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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001039-ME

DAVID ALAN HARNISH — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
ACTION NO. 02-CI-00302

BARBARA KAY HARNISH — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, SCHRODER, AND VANMETER, JUDGES.

ACREE, JUDGE: David Alan Harnish (David) appeals from an April 20, 2005, judgment[1] of the Mason Circuit Court awarding sole custody of the parties' three minor daughters to Barbara Kay Harnish (Barbara) and granting David visitation in accordance with the 19th Judicial Circuit Visitation Schedule. The judgment from which this appeal is taken was entered pursuant to our

[1] Although it is denominated "Findings of Fact, Conclusions of Law and Order Pursuant to Appellate Review," the order from which this appeal is taken is a final judgment as defined by Kentucky Rules of Civil Procedure (CR) 54.01.

previous remand of this case.[2] For the reasons stated herein, we affirm.

David and Barbara married on May 2, 1987. They have three minor children. Barbara initiated the underlying action by filing a petition for legal separation in the Mason Circuit Court. The petition was later amended to one for a decree of dissolution of marriage.

On September 24, 2003, the circuit court entered "Findings of Fact, Conclusions of Law, and Judgment of Dissolution and Award of Child Custody, Division of Property." Sole custody of the parties' three children was awarded to Barbara and visitation was granted to David.

David and Barbara subsequently filed motions to alter, amend or vacate the judgment and David filed a motion for a new trial. Kentucky Rules of Civil Procedure (CR) 59.05 and CR 59.01. David argued the judgment was insufficient as it failed to make findings of fact as required by CR 52.01. By order entered November 24, 2003, the circuit court denied David's motions.

David appealed the November 24, 2003, decision to this court on grounds, *inter alia*, that the circuit court failed to make findings of fact supporting the original award of sole custody to Barbara.

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[2] Opinion, Harnish v. Harnish, No. 2003-CA-002687-ME (Ky.App. February 25, 2005).

On February 25, 2005, this court entered an opinion vacating the custody award on grounds the circuit court failed to make specific findings of fact supporting that award. The case was remanded to the Mason Circuit Court for proceedings not inconsistent with that opinion.

On April 20, 2005, the Mason Circuit Court entered its Findings of Fact, Conclusions of Law and Order Pursuant to Appellate Review. That judgment again awarded sole custody of the parties' three daughters to Barbara and granted David visitation according to the 19th Judicial Circuit Visitation Schedule. This appeal followed.

David first argues that proper application of Troxel v. Granville[3] to these facts requires reversal of the Mason Circuit Court judgment. We disagreed with this argument when David presented it in his previous appeal and we disagree with it now.

In his prior appeal of this case, David made an identical argument to this court and we held: "The facts of Troxel [which addressed visitation rights of non-parents under a Washington statute] are obviously distinguishable from the case

[3] 530 U.S. 57, 147 L.Ed.2d 49, 120 S.Ct. 2054 (2000).

s*ub judice*. . . . We, thus, believe David's argument is without merit."[4]

This court is no less bound by its previous ruling in the case than was the circuit court upon remand. Consequently, we are precluded by the law of the case doctrine from reconsidering this argument.[5] For this reason alone David's argument would be without merit.

However, citing Troxel and Fenwick v. Fenwick,[6] David also urges this court to establish a rule that custody never be awarded solely to one parent absent a finding either that the other parent is unfit or that joint custody will endanger the child. Appellant's Brief p. 13. We decline to do so.

David's approach is in direct conflict with KRS[7] 403.270(2) which requires the trial court to "determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . ."[8] In many cases, the best interests of the child will require an award of sole custody to one parent with reasonable or even liberal

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[4] Opinion, Harnish v. Harnish, No. 2003-CA-002687-ME (Ky.App. February 25, 2005) p. 2.

[5] Commonwealth v. Tamme, 83 S.W.3d 465, 468 (Ky. 2002)("Obviously, the law of the case doctrine is intended to prevent defendants from endlessly litigating the same issue in appeal after appeal.").

[6] 114 S.W.3d 767 (Ky. 2003).

[7] Kentucky Revised Statutes.

[8] KRS 403.270(2).

visitation to the other. David's approach would deprive a trial judge that option since a grant of unsupervised visitation to a parent previously determined to be unfit would be highly suspect under the visitation statute.[9]

David's reliance for his argument on Troxel and Fenwick is misplaced. As noted above, Troxel involves the rights of third-parties relative to the superior rights of fit parents. The case adds nothing directly to the law as it relates to an original award of custody between two fit parents. In fact, a careful reading of Troxel shows that even in custody cases involving third-parties it does not require a court to find the custodial parent unfit before allowing non-parental visitation. In overturning Scott v. Scott,[10] this court said: "We believe that the Scott court incorrectly interpreted the Troxel case . . . as requiring such a strict standard . . . ."[11]

David's reliance on Fenwick is also misplaced. Fenwick addresses matters subsequent to the determination of custody, not the award of permanent custody itself. That is the issue before us. Fenwick involved the primary residential custodian's relocation with the children. Even in that context, and because the current version of KRS 403.340 is substantially

[9] KRS 403.320.

[10] 80 S.W.3d 447 (Ky.App. 2002).

[11] Vibbert v. Vibbert, 144 S.W.3d 292, 294 (Ky.App. 2004).

modified from the version it interpreted, "Fenwick carries quite limited precedential weight."[12]

Whether construed together or individually, Troxel and Fenwick do not justify, let alone require, a reversal of the circuit court's judgment.

