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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002116-ME

MARK WINFIELD HARRIS APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT, FAMILY DIVISION
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 03-CI-00376

JACQUELINE TUSSEY HARRIS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Mark Harris appeals from the October 9, 2009, order of the Greenup Circuit Court, Family Division, addressing visitation and the payment of child support arrearages by his former wife, Jacqueline Tussey. He also appeals the order denying his motion to alter, amend, or vacate that ruling. Mark contends that the family court abused its discretion by refusing his request to watch the

children during Jacqueline's visitation time while she worked and by only ordering her to pay $20.00 per month toward past-due child support. We affirm.

Mark and Jacqueline were married in 1998 and separated in 2003. Mark filed a petition to dissolve the marriage on July 7, 2003, and moved for and was granted temporary custody of their two young children.[1] Following a hearing before the domestic relations commissioner, the court entered a decree of dissolution on July 28, 2005. In the decree, the court ordered the parties to have joint custody of the children, named Mark as the primary physical custodian, and awarded Jacqueline visitation. The court also ordered Jacqueline to pay $215.00 per month in child support.

In 2007, the parties returned to court, arguing about visitation.[2] In addition, Mark stated that Jacqueline was five months in arrears on her child support obligation. In an order entered August 28, 2007, the family court ordered Jacqueline to pay off the five-month arrearage at a rate of $20.00 per month. It also set up summer visitation schedules.

On September 24, 2009, Mark filed another motion concerning child support. He indicated that following the 2007 order, Jacqueline only paid five months of support at the increased rate of $235.00 per month, and that she had fallen further behind in her support obligation. Mark also requested that Jacqueline's Wednesday evening visitation with the children be suspended because

[1] At the time the petition was filed, Ian was 2½ years old, and Rachel was one year old.

[2] Following the entry of the decree by Judge Lewis D. Nicholls, the remainder of the case was heard by Judge Jeffrey L. Preston.

no meaningful visitation was being conducted. Rather, she was taking the children to a different location to be watched.

In her response, Jacqueline admitted that she was in arrears on her child support payments, but she blamed this on expensive car repair bills and her low wages. Until April 2009, Jacqueline had worked at a fast food restaurant thirty-two to thirty-five hours per week, earning $6.85 per hour. That month, she began working as a certified nursing assistant (CNA) at Kingsbrook Lifecare Center working forty hours per week, at a rate of $9.30 per hour. Regarding Wednesday evening visitation, Jacqueline explained that she had been attending a six-week course, which she had since completed and that she no longer had any conflict on Wednesday evenings. She did, however, state that she might have future conflicts due to her college courses and work as a CNA.

On October 9, 2009, the family court held a brief hearing on the issues raised in the motion, at which both Jacqueline and Mark testified. Mark introduced evidence without any real dispute that as of that month, Jacqueline owed $2,171.00 in arrearages on child support. Mark also introduced testimony that Jacqueline was having her mother watch the children while she worked during summer visitation. He requested an order permitting him to watch the children during periods of time that Jacqueline was working, rather than have the children watched by other relatives. At this juncture, we note that John is retired and that he collects disability benefits through his former employer, CSX. Jacqueline testified that she did not want Mark to watch the children during that time as she preferred her

family to be with them during her time of visitation. She also testified that she attended classes during the day on Monday and Wednesday and that she worked the other five days of the week from 2:30 p.m. to 11:00 p.m.

Following the hearing, the family court entered an order ruling on the pending motion. In pertinent part, the order reads as follows:

> [Jacqueline] admits she is in arrears in child support. The Court finds the arrears amount to be $2,171.00. [Jacqueline's] current child support obligation is $215.00 per month. The Court Orders [Jacqueline] to pay-off the arrearages at the rate of an additional $20.00 per month for a total of $235.00 per month to be paid by way of wage assignment.
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> . . . .
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> The Court declines to change the visitation schedule previously Ordered by this Court with the exception that the parties, during the hearing, agreed that the mid-week visitation could be altered depending on the time [Jacqueline] is working. The Court does not see any reason to change the visitation times. The mere fact that [Jacqueline] may be working during part of the time she had the children is not enough, under this Court's interpretation, to change the current visitation schedule.

