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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000157-ME

BILLY RAY WYATT — APPELLANT

v.

APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CI-00330

DEBRA ILENE WYATT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JUDGE; HUDDLESTON,[1] SENIOR JUDGE; HOWARD,[2] SPECIAL JUDGE.

HOWARD, SPECIAL JUDGE: Billy Ray Wyatt (hereinafter "Billy") appeals from an order of the Calloway Circuit Court, setting specific visitation for him with his two minor children. Billy argues that the court's schedule violated KRS 403.320 by restricting his

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] Special Judge James I. Howard completed this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

visitation without a finding that such visitation would seriously endanger the minor children and by limiting his right to seek future modification of visitation. For the reasons stated below, we affirm.

On October 8, 2001, a petition for dissolution of marriage was filed by Debra Ilene Wyatt (hereinafter "Debra") in Calloway Circuit Court seeking to dissolve her marriage to Billy and to resolve various issues arising out of that marriage, including the custody of and visitation with the parties' two minor children. From the beginning, the parties had joint custody of the children, with Debra the primary residential custodian. Also from the beginning, Debra alleged that Billy had a problem with his temper and objected to his having unsupervised visitation. Several temporary orders were entered involving visitation between Billy and the children, containing various restrictions. Then on March 27, 2003, Billy and Debra entered into an "Agreed Final Judgment and Order," granting Billy only supervised visitation, at the discretion of Shelly Allen, the court-appointed counselor. This agreed judgment was entered by the court on April 2, 2003 and was not appealed.

On May 18, 2004, Billy filed a motion to modify visitation. The Calloway Circuit Court entered an order on October 28, 2004, providing that Billy have unsupervised visitation with the two minor children twice a month for a period of two hours as designated by Joseph A. Williams, who had succeeded Shelly Allen as the counselor for Billy and the children. The court further approved incremental increases in visitation at the recommendation of Mr. Williams, to eventually lead up to overnight visits. Mr. Williams was to provide periodic progress reports to the court and the parties

and either party could petition the court for a modification of the visitation schedule after receiving Mr. Williams' reports. The court specifically made this order final and appealable, but again, no appeal was filed.

On November 9, 2005, Debra filed a motion to set supervised visitation and to remove the court ordered counselor, Mr. Williams. Although there had been no further court orders, Mr. Williams had been gradually increasing Billy's visitation, as he was authorized to do, to include overnight visits. A hearing was conducted before the Domestic Relations Commissioner, who recommended that Billy be allowed unsupervised visits every Sunday for four hours and every other Saturday for six hours and that he be allowed to petition for overnight visitation after one year. The effect of this was to allow Billy more time with the children than he had under the last court order, but less than the counselor had been allowing. Finally, the DRC recommended that the counselor, Mr. Williams, be removed, due to Debra's lack of confidence in him.

Billy filed exceptions to these recommendations. On December 19, 2005, the circuit court entered an order adopting the recommendations of the DRC regarding Billy's visitation, including the provision that he be permitted to petition for overnight visitation after one year, but remanding the case to the DRC for clarification on the issue of the removal of the court appointed counselor. On January 12, 2006, Billy filed a notice of appeal from that order.[3]

[3] At the time the notice of appeal was filed, the removal of the counselor, Mr. Williams, was only a recommendation of the Domestic Relations Commissioner. Because there was no final, appealable order, as required by KRS 22A.020, this court will not consider that issue.

Billy argues that the circuit court committed reversible error by restricting his visitation without a finding that such visitation "would endanger seriously the child[ren]'s physical, mental, moral, or emotional health," as required by KRS 403.320(3). He points out that he had been exercising unsupervised, overnight visitation under the direction of the court-appointed counselor prior to Debra's November 9, 2005 motion. Billy further argues that the court limited his right to seek future modification of visitation, in violation of KRS 403.320, by providing that he could seek overnight visitation after one year.

In response, Debra argues that the order did not restrict Billy's visitation, but rather expanded the visitation set out in the previous order of October 28, 2004. She maintains that the court had previously allowed Billy only very limited visitation; the counselor, not the court, had increased that. Debra also argues that the time limitation of one year for seeking overnight visitation was reasonable, based on Billy's past behavior, and was not an abuse of discretion.

We note first that matters involving visitation are generally within the sound discretion of the trial judge and this court will not reverse such rulings absent an abuse of that discretion. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000).

