

RENDERED: FEBRUARY 8, 2008; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2006-CA-002541-MR

SCOTTIE JOE DOZIER

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT  
HONORABLE RODERICK MESSER, JUDGE  
ACTION NO. 03-CI-01145

LISA GAIL DOZIER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON AND WINE, JUDGES.

WINE, JUDGE: Scottie Dozier (“Scottie”) appeals from a decree of dissolution entered by the Laurel Circuit Court incorporating a two-year-old separation agreement which restricted his visitation with his child and, upon entry, created a substantial child support arrearage upon entry. Scottie argues the trial court abused its discretion by not vacating the decree due to lack of proper notice to him and his counsel; refusing to consider his exceptions related to the visitation periods with his child; making his child support

obligation retroactive to the time of the separation agreement; and finding an arrearage in child support when the decree is silent as to an exact arrearage. Having reviewed the case, we find no error and affirm the trial court's order.

The procedural history in this case is lengthy but relevant. Scottie and Lisa Dozier ("Lisa") were married on January 30, 1998. Five years later, Lisa initiated divorce proceedings in the Laurel Circuit Court on November 21, 2003. On February 11, 2004, Lisa filed a motion for temporary custody and child support for the parties' only child, Mason S. Dozier, born May 30, 1999. Scottie was served on February 24, 2004. His attorney at the time, John M. Gambrel, entered his appearance on March 18, 2004.

Both of Lisa's pending motions were scheduled for a hearing on April 22, 2004. However, prior to the hearing on April 20, Scottie and Lisa signed a separation agreement resolving all issues of the litigation, and the hearing was cancelled. The parties' separation agreement was filed April 22, 2004. The agreement stipulated that Lisa would have sole custody of the child and Scottie would pay child support in the amount of \$529.92 per month. The agreement further stated that Scottie would submit to drug and alcohol screenings, including testing hair and blood samples, for a period of twelve months and file the results with the court and a copy to Lisa each month. Provided that each of the drug and alcohol screenings returned negative results, Scottie was entitled to supervised visitation with the child two days a week, with visitation to be supervised by Lisa's mother, Barbara Smith. Upon completion of the twelve-month drug and alcohol screenings, provided that each screening returned negative results, standard visitation would begin pursuant to the Laurel County time-sharing guidelines.

Thereafter, in June 2004, Scottie made a child support payment to Lisa in the amount of \$150.00. Lisa acknowledged receipt of that payment in a pleading filed on July 29, 2004. On September 27, 2004, Lisa filed a motion to submit the case for entry of a decree. Lisa's motion to submit was noticed for a hearing on October 6, 2004. The domestic relations commissioner ("DRC") entered a scheduling order on October 12, 2004, setting the matter for a hearing on November 24, 2004.

Ten months later on August 1, 2005, the trial court entered a notice pursuant to CR 77.02(2), asking the parties to show cause why no action had been taken in the litigation. The trial court then entered an order on October 19, 2005, allowing the case to remain on the docket. However, the court did not enter a decree, and on May 30, 2006, Lisa re-tendered her proposed decree. On June 20, 2006, the DRC recommended a status hearing in the case as the length of time between the court hearing and the recommendation regarding visitation was significant.

One day before the status conference on July 18, Scottie's current counsel, Douglas Benge, entered his appearance. On July 19, 2006, the DRC conducted a status hearing in which it heard testimony that Scottie had never complied with the terms of the parties' settlement agreement. The DRC recommended that the trial court enter the proposed decree. Scottie and his present counsel were in attendance at the hearing. The trial court subsequently signed and entered the decree on August 1, 2006, as recommended by the DRC and previously agreed to by the parties in the settlement agreement.

The ten-day notice of filing of the DRC's recommendation was filed on July 20, 2006. However, the notice was served to Scottie's prior counsel, John Gambrel,

but not to his present counsel. Regardless, the trial court allowed Scottie to file his exceptions late on October 16, 2006, approximately three months following the DRC's recommendation. Scottie's only exception was with regard to visitation.

Subsequently, on November 2, 2006, Lisa filed a motion for contempt, asserting that Scottie had a child support arrearage in the amount of \$17,062.36 as of the date of that filing. The DRC held a hearing on the contempt issue and recommended contempt against Scottie for failure to pay his child support per the settlement agreement and the decree. The trial court heard arguments as to the child support contempt and Scottie's proposed exceptions regarding his visitation. The trial court found that the parties had agreed to child support beginning as of February 11, 2004, and therefore Scottie had accrued an arrearage since that date of \$17,062.36. This appeal followed.

On appeal, Scottie complains that he did not receive proper notice of the entry of the decree; the trial court's adoption of the settlement agreement's terms regarding visitation was error; the trial court improperly calculated his child support obligation retroactive to the time of the separation agreement; and the trial court improperly found an arrearage when the decree did not indicate an arrearage amount. The trial court's denial of a motion to vacate is reviewed under the abuse of discretion standard. The court's factual findings are not in dispute. Scottie merely argues that the terms of the agreement are no longer appropriate given the lapse of time from entry of the settlement agreement to entry of the decree. It is well-settled that the trial court is not bound by parties' agreements as to child custody, support and visitation. KRS 403.180(2). However, the court must determine whether the settlement agreement is in the best interests of the child or is unconscionable. The trial court has broad discretion in

matters involving child support, subject to the statutory requirements of KRS 403.211-213 (support), KRS 403.270 (custody) and KRS 403.320 (visitation). Here, Scottie has set forth no factual basis for finding the agreement to be either not in the best interests of the child or unconscionable. *Peterson v. Peterson*, 583 S.W.2d 707 (Ky.App. 1979). Therefore, the abuse of discretion standard of review is applicable to the trial court's decision to adopt the support and visitation terms of the settlement agreement. *See B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky.App. 2005).

