RENDERED: July 7, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-001233-MR

ROGER DALE BORDEN — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 97-CI-00573

PAULA JEAN BORDEN
AND COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILES AND CHILDREN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

BARBER, JUDGE: Appellant, Roger Borden (Roger), appeals from the order of the Warren Circuit Court holding that Roger could not increase visitation with his child unless he increased the payment of child support. Appellee, Paula Jean Borden (Paula), did not file a brief before this Court. Appellee Commonwealth

[1] Senior Judge Joseph R. Huddleston, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of Kentucky, Cabinet for Families and Children appeared regarding the increase in child support. The Court reverses the order of the Warren Circuit Court, and remands the case for appropriate consideration of visitation issues separate and distinct from requests for increased child support.

Roger and Paula are the parents of two minor children, a boy and a girl. The parties were divorced in 1997. Paula was awarded custody of the children, and Roger was granted visitation rights. Paula denied Roger visitation with the children following the dissolution. In October, 1998, the Cabinet intervened in the case, pursuant to its statutory authority as provided in KRS 205.712, which permits it to enforce child support obligations. On August 24, 1999, Roger was determined to be in contempt of court for failure to pay child support. He was ordered jailed for six months. Roger paid $1,138 of the child support a month later. An agreed order was entered holding that Roger would pay $56.25 per week on the remaining child support arrearage. Roger has paid $17,649.00 in child support and arrearages since October, 1999. The remaining arrearage, $4,517.25, was reduced to a judgment in favor of the Cabinet in March, 2001. Periodically, as the arrearage was paid down, the court reduced the amended sum to a judgment.

During the parties' marriage, Roger was employed at Ford's Furniture. Shortly after the dissolution, financial

necessity required the store to reduce his hours of employment. This reduction in employment was due to circumstances beyond Roger's control. For a period of six months Roger was forced to rely on odd jobs for various people in order to support himself. Roger then found new employment on a dairy farm. It was that employer who paid the bond and partial child support due so that Roger would be released from jail in September, 1999. Roger makes $200 per week at his employment. Roger took special education classes in high school. His standardized testing scores from high school show that he has severely limited academic ability.

In April, 2002, the Cabinet made a motion to increase child support. The Cabinet contended that child support of $50 per week was insufficient to meet the needs of the minor children. The Cabinet was the intervening petitioners in that matter, and the motion was filed on behalf of Paula, the respondent. The motion to increase child support was denied by the circuit court in July, 2002, due to the fact that there had been no 15% or more increase in Roger's income since the child support was ordered. Counsel showed that Roger's income had decreased since the dissolution. The Cabinet made a second motion to increase child support in August, 2004. This motion was made before a new judge. Counsel for Roger again informed the court that there had not been a 15% increase in Roger's

income since the child support order was entered, and provided evidence that Roger's income was less than it had been in 1997.

In September, 2004, at the Cabinet's request, a bench warrant was issued for Roger's failure to appear. In a motion to recall the warrant, counsel for Roger notified the court that counsel for the Cabinet had failed to respond to letters sent by Roger's lawyer before the hearing date, had failed to properly provide Roger with notice of the hearing at which Roger was alleged to have missed, and refused to meet with Roger's counsel or return phone calls to her prior to the hearing date. The court did recall the bench warrant after being apprised of the dilatory Cabinet's actions.

In November, 2004, Roger responded to the request for an increase in support by notifying the court that he could not pay any increase, and asking for a decrease in his payments on the arrearages due to his minimal income. The court failed to address the issue of Roger's decreased income, or his request that the payments for the arrearage be decreased. The court did address the Cabinet's request, and reduced the arrearage to a judgment as had been done periodically. The court held that it would take under consideration the Cabinet's request for an increase in child support due to the increase in cost of living since 1997.

Prior to the filing of the new motion requesting an increase in child support, Roger asked for visitation with his children. A visitation schedule had been made part of the dissolution, but Paula had not adhered to it, and Roger had made no prior motion to enforce it. Roger had been denied visitation by Paula since the dissolution. In April, 2003, Roger made a motion for regular visitation, asserting that he was not being given the visitation ordered by the court at the time of the dissolution. The circuit court ordered transition visitation between Roger and the children for a short period of time. This visitation period provided for a visit of several hours each Sunday. The visitation periods were successful, and by the end of the year, Paula permitted Roger to have the children for an entire weekend.

