RENDERED: JUNE 15, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000434-MR

RICHARD DAVID DIKIN — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 95-CI-00563

PATRICIA DIKIN (NOW NEAL) — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND MCANULTY, JUDGES.

McANULTY, JUDGE: This case began as a dissolution action between appellant Richard Dikin and appellee Patricia Neal (formerly Dikin), in which the issues of visitation of the couple's daughter and child support were determined. Appellant filed a CR 60.02 motion to amend the decree. The trial court denied the motion on the basis that appellant failed to state a claim upon which relief could be granted. We have reviewed the record in this case, and we affirm the order of the trial court.

A motion for CR 60.02 relief is only warranted in situations justifying extraordinary relief. Davis v. Home Indem. Co., Ky., 659 S.W.2d 185 (1983). It is for matters which were

not and could not have been presented to the trial court. Id. Thus, it is not to be used as a substitute for an appeal. United Bonding Ins. Co. v. Commonwealth, Ky., 461 S.W.2d 535 (1970). Determinations under CR 60.02 are addressed to the sound discretion of the court and that exercise of discretion will not be disturbed on appeal except when an abuse has been shown. Brown v. Commonwealth, Ky., 932 S.W.2d 359, 362 (1996).

Appellant sought CR 60.02 relief from the trial court's order of December 17, 1998, in which the court held that it was not in the best interests of the parties' minor child for respondent to have visitation, and further found that visitation with appellant would seriously endanger the child. The court opined that the findings were "clearly compelled" in this case. As a basis for its holding, the court cited the following facts: (1) appellant had been convicted of sexual abuse in the first degree of his stepdaughter (appellee's daughter) who was under the age of eighteen at the time of the offense, (2) the "atrocious nature" of the crime and the misuse of trust placed in appellant as a stepparent as disclosed by victim impact statements, (3) appellant's testimony that the Sexual Offender Treatment Program was not offered at the institution in which he was incarcerated, accompanied by the information in appellant's institutional record that he had specifically refused to participate in the Program, (4) the potential for the child to be victimized if she visited appellant at the correctional institution, because of the possibility of inadequate supervision and (5) appellant's demonstrated "pattern of manipulative and

evasive conduct" before the court. In its order, the court also determined appellant's child support arrearage. Appellant did not appeal.

On December 19, 1999, appellant filed a motion to amend pursuant to CR 60.02, arguing that there was error in the trial court's order of December 17, 1998. Appellant basically contended that all of the findings of the trial court were erroneous, and sought resumption of visitation. Appellant also argued that it was unfair for the trial court to continue his child support obligation when there had been a "de facto" termination of his parental rights because he had no contact with or information about his daughter. Appellant further found fault with the trial court's use of the term "pedophile" to identify him. Appellant argued that term was not cited in appellant's judgment in his criminal case or in any mental health evaluation of appellant, nor is it a part of the statute under which he was convicted. Finally, appellant stated that if he did not obtain the above relief, he wanted a voluntary termination of his parental rights and an accounting of his child support arrearage.[1]

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[1] Subsequent to the trial court's order in this CR 60.02 case, appellee brought an action in the McCracken Circuit Court (Case No. 00-AD-00005) to terminate appellant's parental rights. As this was done after the trial court entered its final order in this case, it does not constitute part of the record on appeal. Since this was cited by appellee, we take judicial notice of it, KRE 201(c), for purposes of this explanation; however, it did not form a basis for our decision in this case.

According to the order in that case entered August 30, 2000, appellant voluntarily consented to the termination of his parental rights. Appellant was represented by counsel. The trial court found therein that the criteria for both voluntary

(continued...)

We believe that all of appellant's allegations of error are unfounded. We conclude from the record that the trial court's order of December 17, 1998 was supported by substantial evidence, and was in accord with applicable statutes and case law. The trial court properly denied visitation pursuant to KRS 403.320. Appellant has not shown that there was any mistake in the trial court's assessment of the evidence. Therefore, there was no basis for CR 60.02 relief.

The trial court properly, in accordance with recent case law from this Court, ordered appellant to pay child support while he was imprisoned. Marshall v Marshall, Ky.App., 15 S.W.3d 396 (2000). The fact that appellant was not entitled to have visitation with his daughter does not remove his responsibility for child support under the child support guidelines. We also believe that appellant errs in equating the denial of visitation with a termination of parental rights, since he retained the potential to have visitation restored after serving out his sentence, as stated in the trial court's order. There was no error in the order, and appellant has shown no right to relief under CR 60.02.

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[1](...continued)
termination of parental rights and involuntary termination of parental rights had been shown by clear and convincing evidence, and that termination was in the best interests of the child. The court held that appellant's child support obligation ceased as of July 21, 2000, the date of hearing on the motion to terminate, but that appellant's child support arrearage remained "due and owing."

We agree with appellee that much of appellant's arguments contained in his CR 60.02 motion have been rendered moot by the voluntary termination of parental rights. Appellant surrendered his right to visitation with the termination of parental rights, and that cannot be restored by the instant action.

Appellant's last argument is that the trial court erred in labeling him a pedophile. The trial court stated as a finding of fact in its order, "The respondent is a convicted pedophile." It is true that this term was not used to describe appellant anywhere else in the record, and so we have no basis to determine whether this label was appropriately applied to appellant. However, appellant fails to show that the use of this term had any impact on this case. The trial court did not make its determination to deny visitation on the fact of appellant's conviction alone, but on all the circumstances. This is the type of complaint that should have been raised in the trial court and on direct appeal. It is not grounds for vacating the judgment under CR 60.02. We agree with appellee that any error in the trial court's characterization is harmless and does not justify relief in this case.

In conclusion, we find that the contentions cited by appellant in his CR 60.02 motion should have been raised by way of a direct appeal, and were not. Thus, relief by way of CR 60.02 is not appropriate. Based upon an examination of all of the foregoing, we agree that the trial court correctly determined that appellant failed to state a claim upon which relief could be granted under CR 60.02. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Richard D. Dikin, pro se Symsonia, Kentucky	Kevin D. Bishop Mayfield, Kentucky