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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001228-ME

RALPH ROADEN, JR. — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CI-00682

DEBRA ROADEN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES, AND ROSENBLUM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Ralph Roaden appeals from a February 3, 2006 decree of the Whitley Circuit Court dissolving his marriage to Debra Roaden; awarding the parties joint custody of their daughter, Rachelle; designating Debra as Rachelle's primary residential custodian; and awarding Debra child support. Ralph contends that he rather than Debra should be Rachelle's primary custodian, that he should be awarded temporary

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5) (b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

child support for part of the time this matter was pending, and that Debra's support award should be amended to reflect the parties' more recent incomes. This is yet another unfortunate case in which divorcing spouses have enlisted their child in the battle between themselves. No custody or support decision in these circumstances can be perfect, but the law does not require perfection. Because Ralph has not shown that the Whitley Circuit Court's decisions were arbitrary or without adequate evidentiary support, we affirm.

The parties separated in September 2004, after a marriage of nearly fourteen years, and Ralph petitioned for dissolution on September 15. At that time, Rachelle had just had her thirteenth birthday. From then until September and November 2005, when the matter was heard, the parties traded allegations of abuse and alienation. Ralph and Rachelle alleged, through formal affidavits, that Debra would become uncontrollably angry at Rachelle for speaking about her father and more than once had beaten her with a belt and, on one occasion in early January 2005, had jerked her from a chair. Twice workers from Social Services, Cabinet for Human Resources, investigated, but neither investigation found conduct amounting to abuse. Debra countered with allegations that Ralph was pressuring Rachelle to fabricate complaints against her in an effort to gain custody. The court referred the family to psychologist David Feinberg for a custody evaluation. Dr. Feinberg reported that there was some truth but much exaggeration all around. He noted that Debra tended to be controlling, a tendency at odds with the growing maturity and independence of her daughter, and that Ralph had "fanned the

flames" of the mother-daughter conflict. He did not believe, however, either that Debra had abused Rachelle or that Ralph had alienated her from her mother. He observed that Rachelle expressed a preference for living primarily with her father, and in his view the mother-daughter tension justified that preference. He recommended, therefore, that Ralph be designated the primary residential custodian and that visitation with Debra be supervised at first, to restore Rachelle's trust. According to Dr. Feinberg, it would be in Rachelle's best interest for the relationship to return to normal as quickly as possible.

Dr. Feinberg made this preliminary report in February 2005, and unfortunately Ralph did not heed the undisputed fact that it was a recommendation only. At the outset of the case, the court had issued a temporary parenting schedule according to which Rachelle spent the weekends with Debra and had telephone contact with her one night during the week. The rest of the time she spent with Ralph. This arrangement was to continue until Dr. Feinberg finalized his findings and the trial court conducted a hearing. Notwithstanding this order, from the issuance of Dr. Feinberg's preliminary report until the hearing in September 2005, Ralph denied Debra visitation by insisting that her visits be supervised and, when her arrangements for supervision did not satisfy him, refusing to allow Rachelle to visit her.

In designating Debra as primary residential custodian, contrary to Dr. Feinberg's recommendation, the trial court emphasized Ralph's improper disregard of the court's temporary parenting schedule, something Dr. Feinberg had not had a chance to consider, as well as the fact that, instead of shielding Rachelle as much as possible from

the discord between her parents, Ralph had thrust her into the midst of it and had encouraged her to take sides by having her sign affidavits against her mother. Concluding from these facts, apparently, that Ralph could not be relied upon to foster Rachelle's relationship with Debra, the court instead sought to preserve that relationship by designating Debra as the primary residential custodian. Ralph contends that this designation, contrary as it was to Rachelle's own expressed preference and to Dr. Feinberg's recommendation, amounted to an abuse of the trial court's discretion. We disagree.

We note at the outset that Debra's objection to Ralph's appeal, as having been based on an untimely CR 59 motion, borders on the frivolous. Contrary to counsel's representation, the record includes a timely served motion which was duly filed two days later. Ralph's appeal following denial of that motion was timely.

As the parties correctly observe, KRS 403.270 provides that custody dispositions shall be made "in accordance with the best interests of the child," and that "equal consideration shall be given to each parent." In making its "best interest" determination, the trial court must consider "all relevant factors" and in particular such factors as the wishes of the parents and of more mature children, the interactions and mental health of all concerned, and the child's adjustment to his or her current circumstances. KRS 403.270(2). Custody determinations are entrusted to the broad discretion of the trial court and may be upset on appeal only if based on clearly erroneous factual findings, *Reichle v. Reichle,* 719 S.W.2d 442 (Ky. 1986), or if otherwise arbitrary

and unreasonable. *Cherry v. Cherry,* 634 S.W.2d 423 (Ky. 1982); *Sherfey v. Sherfey,* 74 S.W.3d 777 (Ky.App. 2002). Assigning the child's primary residence is a custody determination subject to these standards. *Fenwick v. Fenwick,* 114 S.W.3d 767 (Ky. 2003).