In August, 2004, Paula again began to deny Roger any visitation with the children. In November, 2004, Roger filed a motion for enforcement of the visitation provided for at the time of the dissolution. In his November, 2004 motion, Roger requested that the court enter a standing visitation order. The court met with the children before rendering a decision on the motion. Roger's son, who was sixteen at the time, elected not to continue visitation with Roger. Roger's daughter, who was twelve at the time, expressed a desire to have visitation with her father. Weekend and holiday visitation was established for

Roger and his daughter in an order dated December, 2004, and modified at Roger's request in March, 2005. Paula then began to deny visitation again. Roger renewed his request for a standing visitation order.

The Cabinet appeared on Paula's behalf with regard to the child support issue. The Cabinet argued that Roger was capable of earning more income, and was willfully underemployed. No facts or evidence were provided in support of that assertion. Roger's attorney showed the court that Roger had a limited education and therefore could not increase his income. Counsel for Roger provided high school failing grades, standardized testing scores, and Roger's employment history to the court.

The court entered an order dealing with both the motion to modify the visitation order to make visitation a regular schedule and the Cabinet's motion for an increase in child support. In that order, the court denied the motion to modify visitation "until [the] Father shows he can pay 20% more [child] support." The court's order left Roger without any scheduled visitation with the child.

Roger contends that he is not voluntarily underemployed. Roger spent just over two years in high school. During that time he was taking the lowest level classes available. Despite that, Roger failed several of his classes. Even in his special education classes, Roger earned grades as

low as a “D”. During the marriage, Roger earned slightly more income in his job at Ford’s Furniture. Roger showed the court that his job with Ford’s Furniture required significant lifting and other physical activity that he can no longer engage in. He earns less now because he is older and not so physically capable. Roger’s job entails simple and menial farm labor. Roger’s job duties are closely supervised, and Roger frequently has to be reminded to complete jobs. He is unable to supervise himself or complete all duties without reminding. The circuit court stated on the record that Roger is not voluntarily underemployed.

Roger argues that the child support is based on his higher earnings during the marriage, and that the child support amount he is required to pay is too high when it is taken in conjunction with the weekly payment on arrearages. He cannot provide for himself and pay the amount of child support and arrearages ordered on his current salary. Roger asked the court for a reduction in the arrearage payment. At the time of the dissolution in 1997, Roger’s income was $1,200 per month. Roger’s current income is $800 per month. Paula was unemployed at the time of the dissolution and remains unemployed. A statement by Paula made part of the record claims that she suffers from ill health and is attempting to get disability payments. Roger argues that the child support due should be

based on the Kentucky Child Support Guidelines found in KRS 403.212 rather than on his income level from 1997.

KRS 403.212(2) defines income as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." The uncontroverted evidence before the trial court showed that Roger has worked continuously since the dissolution, that he earns $200 a week, that his limited physical and mental abilities prohibit alternate or higher paying employment, and that Roger has made every effort to pay the child support and arrearage payments required by the court. In similar cases, where the father has limited ability to earn and a curtailed education, the court has found that the minimum child support allowed by the law is appropriate. Brashears v. Commonwealth Cabinet for Human Resources, 944 S.W.2d 873 (Ky.App. 1997).

Roger contends that the court's ruling requiring him to increase child support payments by 20% before he may have visitation with his daughter is unjust and improper. Roger argues that the law forbids tying visitation rights to ability to pay child support. KRS 403.320 provides guidelines for establishing visitation, and does not provide the means to deny visitation if child support is not increased. A prohibition on visitation is forbidden unless there has been a finding that visitation would seriously endanger the child. Kulas v. Kulas,

898 S.W.2d 529, 531 (Ky.App. 1995). The trial court is charged with identifying and protecting the child, and "the statutory directive on this issue is that visitation is to be determined in accordance with the best interests of the child." Stewart v. Burton, 108 S.W.3d 647, 650 (Ky.App. 2003).

