RENDERED: MAY 23, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001368-MR

RUSSELL WAYNE BELL — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIM FEELEY, JUDGE
ACTION NO. 06-CI-00326

BETH ANN BELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Russell Wayne Bell appeals the April 4, 2007, decree of dissolution and June 8, 2007, findings of fact and conclusions of law of the Oldham Circuit Court in his dissolution action with Beth Ann Bell. 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 21.580.

The facts of this case are lengthy and need not be portrayed in their entirety herein. The facts relevant to the appeal are as follows: the parties were married on December 28, 2001 and have four children in common. A petition for dissolution of marriage was filed on May 15, 2006, by Russell. On May 19, 2006, Beth filed a petition for entry of a domestic violence order ("DVO") against Russell. On that same day, a DVO was entered for a period of six months. That order addressed several other issues between the parties, including custody of their children. Custody was granted to Beth, with Russell having a set timesharing schedule until further order from the court. Also on May 19, 2006, Russell filed a motion, in the dissolution action, seeking to have Beth enjoined from removing the children from Oldham County, Kentucky for more that a forty-eight hour period of time, without court order.

On May 26, 2006, Beth filed a response to Russell's motion and also filed several motions of her own. In her motions, Beth sought, among other things, temporary and permanent custody of the children; temporary child support; temporary maintenance; permission to relocate, permanently, with the children to Ohio; and a timesharing schedule. On June 14, 2006, a hearing was conducted on all pending motions, and on June 20, 2006, an order was entered. In that order, the court awarded temporary joint custody to the parties and designated Beth as the primary residential custodian. The order also granted Beth permission to relocate to Ohio with the children and set up a timesharing schedule for Russell. It was ordered that the youngest child, Samantha, would not participate in timesharing

with Russell until she was no longer breastfeeding. The court imputed an income to Russell, found that Beth had no income, and accordingly entered orders awarding child support and maintenance to Beth.

Russell filed a motion to alter, amend or vacate the June 20, 2006, order, asking, among other things that he be allowed timesharing with Samantha. On July 7, 2006, a hearing was held and a new order was entered on July 10, 2006, allowing Russell timesharing with Samantha. A final hearing was scheduled for September 1, 2006. On that date, the trial court, noting that Russell had not complied with discovery requests, rescheduled the hearing to November 28, 2006. On November 28, 2006, Russell informed the court that he had relocated to Ohio.[2] The trial court then set a new timesharing schedule, ordered Russell to comply with discovery by January 5, 2007.

On January 19, 2007, Russell was adjudicated to be in contempt for failure to comply with discovery and the case was set for a final trial on March 30, 2007. Russell had filed a motion to dismiss the action or transfer it to Ohio and that motion was denied. The final hearing was held on March 30, 2007. On April 4, 3007, the trial court entered a decree of dissolution, in which it stated that the remaining issues had been taken under submission. On June 8, 2007, the court entered its findings of facts and conclusions of law. This appeal followed.

On appeal, Russell makes the following arguments: 1) the circuit court lacked continuing jurisdiction and should have allowed the matter to be

[2] Sometime after the June 20, 2006, order, Beth had also relocated to Ohio with the children.

transferred to an Ohio court; 2) there was no substantial basis for the amount of child support to be paid; 3) there was no substantial basis for the award of temporary or permanent maintenance, or in the alternative, there was no substantial basis for the amount of maintenance awarded; and 4) the court abused its discretion by denying Russell timesharing due to breast-feeding.

Russell first argues that the circuit court lacked continuing jurisdiction and should have allowed to the matter to be transferred to an Ohio court. Allegations that a court acted outside its jurisdiction are to be reviewed de novo. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). When a dissolution of marriage action is first commenced, the court is given jurisdiction over the parties' children pursuant to KRS 403.822, which reads, in part:

> (1) Except as otherwise provided in KRS 403.828, a court of this state shall have jurisdiction to make an initial child custody determination only if:
>
> (a) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state; or
>
> (b) A court of another state does not have jurisdiction under paragraph (a) of this subsection. . .

The home state of the Bell children, at the time the dissolution action commenced, was Kentucky. Russell argues that jurisdiction over the children should have been transferred to Ohio, pursuant to KRS 403.824, which states, in relevant part:

> (1) Except as otherwise provided in KRS 403.828, a court of this state which has made a child custody determination consistent with KRS 403.822 or 403.826 has exclusive, continuing jurisdiction over the determination until:
>
> (a) A court of this state determines that neither the child, nor the child and one (1) parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
>
> (b) A court of this state or a court of another state determines that the child, the child's parents, and any other person acting as a parent do not presently reside in this state.

