father's Day with Father; Spring Breaks would be spent with Father; and specified time-sharing for various contingent holidays.

While the trial court has great discretion in establishing a time-sharing schedule or parenting plan, it must be done with the best interests of the child as its primary consideration. *See* § 61.13(3), Fla. Stat. (2017). A trial court's ruling amounts to an abuse of discretion "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (internal quotation/citation omitted).

We find that the trial court abused its discretion in establishing this time-sharing and travel schedule as it is unreasonable to require a young child to take two or three dozen annual airplane flights. Such frequent flights with the predictable occasional delays are not in the best interest of the child. Additionally, both parents have testified that they cannot afford the expense of the airline tickets nor the time and income lost from work associated with the travel. We must conclude that no reasonable person would take the view adopted by the trial court. Accordingly, we reverse that portion of the amended final judgment and remand for entry of a reasonable time-sharing and travel schedule that will require the child to fly or otherwise travel between North Carolina and Florida only infrequently. Until such time as the trial court has had entered a new time-sharing and

travel schedule, the parties shall continue to follow the current holiday and school break schedule.

CHANGING THE CHILD'S SURNAME

"The standard of review regarding a change in a child's surname is abuse of discretion." *Neville v. McKibben*, 227 So. 3d 1270, 1273 (Fla. 1st DCA 2017). The trial court granted Father's request to change the child's surname from Mother's to Father's, finding that the name change was in the child's best interest because Father wanted to be involved in the child's life and that the change would promote a father-child relationship. However, as this Court determined in *McKay v. Kaikey*, 860 So. 2d 1046 (Fla. 5th DCA 2003), such reasoning is insufficient to establish that the name change is in the child's best interest. In that case, the father wanted the child to carry on his family name and to know his father's last name, and the court granted the father's request after finding that the mother had originally given the child her surname in anger towards the father. *See McKay*, 860 So. 2d at 1049. This Court held that both the father's and the trial court's reasonings were insufficient to prove that the name change was in the child's best interest. *Id.*

Changing a child's name "is a serious matter and such action may be taken only where the record affirmatively shows that such change is required for the welfare of the minor." *Cothron v. Hadley*, 769 So. 2d 1148, 1148 (Fla. 5th DCA 2000). Here, neither the trial court, Father, nor the record affirmatively show that a change in the child's surname from Mother's to Father's is in the child's best interest. Thus, we find that the trial court abused its discretion in ordering the child's surname to be changed to Father's and reverse that portion of the amended final judgment.

CALCULATING CHILD SUPPORT AND EXPENSES

We also find that the trial court abused its discretion in calculating the parties' financial circumstances in regard to child support and child-related expenses. First, the court improperly calculated child support using the parties' gross income rather than their net income. *See J.A.D. v. K.M.A.*, 264 So. 3d 1080, 1083 (Fla. 2d DCA 2019) ("The trial court erred by failing to make specific findings concerning each parent's net monthly income and relying only on each parent's gross monthly income. . . . Because the guidelines are based on the parents' combined net income and there is an absence of findings as to same in the appellate record, this court cannot conduct a meaningful appellate review of the child support award."). While the final judgment does not indicate whether the incomes were gross or net, the court orally stated several times that the calculations were based on gross income. The court made no findings as to the parties' net income; thus, we are compelled to reverse. *See id.* ("Stated another way, we are compelled to reverse because the absence of findings regarding the parties' net incomes precludes a determination as to whether the award was within the guidelines established in section 61.30 or whether a departure from the guidelines was justified.").

Second, the trial court overlooked health insurance expenses incurred by Mother for both her and the child. The evidence below showed health insurance cost Mother's husband at least $136.06 per month for the child and $209 per month for Mother, and that Mother reimbursed her husband $90 per month for these expenses. The court even verbally found that Mother's insurance cost her husband $209 and that she paid him $90

per month. However, the final judgment incorrectly reflected that the husband incurred no additional expense for health insurance for Mother and the child, thus, the court did not take those expenses into account when calculating Mother's income and the amount of child support. Section 61.30, Florida Statutes (2017), provides for the deduction of health insurance costs when calculating child support, *see* § 61.30(3)(e), (8), Fla. Stat. (2017), and the court abused its discretion in failing to do so. Thus, we reverse and remand with instructions for the court to include the health insurance expenses in its calculations and to enter a child support order that comports to its oral findings. *See Y.G. v. Dep't of Child. & Fams.*, 830 So. 2d 212, 213 (Fla. 5th DCA 2002) (remanding with instructions for court to conform written order to oral pronouncement); *Freid v. Freid*, 731 So. 2d 833, 835 (Fla. 5th DCA 1999) (finding that the oral pronouncement controls over the written order).