However, Billy's claim on this appeal is that his visitation was restricted in violation of a specific statute, KRS 403.320. We therefore look to the language of that statute, which reads, in relevant part, as follows:

> 403.320. Visitation of minor child.
> (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a

> hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.
> . . . .
>
> (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

In other words, visitation may be "modified" anytime the court determines such is in the best interests of the child, but may be "restricted" only upon a finding that the child's physical, mental, moral or emotional health is "endangered seriously."

In *Kulas v. Kulas*, 898 S.W.2d 529 (Ky.App. 1995), the circuit court reduced a father's visitation from what he had previously been awarded, to the standard visitation under the local rules of that court. He made the same argument Billy makes on this appeal, that such ruling "restricted" his visitation in violation of KRS 403.320. On appeal, this court defined the word "restrict" as follows:

> As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation."

We determined that, although the father's visitation was decreased, it had not been "restricted" as that word is used in KRS 403.320(3), because it was still reasonable. The circuit court order was nonetheless reversed, because it failed to contain a finding that any modification was in the best interests of the child.

We believe *Kulas* to be applicable in this case. A reduction in a parent's visitation schedule is considered a restriction of that visitation only if the new schedule is not reasonable. We recognize that "reasonable" is a subjective term. In *Kulas*, visitation was reduced, but only to the standard level under the applicable local rules, which this court found to be reasonable. Here, it is necessary to look to the facts of this specific case to determine whether Billy was awarded reasonable visitation by the circuit court order of December 19, 2005.

In this case, Billy has had only supervised visitation throughout much of the pendency of the action. The original order regarding visitation was an agreed order, signed by counsel for both Billy and Debra, which provided Billy with only supervised visitation. The most recent order, prior to December 19, 2005, was the order of October 28, 2004, which provided him unsupervised visitation, but for only two hours, twice a month. No appeal was taken from either of those prior orders. There is no argument made on this appeal that either order established a visitation schedule which was unreasonable at the time it was entered. In *Hornback v. Hornback*, 636 S.W.2d 24 (Ky. App. 1982), this court stated that an unappealed judgment is the law of the case, as between the parties, and is controlling as regards visitation.

Over the course of a full year from the entry of the October 28, 2004 order, no motion to modify was filed and no new orders were entered. We recognize that changes in the court-ordered visitation schedule were subsequently made, at the recommendation of the counselor, as he had been authorized to do. But it does not follow, as Billy argues, that any reduction in his visitation, as it had been expanded by

the counselor, is necessarily a "restriction" in that visitation. Under *Kulas,* it is only a restriction if it is unreasonable. Given the history of this case, we cannot say that the new schedule was unreasonable. We also note that although the new schedule still provides less than the standard visitation under the local rules, it appears that Billy has always had less than that "standard" visitation. While the local rules are a factor the court may consider, they do not define what is reasonable in every situation. That must be determined on a case by case basis. This order seems to us to be a reasonable attempt to increase Billy's visitation, working toward the goal of a full, normal visitation schedule.

Furthermore, although the expanded visitation schedule, previously in place, was pursuant to the recommendation of the court-appointed counselor, as authorized by the court, and although both Debra and Billy had been participating in the expanded schedule, that schedule itself was never expressly approved by the court or set out in any court order.

Therefore, we find that the circuit court order of December 19, 2005 did not *restrict* Billy's visitation, but rather *modified* it, as those terms are used in KRS 403.320. Thus, the standard is not whether the visitation "would endanger seriously the child[ren]'s physical, mental, moral, or emotional health," but whether such modification "would serve the best interests of the child[ren]." While the language of the order was not as explicit as we might like, we believe a finding is implicit in that order that the modification was in the best interests of the minor children. For these reasons, we find no abuse of discretion and affirm the decision of the court regarding Billy's visitation schedule.

Billy next argues that the court abused its discretion and restricted his visitation, in violation of KRS 403.320(3), when it set a specific time limitation of one year for him to be able to petition the court for overnight visitation.

The language to which Billy objects states that he "may petition the court for overnight visitation after one (1) year." We do not believe that this language places a restriction on Billy's ability to file an appropriate motion prior to one year from that date. Certainly if there were a change in circumstances warranting a modification of visitation, the court would hear any necessary motions on the issue. It is our opinion that this language should be interpreted merely as a tentative time line for increasing Billy's visitation with his children. It seems to be in the best interests of the children that there be a predictable visitation schedule so that the children will have as much stability as possible. Therefore, we do not believe the court abused its discretion in so ordering.

For the foregoing reasons, the December 19, 2005 order of the Calloway Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Prince
Benton, Kentucky

BRIEF FOR APPELLEE:

Gary R. Haverstock
Murray, Kentucky