Mark moved the family court to alter, amend, or vacate the October 9, 2009, order on two grounds. First, Mark argued that the family court's decision not to amend the visitation schedule was illogical and against his fundamental rights, as he should be the proper person to watch the children while Jacqueline works during her periods of visitation. Mark also argued that the family court abused its discretion when it ordered Jacqueline to pay only an additional $20.00 per month toward the $2,171.00 arrearage. He asserted that Jacqueline should be required to

pay the arrearage in a much quicker fashion. The family court denied Mark's motion in an order entered October 28, 2009, and this appeal follows.

On appeal, Mark continues to argue that the family court abused its discretion in refusing to alter the visitation schedule and in ordering the payment of only an additional $20.00 per month toward Jacqueline's child support arrearage. Jacqueline disputes Mark's arguments and contends that the family court did not abuse its discretion on either ruling.

Mark's first argument addresses Jacqueline's visitation with the children. He asserts that the family court abused its discretion by essentially permitting the children to be placed with a non-parent during periods of Jacqueline's visitation when he, their father, was able to watch them. This, he contends, is not in the children's best interest as no meaningful visitation between Jacqueline and the children was taking place and they were being deprived of their father during the times in question. Jacqueline counters that Mark has failed to establish that it would not be in the children's best interest to be in the care of their grandmother at times when Jacqueline was at work. She also contends that the added pressure of additional visitation exchanges would not benefit the children.

The applicable statute in this case is Kentucky Revised Statutes (KRS) 403.320(3), which permits the court to "modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" In *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008), the Supreme Court of Kentucky addressed modification of custody or timesharing, albeit related

to the issue of relocation, and set forth the applicable standard as that of abuse of discretion:

> Every case will present its own unique facts, and the change of custody motion or modification of visitation/timesharing must be decided in the sound discretion of the trial court. This is true whether the child lives with one parent in an arrangement like a sole custody arrangement or whether there is equal timesharing or something in between. Since "serious endangerment" or "best interests" is not defined, it is left to the sound discretion of the trial court whether the party opposing relocation has met his burden on either a modification of custody or visitation/timesharing.

Id. at 769. "Abuse of discretion in relation to the exercise of judicial power implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision. The exercise of discretion must be legally sound." *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (internal citations and quotations omitted).

In the present case, the family court declined to change the visitation schedule, holding that "[t]he mere fact that [Jacqueline] may be working during part of the time she has the children" was insufficient to justify Mark's requested change. We agree. During times when Jacqueline is at work, the children are in the care of their maternal grandmother, who Jacqueline testified is alert and in good health. Mark has failed to establish that this arrangement is not in the children's best interest. Ideally, Jacqueline would be with the children during the entirety of her visitation periods rather than only during the periods she is not working, but this is not currently possible due to the demands of her present work

schedule. However, there is nothing in the record to show that having the children's grandchildren watch them while Jacqueline works is not in their best interest. Consequently, we hold that the family court did not abuse its discretion in declining to modify the visitation schedule.

Next, Mark argues that the family court abused its discretion by only requiring Jacqueline to pay an additional $20.00 in child support per month toward her arrearage. He points out that at that rate, the $2,171.00 arrearage will not be paid off for nine years, by which time the oldest child will have reached the age of eighteen. Mark contends that this ruling amounts to the application of a double standard based upon gender. Jacqueline argues that the repayment schedule did not constitute an abuse of discretion based upon her minimal income and well-established car problems. She states that she needs to keep her 1991 Chevrolet Lumina automobile in working order so that she may get back and forth from work and her college classes.

Based upon Jacqueline's financial situation, we do not perceive any abuse of discretion in the family court's decision to add $20.00 per month to her child support obligation, raising the total monthly payment to $235.00. Jacqueline has amply established she is supporting herself earning $9.30 per hour as a CNA, is attending college classes to better her potential income, and has had to pay expensive car repair bills. Furthermore, Mark has not set forth any suggestion as to what he believes a reasonable payment would be under the circumstances. While this Court certainly does not condone her failure to stay current on her child

support obligation, we believe the family court carefully considered the evidence before it in determining a proper sum for her to pay toward her arrearage each month. We specifically disagree with Mark's assertion that the order demonstrated any type of double standard based on gender. Accordingly, we hold that the family court did not abuse its discretion in regard to the additional amount it ordered Jacqueline to pay.

For the foregoing reasons, the orders of the Greenup Circuit Court, Family Division, are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Jeffrey Scott
Grayson, Kentucky

BRIEF FOR APPELLEE:

Roger R. Cantrell
Greenup, Kentucky