Third, the court abused its discretion in its calculations of retroactive and future child support. The court awarded Father $313 per month in both retroactive and future child support, which, as Mother argues, suggests the court calculated the amounts using the same income and time-sharing schedule. With the retroactive support award, the court properly used the same income as at the time of the final hearing since it found Mother was not honest in her reported income during the retroactive period. *See* § 61.30(17), Fla. Stat. (2017). However, the court failed to calculate the support award using the time-sharing schedules during the retroactive period. The evidence shows the time-sharing schedule changed three times during the retroactive period, with each change giving Father more overnights with the child. The multiple changes in overnights suggest the parties' 70/30 percentage share at the time of the final hearing would be

different during the retroactive period, thus resulting in a different amount of support, yet the $313 calculation in retroactive support indicates the court used the same percentage share as of the time of the final hearing. Similarly, the $313 in future child support indicates the court used the same time-sharing schedule as of the time of the final hearing despite the three-tier time-sharing schedule that reduces Father's number of overnights based on the child's schooling. We accordingly find that it was an abuse of discretion for the court to award the same amount of retroactive and future child support when the court-ordered time-sharing schedules show the amounts should be different, and remand with instructions for the court to recalculate the retroactive and future support awards using the time-sharing schedules pertinent to the respective periods.

Fourth, the court abused its discretion by imputing an income to Mother based upon full-time employment when the court-ordered time-sharing travel schedule prevents a full-time work schedule. Both parties testified below that the time-sharing schedule impacted their work schedule and that both had to miss work in order to travel with the child. Mother even testified that she had lost her main source of employment due to the work absences caused by the court-ordered time-sharing schedule, and that her employment had always been part-time for thirty hours per week. Despite the impact of the time-sharing schedule on Mother's employment, the court nonetheless imputed an income to her based upon full-time employment. Given that the evidence demonstrates neither party could maintain full-time work with that schedule, we find the court abused its discretion in imputing such an income to Mother. We reverse and remand with instructions for the court to recalculate Mother's income based upon the applicable time-sharing schedule.

Fifth, the trial court failed to consider the cost of travel expenses. The parties introduced evidence on the cost of flights and accommodations incurred because of the travel schedule and both testified that they could not afford the high expenses. It does not appear that the court considered the travel expenses when calculating child support or the parties' income. While the court is not specifically required to consider such expenses in all cases for child support, the catchall provision under section 61.30(11)(a)11, Florida Statutes (2017), provides that the court may consider reasonable and necessary existing expenses in order to achieve an equitable result. Given that the travel expenses are necessary expenses incurred pursuant to court order and that the parties both professed difficulty paying such exorbitant expenses, we find the court abused its discretion in failing to consider the expenses when calculating the child support award. The court also abused its discretion in failing to consider the travel expenses when determining the parties' income and Mother's ability to pay. We reverse and remand with instructions for the trial court to recalculate the parties' income and the child support award after factoring in the travel expenses.

Finally, we find that the trial court abused its discretion in awarding Father $25,000 in attorney's fees without first determining each party's need and ability to pay. The court awarded attorney's fees because Father had no unsupervised visits with the child and had to come to court to obtain such visits. While this reasoning may be a factor for consideration, it does not abrogate the requirement that Mother have the ability to pay and Father have a need. *See Zanone v. Clause*, 848 So. 2d 1268, 1271 (Fla. 5th DCA 2003) (finding that "over-litigation" is an appropriate factor to consider but does not "abrogate the requirement that Zanone have the ability to pay," and holding that courts

"must first determine whether the primary factors of need and ability to pay were demonstrated before any consideration may be given to" additional factors). Furthermore, the court's finding that Mother "obviously" had the ability to pay does not by itself establish Father's need. *See Bohner v. Bohner*, 997 So. 2d 454, 457 (Fla. 4th DCA 2008). Father presented no evidence that he did not have the ability to pay his attorney's fees, and we find the court abused its discretion by failing to make that finding. Accordingly, we reverse and remand the award of attorney's fees for the trial court to determine whether Father had a need for attorney's fees.

CONCLUSION

We reverse the amended final judgment and remand with instructions for the trial court, consistent with this opinion, to: (1) enter a reasonable time-sharing and travel schedule that is focused on the best interests of the child; (2) recalculate each party's net income with consideration of the new time-sharing schedule, health insurance costs, and travel expenses; (3) recalculate retroactive, current, and future child support; and (4) reconsider Father's request for an award of attorney's fees by considering each party's need and ability to pay. Given the passage of time since trial, the trial court may consider whether it should take evidence regarding the current status of the parties. We reverse that portion of the order requiring the change of the child's surname, and affirm in all other respects.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.

EVANDER, C.J., and ORFINGER, J., concur.