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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000770-MR

STEPHEN CONLEY — APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE MARC I. ROSEN, JUDGE
ACTION NO. 06-CI-00410

LOUTICIA CONLEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; AND KNOPF,[1] SENIOR JUDGE.

STUMBO, JUDGE: Stephen Conley (Appellant) appeals from orders of the Boyd County Circuit Court dealing with issues of child custody, visitation, and child support. Appellant argues that the trial court erred when it determined the parties had agreed on the issue of custody; that the visitation award was vague and contradictory; that the trial court erred when it ordered retroactive child support; and that the trial court erred in the amount of child support awarded. We find that the evidence presented at the final hearing before the Domestic Relations Commissioner (DRC) supports the decisions regarding custody, visitation, and child support. As such, we affirm.

[1] Senior Judge William L. Knopf, 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.

On April 11, 2006, Louticia Conley (Appellee) filed a petition for dissolution of marriage and a motion for temporary custody, child support, maintenance, and possession of the marital residence. She also sought full custody of the children.

No order was entered regarding the motion for temporary custody, child support, maintenance, and possession of the marital residence. The next occurrence was the final hearing on the merits before the DRC on July 26, 2006.

During the final hearing before the DRC, both parties agreed that their current custody arrangement was working out. Testimony reflected that each party had the children on his or her days off, with Appellee or one of the parties' mothers having them the rest of the time. Based on the evidence presented at that hearing, the DRC's order attempted to set forth this arrangement.

She recommended that the parties have joint custody of their children, with Appellee having primary physical custody and Appellant having "liberal parenting time based on his work schedule of not less than what he currently enjoys and what is set in the Boyd County Visitation Schedule." During the hearing, the parties discussed at length how the current arrangement, while sometimes difficult, was working out for the best. Both parties expressed a willingness to keep the status quo, with Appellant specifically stating that he did not see a problem with the way things had been going. The DRC's findings noted that Appellee "routinely had the children four to five days per week and the [Appellant] had the children the remaining days." The evidence clearly supports the DRC's finding that the parties agreed on a custody arrangement, one that allowed them to utilize the system they already had in place.

Appellant argues that the visitation arrangement set forth by the DRC and adopted by the trial court does not reflect the arrangement the parties were using. He takes issue with the fact that the DRC stated he was to get "liberal parenting time based

on his work schedule of not less than what he currently enjoys and what is set in the Boyd County Visitation Schedule." He claims that the "not less than what he currently enjoys" language and the "Boyd County Visitation Schedule" language is contradictory. Appellant foresees a situation in which he tries to enforce his parenting time based on "what he currently enjoys," but Appellee only giving him time based on the Boyd County Visitation Schedule. We do not see this as the case. According to the DRC recommendation, which was adopted by the trial court, Appellant is to receive as much time as he does now. The visitation schedule is mentioned in the recommendation only to show that Appellant is to never receive less visitation than that set forth in the Boyd County Visitation Schedule. But first and foremost, he is to receive as much time as he is getting now.

The DRC and trial court tried to leave Appellant's parenting time flexible so he could have as much time as possible with his children. The parties in this case seem to have their children's best interests at heart and are trying to ensure they both are involved as much as possible. As such, the court tried to create a visitation schedule that was flexible and adapted to the parents' work schedules. We interpret the visitation award to give Appellant as much time with his children as he currently enjoys and to keep the current arrangement intact.

Both parties have jobs that require them to work multiple or alternating shifts. This makes crafting a definite visitation schedule difficult. That is why the decision of the DRC and trial court would work best, which is to say they are allowing the parties to have the children when they can, with Appellee having primary physical custody. If either party's work schedule changes or becomes more definite, then it would not be unreasonable for either to request a modification of custody or visitation.

Based on the record as it stands before us, the trial court's award of visitation is affirmed.

Appellant's next argument is that the court erred when it ordered retroactive child support. As stated above, Appellee filed a motion for temporary support, but it was not ruled on. Had it been ruled upon prior to the final hearing, child support could have been set retroactive to the filing of the motion. KRS 403.160(2)(a). During the final hearing, the DRC recommended and the trial court ordered Appellant to pay child support arrearages in the form of payments of the debt on Appellee's vehicle.

Appellant claims that this retroactive child support obligation was a backdoor maintenance award even after the DRC found that Appellee did not meet the statutory requirements for an award of maintenance. We disagree. Had the temporary motion for child support been heard earlier, then the support could have been made retroactive. The record is not clear as to why the motion was not heard, but it was not unreasonable for the court to determine that child support should be retroactive during the divorce proceeding's final hearing, particularly given how quickly this matter advanced from filing to final hearing. *See Weldon v. Weldon*, 957 S.W.2d 283 (Ky. App. 1997)(where retroactive child support was set during the final hearing).

Appellant's final argument is that the court erred in setting child support without taking into account the amount of time each parent had with the children. Appellant cites the cases of *Downey v. Rogers*, 847 S.W.2d 63 (Ky. App. 1993), and *Downing v. Downing*, 45 S.W.3d 449 (Ky. App. 2001), to support his argument. These cases do state that a trial court can take into account the amount of time the children spend with each parent when calculating child support, but we do not believe that the court is required to deviate from the child support guidelines set forth in KRS 403.212. While courts can deviate from the guidelines, KRS 403.211 states that the guidelines

shall serve as a "rebuttable presumption for the establishment or modification of the amount of child support."

Appellant contends that testimony showed he had the children more than 50% of the time and thus he should be given credit for this time and his child support obligation be lowered. However, our review of the evidence does not support this assertion. Appellant testified that he had the children on his days off from work. The record is devoid of evidence showing how much time Appellant had off. The majority of evidence regarding whom the children resided with the most came from Appellee. While it appears that the parent who had a day off from work would have the children, only Appellee testified where the children were when both parents were working.

She stated that when she had to work and the children were not with Appellant, her mother would look after them. Appellee testified that between shifts, she would look in on the children and then take them home with her after work. When the children had school, Appellee testified she would take them to school and then to her mother's house afterwards and until she got off work. While we can imagine Appellant did similar things when the children were with him, the testimony during the hearing did not reflect this.

Since the evidence and testimony favored Appellee, and because she is the primary physical custodian, we can not say that the court erred in applying the child support guidelines set forth in KRS 403.212. Accordingly, we affirm.

For the reasons set forth above, we affirm the court's decisions regarding custody, visitation, and child support.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Rhonda M. Copley
Ashland, Kentucky