Although we agree with Ralph that Rachelle's wishes and Dr. Feinberg's recommendations were important factors to consider in this case, our Supreme Court has made it clear that neither the child's wishes nor an expert's opinion is binding on the trial court. *Reichle v. Reichle, supra; Cox v. Bramblet,* 492 S.W.2d 188 (Ky. 1973). Here, as was its prerogative, the court took these factors into consideration, but found that other factors outweighed them, in particular the need to heal, not to exacerbate, the rift between Rachelle and Debra. The trial court's findings with respect to this factor were adequately supported. There is no dispute, for example, that Ralph procured Rachelle's affidavits or that he prevented Debra's visitation for several months. The trial court's finding that Debra's corporal punishment of Rachelle had not been what Ralph and Rachelle alleged was adequately supported by Dr. Feinberg's similar conclusion as well as Debra's testimony, the credibility of which was for the trial court to assess. Dr. Feinberg also emphasized the importance to Rachelle, as well as Debra, of reestablishing a good relationship between them. Given Ralph's encouragement of their rift, which after his denial of Debra's visitation rights appeared more serious to the trial court than it had to Dr. Feinberg, it was not arbitrary or unreasonable for the trial court to overrule Rachelle's wishes and Dr. Feinberg's recommendation, and to insure that as primary residential

custodian Debra would at least have the opportunity to reestablish a loving relationship with her daughter. The trial court did not err in designating Debra as Rachelle's primary residential custodian. We find it is appropriate in this case, however, to remind Debra that Ralph and Rachelle also have a loving relationship, which, for Rachelle's sake, should be fostered rather than slighted.

In March 2005, after Dr. Feinberg's preliminary report and after initiation of the campaign to deny Debra's visitation, Ralph moved for an award of temporary child support. KRS 403.160 provides for such an award and also provides that "[t]he court shall, within fourteen (14) days from the filing of said motion, order an amount of temporary child support based upon the child support guidelines as provided by law." Notwithstanding this statutory mandate, Ralph's motion, which he renewed several times, was not addressed until it was implicitly denied by the court's February 3, 2006 decree. Ralph contends that because the trial court's initial parenting schedule assigned to him the majority of Rachelle's care, he is entitled to an award of child support from the time of his motion in March 2005 until November 2005 when Debra became the primary residential custodian.

Although proceedings in this case were complicated by the retirement of the domestic relations commissioner and later by the recusal of the trial judge and appointment of a special judge, this support issue did not receive the prompt attention the statute requires. As our Supreme Court recently observed, "[b]y their very nature, child support payments are exigent. Such payments cannot be indefinitely postponed while

parties litigate." *Thompson v. Thompson,* 172 S.W.3d 379, 382 (Ky. 2005). The statute, therefore, provides for prompt temporary support arrangements pending final resolution. Fortunately, there is no indication that Rachelle's care was compromised owing to the delay in the trial court's decision on this issue. However, prompt attention to the temporary support issue in this case, would have not only served the purposes underlying KRS 403.160, but would very likely have led to the restoration of Debra's visitation months earlier than in fact occurred. The trial court erred, therefore, under KRS 403.160, when it did not promptly address Ralph's support motion and either award temporary support in accordance with the guidelines or make written findings justifying a deviation from them. KRS 403.211(2). *Rasnick v. Rasnick,* 982 S.W.2d 218 (Ky. 1998).

We are persuaded that the error was harmless in this case, however, because the trial court's ultimate denial of Ralph's support motion was clearly based on Ralph's contumacious interference with Debra's court-ordered visitation, conduct that supplied adequate reason for the denial of his request for temporary support payments. We are aware that our law carefully separates support and visitation rights and that one party's non-compliance with a visitation order does not justify the other party's non-compliance with a support order. *Stevens v. Stevens,* 729 S.W.2d 461 (Ky.App. 1987). This is not the typical scenario where the custodial parent denies visitation and the other parent retaliates by not honoring a court ordered support obligation. In this case, Ralph's interference with Debra's visitation came *before* a support order had been entered and was a proper factor for the trial court to consider when deciding whether application of

the support guidelines "would be unjust or inappropriate." KRS 403.211(2). Thus, although the trial court erred by failing to address Ralph's motion for temporary child support in the manner mandated by KRS 403.160, the error does not entitle Ralph to relief.

Nor is Ralph entitled to relief from that portion of the decree awarding child support to Debra. The decree fixes Ralph's support obligation at $548.10 per month, an amount based, apparently, on the parties' incomes for 2004 as reflected on their tax returns. Ralph contends that had the court based its award on the parties' 2005 incomes, as reflected on year-to-date pay stubs introduced at trial, his obligation would have been $479.50 per month. The trial court did not explain why it relied on the 2004 information, but Debra, who, like Ralph, works for the United States Postal Service, testified that her 2005 income included pay for an extra, temporary work assignment that had come to an end and would no longer provide extra income. This testimony would support an inference that the parties' 2004 incomes reflected more accurately than their 2005 incomes what they would be apt to earn in the near future. We cannot say, therefore, that the trial court's findings regarding Ralph's and Debra's annual incomes were clearly erroneous, even though based on the parties' 2004 earnings.

In sum, although the record in this difficult case may well have supported custody and support rulings different from those the trial court made, the trial court's decisions were adequately grounded in the evidence and constitute a reasonable attempt

to insure Rachelle's best interest. Accordingly, we affirm the February 3, 2006 decree of the Whitley Circuit Court.

ALL CONCUR.

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