David's second argument is that the trial court's award of sole custody to Barbara is not supported by the evidence. The applicable standard of review is set forth in CR 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment . . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In Moore v. Asente[13] the Supreme Court of Kentucky addressed this standard, and held that a reviewing court may set aside findings of fact, only if those findings are clearly erroneous. The dispositive question we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether those findings are supported by substantial evidence. "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a

[12] Fowler v. Sowers, 151 S.W.3d 357, 359 (Ky.App. 2004).

[13] 110 S.W.3d 336, 354 (Ky. 2003).

conclusion" and evidence that, when "taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. "Mere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted.)

Upon this court's previous remand of the case to the Mason Circuit Court the trial judge made specific and exhaustive findings, thoroughly explaining his reasoning for the award of sole custody to Barbara. It is simply not enough for David to argue that the evidence could have supported the outcome he desired. To justify reversal, our review must reveal that the evidence did not support the outcome David challenges. That is not what our review reveals. On the contrary, we find the award of sole custody is supported by substantial evidence.

Finally, David contends that visitation should not have been ordered according to the local schedule thereby

resulting in his receiving less visitation than he had prior to the April 20, 2005, judgment.

A review of the record shows this is not so. The standard visitation schedule, with some court-recommended flexibility, was originally ordered on February 25, 2003. Since then, the parties have been cooperating under that schedule with apparent informal modifications as the parties found appropriate.

Again, this is an argument David asserted in his previous appeal. However, as we vacated and remanded the circuit court's custody determination, we determined the visitation issue to be moot as the circuit court would necessarily revisit the issue upon remand.

On remand, the trial court did revisit this issue, stating at paragraph 8 of the judgment:

> In the original order, the Court imposed the 19th Judicial Circuit Visitation Schedule as a minimum visitation. This schedule essentially gives one night each week and every other weekend to the non-custodial parent. The court, at the initial hearing, urged that the parties consider informally expanding the visitation, inasmuch as the residences of the parents are for practical purposes back to back and the school which they attend is a block away. The court feels, however, that it is unwise to impose additional rigid scheduled visitation because either parent may choose to move to a location which makes the visitation process considerably more burdensome.

Nevertheless, David argues the trial court's order as to visitation is contrary to this court's ruling in Drury v. Drury.[14]

In Drury, this court considered the use of a standard visitation schedule adopted by the 11th Judicial Circuit. The 19th Judicial Circuit Visitation Schedule is, for all practical purposes, equivalent to that of the 11th Circuit. A local rule in that circuit provided that the Court "shall order visitation according to the Schedule unless the parties by agreement, or the Court determines, that such visitation should be modified." Noting that local rules must comply with existing substantive law, rules of practice and procedure promulgated by our Supreme Court, rules of criminal and civil procedure, and must be consistent with statutory law, the court discussed the potential problems posed by local visitation schedules. It pointed out that KRS 403.320 requires that the court make findings regarding visitation based upon the facts of a particular case. A standard schedule applicable to all cases without reference to the circumstances in each case is contrary to that statute.

Furthermore, a standard visitation order, even to the extent it has been adopted as a local rule, is not binding until it has been entered as an order in a particular case. Thus, the local rule cannot be interpreted as requiring a parent to prove

[14] 32 S.W.3d 521 (Ky.App. 2000).

grounds for modifying an existing visitation order, as under KRS 403.340.[15]

The use of a visitation schedule must not supplant the court's obligation to make its own findings of fact and no presumptive weight should be given to the schedule. Therefore, the court held, that if specific findings regarding visitation are requested by either party, "the trial court must make a *de novo* determination of what amount of visitation is appropriate . . . ."[16]

Despite its caution against the use of a visitation schedule, the court in Drury nevertheless held that it is not a basis for reversal unless the court's determination as to visitation is a manifest abuse of discretion or is clearly erroneous.[17]

Applying the reasoning in Drury, we affirm the trial court's decision. The visitation schedule in the 19th Judicial Circuit does not contain any mandatory language as to its effect, thus it leaves the court's role as fact finder intact.

It is not apparent from our review of the record that David requested more specific findings than the trial court offered and David's brief does not contain a statement showing how, or if, this argument was preserved for review, as is

[15] Id. at 525.

[16] Id.

[17] Id.

required by CR 76.12(4)(c)(v). Indeed, David's brief does not show where any of the issues he attempts to raise were preserved for appellate review. Since we have not been directed to nor discovered a request for specific findings, none would have been required of the trial court. Nevertheless, we believe paragraph 8 of the April 20, 2005, judgment would satisfy the specificity requirements of Drury.

In its conclusion, the court in Drury made the following observation applicable to the majority of visitation orders:

> A trial court's visitation orders should attempt to provide the non-residential parent with the greatest amount of visitation which is reasonable under the circumstances. Unfortunately, in custody proceedings it is seldom possible for a trial court to impose a visitation regime which makes both parties happy. For this reason, matters involving visitation rights are held to be peculiarly within the discretion of the trial court.[18]

The Mason Circuit Court's order is not an exception to this general observation. Although David desires more time with his daughters, the visitation provided by the local schedule grants him reasonable visitation and there is no evidence that the court failed to consider the circumstances of both parents and the children. Its application in this case was not a manifest abuse of discretion nor is it clearly erroneous.

[18] Id. at 526.

Accordingly, the judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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