None of the determinations required by KRS 403.824 to change jurisdiction have been made by this or any other state. It is likely that the current location of all parties may make Ohio more appropriate for future custody determinations. However, we do not believe the jurisdiction exercised for the initial custody determination was improper when the parties resided in Kentucky at the time the action was commenced.

Russell next argues that there was no substantial basis for the amount of child support to be paid and that the trial court deviated from the guidelines. The family court has broad discretion with regard to child support matters and a family court's decision will not be reversed unless it has abused that discretion. *Wilhoit v. Wilhoit*, 521 S .W.2d 512, 513 (Ky.1975). Temporary child support was originally set at $1,794.00 per month. This amount was based on Russell's making $7,000.00 per month; an amount arrived at through testimony of the parties

regarding their monthly expenses. Under the child support guidelines, the amount of support is correct. KRS 403.212. The June 8, 2007, judgment of the trial court imputed an annual salary of $45,000.00 to Russell, also based upon his testimony, and child support was set at $1,126.00 per month. This amount is also correct under the child support guidelines. KRS 403.212.

It is appropriate for the trial court to impute income to a parent who is voluntarily underemployed or unemployed. KRS 403.212 (2) (d). We believe this practice is also appropriate when a party fails to appropriately provide the court with their income information. It is clear from the record that Russell was less than forthcoming with his income information and failed repeatedly to comply with discovery. This, combined with his testimony regarding his income, is sufficient to convince us that the trial court's imputation was appropriate and we affirm its child support award. At the time of trial, Beth was not working, so no income was imputed to her. Because she was caring for three children under the age of three, this decision was appropriate. KRS 403.212 (2) (d).

Next, Russell argues that there was no substantial basis for the award of temporary or permanent maintenance, or in the alternative, there was no substantial basis for the amount of maintenance awarded. Our standard of review regarding an award of maintenance is that of abuse of discretion. "The amount and duration of maintenance is within the sound discretion of the trial court." *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994). The requirements for an award of maintenance are set out in KRS 403.200, which states in part:

> (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

As we have previously discussed, Beth is the primary residential custodian for several very young children. The June 8, 2007, judgment awarded Beth with maintenance in the amount of $400.00 per month for a period of twenty-four months as well as a lump sum payment of $3,875.00 payment towards her attorney's fees. Additionally, Beth was awarded several other maintenance awards to cover a joint unsecured debt, uninsured medical expenses for the children, birthing expenses, and debt payments made by Beth that had previously been ordered to be paid by Russell. After reviewing the record, we do not believe this determination to be an abuse of discretion by the trial court. The award appears to assist Beth in providing for herself, while continuing to care for the youngest children. Also, the award ends after two years. The additional awards of maintenance appear to cover expenses that Russell has shown a history of refusing to pay, regardless of the court orders to do so and also expenses accrued on behalf

of the children. Furthermore, Russell has failed to show that these awards are an abuse of discretion.

Russell's final argument is that the court abused its discretion by denying Russell timesharing with Samantha due to breast-feeding. The issue of timesharing is interrelated to that of custody. When reviewing child custody issues, we must determine whether the ruling was clearly erroneous or constituted an abuse of discretion. *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The trial court, when determining how custody will be shared among the parties, must also determine what is in the best interest of the child. This determination includes the issue of timesharing. *See* KRS 403.270 and KRS 403.320. *See also Fenwick v. Fenwick*, 114 S.W.3d 767 (Ky. 2003). Under the facts of this case, we do not believe that the temporary denial of timesharing to one parent while the other is breastfeeding and in another state is an abuse of discretion. Furthermore, because the trial court has since entered orders granting timesharing to Russell, this issue becomes moot.[3]

For the foregoing reasons, the April 4, 2007, decree of dissolution and June 8, 2007, findings of fact and conclusions of law of the Oldham Circuit Court are affirmed.

ALL CONCUR.

[3] It has also been brought to the Court's attention that, on several occasions, Russell chose to forego the timesharing with Samantha when he had an opportunity to do so.

BRIEFS FOR APPELLANT:

Stephen C. Emery
Stewart Roelandt Stoess
Craigmyle & Emery, PLLC
Crestwood, Kentucky

BRIEF FOR APPELLEE:

James L. Theiss
Williamson, Simpson & Theiss
LaGrange, Kentucky