

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000329-MR

RICHARD A. HIRSCH, JR.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE STEVEN R. JAEGER, JUDGE  
ACTION NO. 00-CI-01934

SUSAN M. HIRSCH

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Richard Hirsch (Richard), appeals the actions of the Kenton Circuit Court, claiming that the court was in error basing a child custody and support determination in part on telephonic testimony taken when Richard was not present. Appellee, Susan Hirsch (Susan), failed to file a brief, instead filing a motion to strike Appellant's Brief due to its failure to contain citation to the Record on Appeal. The Notice of Appeal shows that the determination Richard is appealing is an order affirming division of child support and visitation, with a few minor changes, and amending the parties' written agreement

regarding division of holidays with the child to reflect the year in which such division was to commence.

A hearing was held on December 13, 2002, regarding Susan's motion for contempt, Richard's motion for review of child support, and a counter motion for contempt. The court overruled both motions for contempt, and ordered payment of child support by Richard. The court found the parties' written Property Settlement Agreement, which included matters of visitation and child support, enforceable, with changes only as to when division of holidays starts. Richard asserts that the court took testimony over the telephone regarding the propriety of custody and the amount of child support when neither Richard nor his counsel were present. Richard claims to have objected to the evidence prior to entry of judgment in the case. Richard asserts that his objection was overruled by the trial court. No citation to the record is made in Appellant's Brief, and this Court finds no objection to the hearing in the record. Richard argues that the right of confrontation should extend to civil matters involving dissolution, custody and support proceedings.

The dissolution action underlying this appeal was filed in September, 2000. On November 14, 2000, the parties filed an Agreed Order permitting them joint custody of the minor children, who were 16 and 12 at the time. The parties agreed that Susan would be the residential parent for the 12 year old

girl and her 18 year old daughter, while the parties' son would stay with Richard. The parties agreed that Richard would pay child support in accordance with the child support guidelines. The parties agreed to share the marital residence. Susan renewed her motion for an award of temporary child support and maintenance in January, 2001. The trial court entered an order directing the marital residence to be sold, and awarding custody and child support in March, 2001. The court denied Susan's request for maintenance, but directed that Richard should pay child support in the sum of \$21.52 per week, as well as payment of \$28.48 weekly on the child support arrearages.

In May, 2001, Susan filed an affidavit stating that she had full custody of all three children, and was supporting all of them. She requested a new award of child support to reflect those facts. The court directed Richard to make mortgage payments on the marital residence, but denied the request for modification in child support.

In June, 2001, the court entered an order showing that Susan had moved orally to modify support due to her continued full time care of the parties' minor children. The court modified the child support requirements based on these facts. The court also ordered again that Richard pay arrearages on past due child support.

In November, 2001, Richard moved the court to hold a contested hearing. The motion was not filed with the financial disclosure forms required by Local Rule 33(c). The court reserved a ruling on the motion for that reason until a motion complying with the rules was filed. The matter was eventually set for trial in January, 2002.

In January, 2002, the parties entered into a Property Settlement Agreement, the stated purpose of which was "to settle and determine forever and completely all obligations and matters between them. . . ." The parties agreed that Susan would have physical custody of the parties' minor daughter, and Richard would have custody of the parties' minor son. Reasonable visitation was granted to each non-custodial parent. Richard agreed to pay child support in the sum of \$60.00 per week for the daughter, half her school fees, and all her health insurance. The court's order of dissolution incorporated this written agreement without change.

In June, 2002, Susan filed an affidavit showing that the parties' son had graduated from high school and became emancipated, and asked for a recalculation of child support based on the fact that she was the primary custodian of the parties' only minor child. A hearing on this matter was held in August, 2002. Richard was not present at the hearing, but counsel for Richard appeared on his behalf. In September, 2002,

the court entered an order recalculating child support. Richard was ordered to pay child support in the sum of \$132.38 per week, as well as making payments on the arrearage. Richard objected to the court's ruling, claiming that the income amounts used to make the child support determination were erroneous. A hearing was scheduled on this matter for December, 2002. Susan and her counsel were present in person at the hearing, and Richard and his counsel appeared via telephone. The court amended its ruling regarding child support and arrearages based on the evidence determined in the hearing.

Richard appeals that final order, contending that he was not present during the hearing. No evidence in the record supports Richard's assertion. The trial court's order states on its face that both parties were present, Richard and his counsel by telephone. Richard asserts that Susan gave testimony used by the court prior to his appearance on the telephone. There is nothing supporting Richard's contention in his brief, or in the evidence before this Court. The record reflects the fact that both parties frequently appeared via telephone, rather than in person, at hearings in the underlying action. The record also reflects extensive documentation regarding the parties' expenses, income, and financial condition. It must also be noted that the order appealed from only slightly modifies the court's earlier rulings, which were based on hearings in which

both parties were present, and on documents provided by both parties.

No contemporaneous objection is preserved regarding the court's actions in the final hearing. Richard did not file any objection to the court's ruling following entry of the final order. The record contains substantial documentation regarding the issues before this Court. While this Court does not approve of Susan's failure to file a brief in support of her position, in this case a ruling may properly be made on the evidence contained in the record.

Richard cites to foreign case law in support of his claim that he was denied his right to confront and cross-examine the witness. In Bonamarte v. Bonamarte, 866 P.2d 1132 (Mont. 1994), the Montana Supreme Court held that it was in error for the wife to testify telephonically at child support and custody hearings over the objection of the husband. That case differs from the present one in that it was the pattern of the parties in the underlying action to appear before the trial court telephonically, and no objection was ever made by either party to this method of appearing. Further, as numerous hearings permitting confrontation and cross-examination of the witnesses had been held in the underlying action, this case differed from Bonamarte, supra., where the ruling at issue was an initial custody and support determination. The final hearing, out of

many, in the present case, related solely to a minor adjustment in child support already ordered, and the ruling was based on documentation before the court and in possession of the parties. Richard also cites In Re., Baby K., N.H. 722 A.2d 470, 471 (1998), a case involving termination of parental rights. In that case, the New Hampshire Supreme Court overruled the termination based on the fact that procedural safeguards were not in place to protect an incarcerated father's due process rights. In the present case, due process rights were not an issue. The court was ruling on a slight modification in child support and visitation, and the ruling was not objected to by Richard.

We affirm the ruling of the Kenton Circuit Court, as there is ample evidence in the record supporting the court's ruling, and that under the circumstances in this case, the court permitting the parties to testify via telephone at repeated hearings, in the absence of contemporaneous objection by either party, does not constitute reversible error.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Ed Massey  
Erlanger, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed.