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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000889-ME

WILLIAM MILLER — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. CHRISTINE WARD, JUDGE
ACTION NO. 15-CI-500826

KIARA MILLER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, AND K. THOMPSON, JUDGES.

JONES, JUDGE: William Miller ("William") appeals from the findings of fact, conclusions of law, and order entered by the trial court on April 20, 2017 ("Order"). Specifically, William raises two errors on appeal. First, William asserts the trial court erred in granting Kiara Miller ("Kiara") sole custody of the parties' minor child, A.M. Second, William contends the trial court unreasonably restricted his visitation with A.M. After a careful review of the record, we affirm.

I. BACKGROUND

William and Kiara were married in 2013 in Jefferson County. They share one minor child, A.M., born November 20, 2012. Kiara petitioned the trial court for a decree of divorce on March 17, 2015. The trial court conducted a final hearing on March 22, 2017. William appeared *pro se* at the final hearing, while Kiara was represented by counsel.[1] William and Kiara were the only witnesses who testified at the final hearing.

The parties separated in September 2014. William moved in with his brother in Louisville for a period of time following the separation. Then, in or about June 2015, William relocated to Georgia. While in Louisville following the separation and before his move to Georgia (a period of around eight months), William visited A.M. three times. After he moved to Georgia, William visited A.M. twice. William had last seen A.M. in January 2016, approximately fourteen

[1]William retained counsel for this appeal. Kiara is represented by counsel but did not file an appellate brief. Kentucky Rule of Civil Procedure ("CR") 76.12(8)(c) provides: "If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." The decision as to how to proceed where the appellee has failed to file a brief is a matter within the appellate court's discretion, and the appellate court may decline to exercise any of these sanctions and consider the case on the merits. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007). Because this case involves important issues concerning child custody, we will exercise our discretion and consider the appeal on the merits.

months before the final hearing. A.M. was four years old at the time of the final hearing.

On November 10, 2016, the trial court entered a Domestic Violence Order ("DVO") against William, which remains in effect until November 9, 2019.[2] The DVO was based on physical threats made by William against Kiara on Facebook. The messages apparently stem from a physical altercation involving William's girlfriend and her family against Kiara in front of a boat. For his part, William testified he did not "throw punches." William asserts Kiara struck him in the face as he was walking away from the incident. However, it is undisputed that at some point William sent Kiara Facebook messages asking whether she wanted "to get beat up again like [she] already did in front of the boat"; stating that Kiara was "about to have [her] [expletive] face mangled"; and stating "stupid [expletive] gave me her address[3] didn't you already get your [expletive] beat in front of the boat, you want it in your neighborhood too?"

William does not dispute the accuracy of the Facebook messages and that he was the author of them. However, William testified he made the Facebook posts out of anger and because of "Facebook slander." He asserts that he does not

[2] The DVO was not introduced as an exhibit at the final hearing. Our discussion of it is based upon the testimony of the parties at the final hearing.

[3] Kiara gave William her Louisville address for the purpose of facilitating a visit with A.M. in May 2016 which did not occur.

actually pose a threat to Kiara. To this end, William emphasized that he currently lives in Georgia. He says he is not a violent person, and he does not have any intentions to hurt Kiara.[4] Kiara maintained she took the Facebook threats from William seriously.

The trial court ultimately determined that it was in A.M.'s best interest that Kiara be awarded sole custody based on the factors enumerated in KRS[5] 403.270(2). The trial court awarded William visitation with A.M. in May 2017 while he was in Louisville for a period of five hours. By agreement of the parties, the DVO was amended to allow William to contact A.M. by phone consistently "in order to restore their relationship." The trial court ordered that William would also have visitation from the Friday after Thanksgiving at 12:00 P.M. through Saturday at 12:00 P.M. in Louisville, and from December 19th through December 23rd in Louisville, each year. William timely appealed the final order.

II. STANDARD OF REVIEW

Appellate courts review child custody awards for an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982). Factual findings

[4] The trial court noted that the propriety of the DVO was not before it; rather, the only issues before the court were those pertaining to entry of a final divorce decree between the parties.

[5] Kentucky Revised Statutes.

must be supported by substantial evidence, and the correct law must be applied. *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005). Due regard must also be given when the trial court assesses witness credibility. CR 52.01. With these principles in mind, we turn to the instant case.

IV. ANALYSIS

William raises two issues on appeal. First, he asserts that the trial court erred when it awarded sole custody of A.M. to Kiara; he believes that trial court should have awarded the parties joint custody. Second, he contends that by specifying that the location of visitation must be in Louisville, the trial court unreasonably restricted his visitation with A.M. He contends that there was no evidence that presented that visitation with him would endanger A.M.'s mental and emotional heath, and therefore, he should have been awarded more liberal visitation.[6]

[6] Before we address the merits of William's arguments, we must point out that William did not comply with CR 76.12(4)(c)(v), which provides that each brief "shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." William's brief does not state whether the issues he raises on appeal were preserved for review, and if so, where. We do not take counsel's failure to follow our Rules lightly, and we have the discretion to dismiss appeals for noncompliance. However, in this case, the issues are straightforward and the record concise. Accordingly, we will review the merits of William's arguments notwithstanding his failure to comply with our briefing requirements.

A. Custody

Under KRS 403.270(2), the trial court is directed to determine child custody in accordance with the best interests of the child. The statute requires the trial court to weigh all factors set out in KRS 403.270 in determining the "best interest of the child."

The factors enumerated in KRS 403.270(2), in pertinent part, were as follows at the time the trial court entered its findings:[7]

> (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved;

[7] KRS 403.270 was amended effective July 14, 2018, and KRS 403.315 was enacted effective July 14, 2018. Because we find that the statutory changes effected substantive changes in the law, we do not apply them retroactively to this case. KRS 446.080. *See also Moore v. Stills*, 307 S.W.3d 71, 81 (Ky. 2010) (statute which alters the law in a substantive way may not be applied retroactively). KRS 403.315 now provides:

> When determining or modifying a custody order pursuant to KRS 403.270, 403.280, 403.340, 403.740, the court shall consider the safety and well-being of the parties and of the children. If a domestic violence order is being or has been entered against a party by another party or on behalf of a child at issue in the custody hearing, the presumption that joint custody and equally shared parenting time is in the best interest of the child shall not apply as to the party against whom the domestic violence order is being or has been entered. The court shall weigh all factors set out in KRS 403.270 in determining the best interest of the child.

> (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;[8]
>
> . . .

At the time of the trial court's findings, KRS 403.270(3) provided:

> The court shall not consider conduct of the proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship with both parents.

William argues that there was no showing that the domestic violence actually affected the child under KRS 403.270(3). In *Krug v. Krug*, 647 S.W.2d 790 (Ky. 1983), the Supreme Court of Kentucky granted discretionary review to consider whether the party relying on misconduct of a spouse as a factor in determining child custody must first "first introduce evidence showing that the alleged misconduct has adversely affected the child before the proffered evidence may be admitted or considered by the trial court." *Id.* at 791. At issue were various extramarital affairs of the wife, as well as her admission that she had written numerous "cold checks." *Id.* at 792. The Supreme Court of Kentucky held that the trial court did not abuse its discretion in granting custody of the minor children to the husband.

[8] The omitted subsections of KRS 403.270(2) pertain to de facto custodians and are not at issue here.

The Court held that KRS 403.270 was not "intended to require the testimony of a child psychologist or a social worker that certain conduct had affected, or would adversely affect, the child as an absolute prerequisite to the consideration of the conduct by the trial judge." *Id*. at 793. Rather, the Court noted that "[m]any kinds of neglect or abuse or exposure to unwholesome environment speak for themselves, and the proof of the neglect or abuse or exposure is in itself sufficient to permit a conclusion that its continuation would adversely affect children." The Court concluded by reiterating that "a judge is not required to wait until the children have already been harmed before he can give consideration to the conduct causing the harm." *Id.*

The trial court noted that the evidence before it was "contradictory regarding the extent and degree of domestic violence." After considering the evidence, the trial court found that William did commit an act of domestic violence against Kiara. It further held that the history of domestic violence has negatively affected Kiara's ability to co-parent with William because she is fearful of him. This is a legitimate conclusion that is supported by the record. Given the court's determination that the parties' history of domestic violence made co-parenting impractical, the trial court was tasked with determining which parent should be awarded sole custody.

Given William's limited visits with A.M. the trial court logically determined that Kiara, who William described as a "fabulous mother," was best suited to have sole custody of A.M. In sum, William has not shown that the award of sole custody to Kiara was arbitrary, unreasonable, or unfair.

B. Visitation

William testified he did not want "anything major" in terms of timesharing or visitation.[9] He testified he lacked the funds to visit Kentucky more than a few times a year, and he did not have reliable transportation to make numerous trips. He requested he be permitted to take A.M. to Georgia for visitation/timesharing and proposed to meet Kiara in Nashville, Tennessee to exchange the child. The trial court ordered William would have visitation with A.M. in May 2017, and each November and December thereafter.

KRS 403.320(1) provides that a parent not granted custody of the child and not awarded shared parenting time "is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger

[9] The trial court actually referred to William's time with A.M. as "timesharing." However, because Kiara was granted sole custody, the trial court should have actually designated William's schedule with A.M. as a "visitation" schedule as opposed to a "timesharing" schedule. "Visitation" is a concept limited to cases in which one party is awarded sole custody. *Pennington v. Marcum*, 266 S.W.3d 759, 764 (Ky. 2008). "'Time-sharing,' on the other hand, is a joint-custody term, as the non-residential parent is also a legal custodian." *Williams v. Williams*, 526 S.W.3d 108, 111 n.4 (Ky. App. 2017).

seriously the child's physical, mental, moral, or emotional health." The trial court also correctly relied on KRS 403.320, which provides:

> If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

The trial court found that Kiara had not met the burden of showing that visitation with William would "seriously endanger" A.M.'s physical, mental, moral, or emotional health. In *Pennington*, 266 S.W.3d at 769, the Supreme Court of Kentucky held that because "serious endangerment" is not defined by statute, "it is left to the sound discretion of the court . . . ."

William argues that the trial court unreasonably restricted his visitation with A.M. despite finding that the standard of "serious endangerment" was not met. William asserts that the ordered visitation was "analogous to supervised visitation with the child."

We have no doubt that the trial court would have likely given William greater visitation if he were located in Louisville, where A.M. lives. However, William testified that, at most, he was able to travel to Louisville a few times a year. Given A.M.'s limited, past contact with William and the great distance from Louisville to Atlanta, we cannot conclude the trial court abused its discretion in this instance. To the contrary, it is apparent the trial court placed A.M.'s needs at

the forefront and fashioned a schedule it believed would be most appropriate and beneficial *until* William and A.M. had time to develop a deeper parent child relationship. To this end, the trial court ordered that William could have up to three weekly phone conversations with A.M. and could move for increased visitation once his relationship with A.M. has been re-established. There was no abuse of discretion with respect to the trial court's visitation schedule.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Brandon Edwards Louisville, Kentucky	No brief filed