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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001849-ME

WILLIAM NATHAN WALLS — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 05-CI-00081

LORI WYNN WALLS (NOW CONGER) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; SHAKE,[1] SENIOR JUDGE.

NICKELL, JUDGE: William Nathan Walls appeals from an order entered by the Caldwell Circuit Court on September 17, 2010, denying his motion to restore visitation with his minor daughter. He contends visitation should not have been denied absent proof that visitation with him would seriously endanger his child,

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

and the court should have imposed a less restrictive alternative, such as supervised visitation, rather than indefinitely terminating all visitation. Upon review of the briefs, the record and the law, we affirm.

FACTS

William and Lori Wynn Walls (now Conger) were married on June 20, 1998. A daughter, KBW, was born to their union on April 17, 2003. William and Lori separated on June 27, 2004, and on May 3, 2005, Lori petitioned the court to dissolve the marriage. The following month they filed a child custody and property settlement agreement under which they shared custody of their daughter, with Lori being designated as the primary custodian. The agreement awarded visitation to William and he agreed to pay child support in the amount of $300.00 each month.

On July 6, 2005, the Caldwell Circuit Court entered findings of fact, conclusions of law, and decree of dissolution of marriage. The court found the child custody and property settlement agreement was not unconscionable and incorporated it into the decree of dissolution.

On August 3, 2006, William filed a motion for review of child support. In August of 2008, Lori married her current husband, Craig Conger. On December 5, 2008, William filed a motion for review of visitation alleging:

> [b]een denied rights for the past year and half. I only see her when its (sic) convenient for her mother and she says that I am an unfit father. She goes on what people tell her and has no right to judge me or keep my daughter and (sic) from being together.

Lori responded to the motion stating:

1. Petitioner states that the Respondent has had reasonable and regularly scheduled opportunities to visit with the minor child when the child is with his mother, Wanda Wells.

2. Petitioner does not allow the Respondent to have unsupervised visitation with the minor child, [KBW], due to suspected drug use, recent arrests, and his failure to care for her when she has been in his physical custody in the past.

3. Petitioner believes that any visitation that the Respondent has with [KBW] should continue to be supervised by his mother and Petitioner is prepared to have witnesses to testify to support her position.

On December 30, 2008, William filed a letter with the court stating he and Lori had discussed the matter and he no longer wanted to pursue the motion for visitation.

In 2009, William and Lori executed an agreed order providing that:

1. Petitioner, Lori Conger, shall be awarded the sole care, custody and control of the minor child, namely, [KBW], born April 17, 2003. Respondent waives any and all visitation with the minor child, both present and/or future.

2. In the event that Petitioner's husband, in the future, desires to adopt the minor child, the Respondent agrees that he shall voluntarily terminate his parental rights and agrees to execute any and all documents necessary to effectuate the adoption.

3. Respondent currently owes child support arrearages to Petitioner in the amount of $1,446.93. Respondent agrees that this child support arrearage shall be paid, in full, no later than June 30, 2009. Any future child support obligation from Respondent to Petitioner is hereby terminated, effective immediately.

4. Any and all other orders of the Court not modified by this order shall remain in full force and effect.

The agreed order was entered by the court on January 21, 2009. On July 9, 2009, William signed a statement giving permission "for my daughter's name to be changed from [KBW] to [KBC]."

On June 23, 2010, William moved the court to restore regular visitation with his daughter. The motion referenced the agreed order in which he had waived his visitation rights to his daughter but alleged that he had enjoyed regular visitation with her until May of 2010 when Lori ceased visitation and all contact with him.

Following a hearing on September 3, 2010, the court entered an order denying William's motion to restore visitation. It is from this order that William appeals.

ANALYSIS

We begin with William's framing of the question on appeal as "whether the trial court's determination to deny all visitation with [William] was error." A critical fact omitted from this statement is William's voluntary signing of an agreed order waiving visitation with his daughter in exchange for freedom from any future child support obligation, an order he never challenged on appeal and never claimed was signed under duress. That agreement is enforceable by either party and "courts will enforce the agreement, provided it is for the best interest of the child." *Combs v. Brewer,* 310 Ky. 261, 264, 220 S.W.2d 572, 573

(Ky. 1949) (internal citations omitted). After reaching their agreement, William and Lori submitted it to the trial court in the form of an agreed order which the court signed and entered. Having failed to challenge the order, William must accept responsibility for his actions.

Next, William cites no authority for his position that the trial court erred in applying the best interests of the child standard rather than requiring Lori to prove visitation with William would seriously endanger their daughter's health under KRS 403.320(3). Again, we emphasize that William and Lori shared custody of their daughter when the decree of dissolution was entered in 2005. It was not until 2009 that William voluntarily relinquished all rights to visitation in return for freedom from any future child support obligation. William offered no evidence that he was compelled to sign the agreed order. He candidly testified he signed it so he would not have to pay child support and would not be sent to jail. Thus, in the true sense of the word, the trial court did not terminate William's visitation with his child. William made that choice of his own accord and enforcement of the agreed order is entirely appropriate.

Under *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky. App. 2000), cited by both William and Lori in their briefs on appeal, we:

> [w]ill only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case. *Wilhelm v. Wilhelm,* Ky., 504 S.W.2d 699, 700 (1973).

An abuse of discretion occurs when the "trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). Furthermore, a court's findings of fact are conclusive if supported by substantial evidence of a probative value. *Spurlin v. Spurlin*, 456 S.W.2d 638 (Ky. 1970).

After reviewing the evidence developed during the hearing on the motion to restore visitation, we conclude the trial court's factual findings are supported by substantial evidence. William's contact with his daughter has been sporadic at best. He called the child only one or two times during the five-year period after the separation and divorce and his promises to the child were often broken. In one striking example, the child returned home after seeing William and immediately began collecting items for the playhouse they were going to build together. When she returned home from the next visit with her grandparents she was distraught and inconsolable because William was not there to begin construction of the playhouse. In an attempt to placate the child, her stepfather spent the next month building a treehouse for her. As the trial court found, "[i]t would be in the best interests of the child for her to continue to have no visitation with [William] under the circumstances." Furthermore, the evidence developed during the hearing fully supports the trial court's finding that:

> [c]onsidering [William's] demeanor during the hearing, his past conduct, and the two signed agreements, the Court is not convinced that [William] is really interested in maintaining a relationship with his daughter and is not presently capable of supporting her.

Finally, William argues that the trial court was required to consider a less restrictive alternative to denying resumption of visitation. However, William has offered no authority for this theory.

For the foregoing reasons, the order of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Eddyville, Kentucky

BRIEF FOR APPELLEE:

Jill L. Giordano
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