Scottie first argues that the trial court abused its discretion by not vacating the decree of dissolution on grounds of lack of proper notice to him and his counsel. Scottie is correct that CR 53.06(1) requires the clerk of the court to serve notice of the DRC's recommendations to the court within ten days upon all parties who have appeared in the action. However, the Kentucky Supreme Court held that a trial court did not abuse its discretion in considering untimely objections in consideration of a DRC report. *Eiland v. Ferrell*, 937 S.W.2d 713 (Ky. 1997). In this case, Scottie's counsel of record filed his appearance the day before the hearing, while Scottie's former counsel never withdrew his representation and was still named as counsel of record in the file. Even Scottie concedes that it is understandable how the ten-day notice was erroneously served on his former attorney. First, Scottie's present counsel was in attendance at the hearing where the DRC recommended the court adopt the settlement agreement into the decree, thus putting him on notice. Secondly, Lisa's counsel faxed a copy of the filed decree on August 14, 2006, to Scottie's present counsel yet Scottie still did not file his exceptions until October 16, 2006. Therefore, Scottie has failed to show any prejudice from the error.

Scottie contends that the trial court's adoption of the visitation terms in the settlement agreement was unreasonable due to the lapse of time between the execution of that agreement and the entry of the decree. We find this argument to be without merit. Pursuant to the terms of the settlement agreement, Scottie was ordered supervised visitation as long as he submitted negative blood and drug tests. However, Scottie submitted only a few drug screens from the time of the status conference in July 2006, but none of them were hair/blood drug screens required by the settlement agreement or decree. As Scottie has admittedly not complied with the terms of the settlement agreement which he willingly entered into, he cannot now challenge those terms.

Scottie next argues that the trial court abused its discretion by refusing to hold a hearing on his proposed exceptions related to visitation with his child. The trial court did allow Scottie to file his objections. However, after review of the objections to the visitation, the court was not willing to vacate a decree which incorporated the exact terms of a signed settlement agreement between the parties. Scottie argues that without a hearing, the trial court never considered evidence regarding the restrictions of his visitation rights under KRS 403.320 other than the exceptions he filed. We disagree.

In this case, the trial court actually considered Scottie's untimely objections. There is no dispute that Scottie did not comply with the visitation requirements of the settlement agreement prior to the entry of the decree. Further, it was only after the decree was entered that Scottie asserted exceptions to the requirements that he submit to the drug tests and have supervised visitation. Scottie failed to show any reason why adopting this portion of the settlement agreement is unreasonable. Scottie has failed to assert grounds upon which to set aside a settlement agreement in which he

freely entered into at the start of these proceedings. Therefore, his argument is without merit.

Next, Scottie argues the trial court abused its discretion in finding his child support obligation retroactive to February 2004, rather than the date of the entry of the decree. However, the parties' settlement agreement specifies that Scottie would pay \$529.92 per month in child support, effective February 11, 2004. The trial court adopted the settlement agreement by reference in its decree of August 1, 2006. Furthermore, Scottie never complained about the terms of the settlement agreement until he filed exceptions on October 16, 2006. And even then, Scottie's exceptions, which the court accepted into the record, only included complaints about his visitation arrangement, not child support. To that extent, any question about the effective date of child support is not preserved on appeal.

And even if the issue was properly preserved, the trial court was authorized to make the support provisions retroactive, consistent with the express terms of the settlement agreement. A trial court may order child support retroactively from the date of an oral motion to set or modify support. *Weldon v. Weldon*, 957 S.W.2d 283, 286 (Ky.App. 1997). Thus, the trial court would have been authorized to order Scottie to pay support retroactively from the date of the settlement agreement. As a general rule, "the court encourages voluntary, arms-length negotiated settlement, as opposed to protracted litigation . . . ." *Brown v. Brown*, 796 S.W.2d 5, 7 (Ky. 1990).

Scottie submits that the delay in the court's signing the decree had nothing to do with him as he merely sat idly by waiting for instructions from the court. This argument is absurd as the settlement agreement, entered in February 2004, clearly stated

the amount and time-frame for child support, to which Scottie, assisted by counsel, agreed to but never complied. Significantly, Scottie never once objected at the November 24, 2004, hearing to his restricted visitation or the retroapplication of the child support to February 11, 2004. In fact, Scottie admitted to being in arrears at the November 2004 hearing. It only makes sense that the arrearage grew to over \$17,000.00 when he continued to neglect his support payments for approximately three years. As so succinctly stated in *Thompson v. Thompson*, 172 S.W.3d 379, 382 (Ky. 2005), “By their very nature, child support payments are exigent. Such payments cannot be indefinitely postponed while parties litigate. If a subsequent court order retroactively cancels a child support debt, parties would be encouraged to refrain from payment in the hope of obtaining relief subsequently.”

Finally, Scottie argues the court abused its discretion by finding an arrearage when the decree is silent as to an exact arrearage. Scottie cites no authority in furtherance of his contention. Regardless, there is no ambiguity as to what amount Scottie is in arrears for his child support as the settlement agreement is clear. The trial court could easily calculate the arrearage by adding each of the payments which became due from the effective date of child support to the date of the contempt hearing, and then subtracting any payments which Scottie made during this period. Therefore, we reject this argument.

Accordingly, the order of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas G. Bengé  
London, Kentucky

BRIEF FOR APPELLEE:

Jill Osborne Edwards  
London, Kentucky