At the time of the dissolution, Roger was granted visitation for three hours each Wednesday evening, and alternate weekend visitation. Roger was also granted three one-week periods of visitation during the summer. The parties were to alternate holiday visitation. At the hearing before the trial court, Paula testified regarding the visitation issue pro se, arguing against allowing Roger visitation. The Cabinet appeared on its motion to require Roger to increase his child support payments, as Roger still owed over $2,000 in arrearages. The record reflects that Roger had been paying the sum required by the court on the past due child support and remained current on his obligations from 1997 to the present.

The Cabinet assures this Court on appeal that it took no position on the visitation issue, and does not wish to involve itself in the visitation issue. The Cabinet asserts that it has no attorney-client relationship with Paula. Paula did not support her position on appeal. Where a party does not file a brief, the Court is permitted to accept as true statements of fact made by the Appellant. CR 76.12(8). Failure

to address an issue on appeal may be considered a waiver of that issue. Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000).

Visitation orders were in effect at the time of the hearing, permitting Roger alternate weekend visitation with his daughter. Roger contended that Paula was failing to comply with those orders. Paula provided no defense to the claim of non-compliance. Roger argued before the circuit court that he needed an order mandating compliance with the visitation already in place. The court declined to address the visitation matter until Roger increased child support payments, which the record is clear in showing that he is financially incapable of doing.

On appeal, the Cabinet contends that it does not claim that Roger is underemployed. These assertions are disproved by the Record on Appeal, which contains both the arguments of counsel for the Cabinet to that effect, and a memorandum filed by the Cabinet which contains the unsupported claims that "Petitioner [Roger] is voluntarily underemployed because his wages are less than minimum wage and significantly lower than when the original order was entered in 1997." The Cabinet also belittled Roger's employer, who has employed him since 1998, claiming that the employer's statements before the court to the effect that Roger is physically and mentally incapable of more demanding/higher paying employment are "without basis." Roger's lawyer, who trades legal services for yard work, also testified

that Roger is incapable of following any but the simplest directions, and must be constantly supervised while working. The Cabinet gave no credence to the attorney's testimony either. Obviously, counsel for the Cabinet, who was not able to provide any evidence showing that Roger was capable of more demanding employment, or that such employment was available to Roger in Warren County, made its assertions without any basis in fact. The law finds that bad faith is implied in a claim of voluntary unemployment. McKinney v. McKinney, 813 S.W.2d 28, 828, 829 (Ky.App. 1991). All circumstances must be taken into account in determining whether a party is voluntarily underemployed. Id. All evidence in the record shows that Roger is employed to his full capacity. The Cabinet's claims are wholly unsupported by law or fact.

The Cabinet argued that the court should find Roger's appropriate income to be $1,378.43 based on the increase in cost of living. Before the circuit court the Cabinet made repeated motions asking for an increase in child support payments and claiming that Roger was not paying enough. The Cabinet appeared on Paula's behalf in making those motions. The Cabinet never provided the court with any evidence supporting its claims that the child support could properly be increased. Before this Court, however, the Cabinet claims that it "takes no position on this appeal." This contention is refuted by the record on

appeal. The record shows that the Cabinet has been actively involved in the case both before the circuit court and on appeal, even making a motion to dismiss the appeal because Roger's brief was not timely filed due to severe illness of his counsel. The Cabinet's allegation that it has no involvement in the appeal and takes no position on the issues before this Court is without merit.

The trial court agreed with the Cabinet's position, finding that Roger should increase his child support payments. While recognizing that Roger does not make sufficient income to increase the payments, the court indicated that he needed to find a way to do so. The court took notice of Roger's limited mental and physical abilities, but did not find that those precluded an increase in earnings. There is no basis in the record for the court's assumptions.

For the foregoing reasons, we find that the trial court was in error in linking visitation with child support issues, and for requiring that a party increase child support payments before the visitation issue would be addressed. The court's ruling is reversed, and this case is remanded.

HUDDLESTON, SENIOR JUDGE, CONCURS IN RESULT.

MINTON, JUDGE, CONCURS IN RESULT.

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