

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000438-MR

BRAHIM BENMOUSSA

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE RICHARD J. FITZGERALD, JUDGE
ACTION NO. 93-FD-02400

DEBRA SUSAN LOWRY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, CHIEF JUDGE; HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE: This is an appeal by Brahim Benmoussa (Brahim) from an order of the Jefferson County Family Court granting the motion of the appellee Debra Susan Lowry (Debra) to restrict Brahim's visitation with the parties' two minor children. The order restricts Brahim's visitation to supervised, recorded telephone visitation. Finding no reversible error, we affirm.

The parties were married in September 1989 and have two children, a daughter, Sophia, born April 24, 1990, and a son, Lail, born July 23, 1992. The parties separated on August 19, 1993, and on August 25, 1993, Debra filed a petition for divorce.

Thereafter, Brahim apparently commenced a normal visitation schedule with the children.

In November 1993, Debra filed a motion seeking a review of Brahim's visitation rights for the reason that Brahim was sexually abusing Sophia. Pending a decision on this motion, Brahim agreed to supervised visitation. The Cabinet for Human Resources did not substantiate the allegations. By order of March, 18, 1994, the trial court granted Brahim unsupervised visitation on alternating weekends. On March 31, 1994, Debra filed a second motion seeking the suspension of Brahim's visitation privileges on the ground that Brahim had violated the trial court's visitation order by not informing her of the location of the children during one of his visitation periods. There is no written order in the record addressing that motion; however, in early June 1994, Debra filed yet another motion for an order restraining Brahim from visiting with the children. This motion again alleged that Brahim was sexually abusing Sophia. On June 6, 1994, based upon the affidavits accompanying the motion, the trial court entered an order suspending Brahim's visitation privileges pending a decision on Debra's last motion. On June 17, 1994, the trial court entered an order reinstating supervised visitation for Brahim. The order noted that Sophia was acting out in a sexual manner, and appeared to have been "sexualized."

The divorce decree was entered on December 21, 1994. Also on that day, the trial court entered an order incorporating into the decree various agreements of the parties. The order

established a detailed visitation plan and provided for a visitation director. The plan granted Brahim supervised visitation limited to one hour per week. Both parties were required to attend individual counseling, with additional sexual abuse counseling for Brahim. The visitation director, Sophia's therapist, Dr. Patricia Abbott, was granted broad authority to coordinate visitation and make recommendations to the court regarding Brahim's visitation. On December 29, 1994, Brahim filed a motion to alter, amend, or vacate the order, stating that he had not agreed to the broad authority the order granted to Dr. Abbot or to the one hour per week visitation. This motion was denied on March 10, 1995. Brahim did not appeal. On February 23, 1995, Debra filed a motion to terminate Brahim's visitation privileges arguing that Brahim was not complying with the counseling requirements of the December 21, 1994, order. On May 11, 1995, Debra filed yet another motion to terminate Brahim's visitation privileges based on Dr. Abbot's representation that "Sophia has made numerous statements to me that she is worried about seeing her father and scared that he will re-abuse her." Debra apparently refused Brahim visitation on several occasions during this period and he filed several motions to hold Debra in contempt. Various motions were filed by both parties throughout the remainder of 1995.

On January 11, 1996, the trial court entered an order addressing various outstanding motions. The order recounted the history of the case and included the statement that, "[t]he Respondent [Brahim] has maintained that he did not sexually abuse

the child although a stipulation was entered into in a separate dependency action that the child was sexually abused and identifies the father as the perpetrator[.]” However, due to other factors, including Sophia’s contradictory statements regarding the abuse, the order provided that Brahim was entitled to six hours of supervised visitation every other week. The order also provided for weekly telephone visitation.

Debra did not immediately permit the visitation provided for in the January 11 order, and there followed various contempt motions and protracted efforts to agree on suitable visitation arrangements. Many visitations were missed during this period because the parties could not agree on a visitation supervisor. Brahim’s proposed supervisors, who charged in the \$8.00 to \$12.00 per hour range were rejected by Debra as unacceptable, and Debra’s proposed supervisors, who charged in the \$50.00 to \$60.00 per hour range, were rejected by Brahim as unaffordable. Various other motions were filed during this period, including motions for contempt and motions for attorney’s fees.

All the matters were referred to a Domestic Relations Commissioner (Commissioner), who held hearings on March 15, May 13, and June 7, 1996. On September 19, 1996, the Commissioner issued his report, which report was adopted by the trial court on October 24, 1996. These proceedings resulted in no substantive change to visitation arrangements, but reiterated Debra’s authority to select the visitation supervisor. Following this, Brahim filed a motion to alter or amend. Also during this time,

at the trial court's request, the parties identified various other issues as outstanding. On December 3, 1996, the trial court issued an order resolving all outstanding issues, denying Brahim's motion to alter or amend, and reiterating its previous judgments regarding restrictions on visitation.

In the first half of 1997, litigation continued regarding, among other things, payment of medical bills. On June 19, 1997, Debra filed an emergency motion to cancel a visitation scheduled for June 21. Affidavits attached to the motion described various "disturbing behaviors related to [the children's] contact with their father." On June 20, the trial court signed an ex parte order canceling the June 21 visitation.

On June 26, 1997, Debra filed a motion to suspend Brahim's visitation privileges pending the outcome of litigation to terminate his parental rights.¹ The petition alleged "that the children have become more and more anxious with greater periods of out-of-control behavior as a result of the visits with their father." Visitation remained suspended pending the trial court's consideration of the motion. On October 31, 1997, the trial court entered an order restricting Brahim's visitation privileges to supervised, recorded, one-hour per week telephonic visitations. Brahim filed a motion to alter, amend, or vacate its order, which was denied by order dated January 8, 1998. This appeal followed.

Brahim's first argument on appeal is that it was an abuse of discretion for the trial court to terminate his

¹ The record does not disclose the results of the termination proceedings.

visitation privileges when there was no showing that the children's physical, mental, or emotional health was being endangered. Similarly, Brahim's third argument is that the trial court improperly terminated his visitation privileges without proof that he has committed acts harmful to the children.

"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." KRS 403.320(1). "Under K.R.S. 403.320(1), the noncustodial parent has absolute entitlement to visitation unless there is a finding of serious endangerment to the child." Hornback v. Hornback, Ky. App., 636 S.W.2d 24, 26 (1982). "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." KRS 403.320(3) As used in the statute, the term "restrict" means to provide the non-custodial parent with something less than "reasonable visitation." Kulas v. Kulas, Ky. App., 898 S.W.2d 529, 530 (1995).

"The non-custodial parent is not required to show visitation is in the child's best interest[.]" Smith v. Smith, Ky. App., 869 S.W.2d 55, 56 (1994). "Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both its parents. The burden

of proving that visitation would harm the child is on the one who would deny visitation." Id. "A parent's right of access to or visitation with his minor children is a natural right, sometimes regarded as sacred ... and always respected as exceedingly important" Smith at 57, quoting M.L.B. v. W.R.B., 457 S.W.2d 465, 466-467 (Mo.App.1970).

While the trial court did not, in its October 31, 1997, order, explicitly make a finding of endangerment pursuant to KRS 403.320, it acknowledged the requirement of a finding of endangerment, and implied a finding of endangerment:

Mr. Benmoussa should not be allowed unsupervised visitation until he successfully completes his treatment and Sophia's therapist feels it is safe and beneficial for Sophia. The Court has not received any indication from any therapist that it is any safer today than it was at the time of the original agreed order of the parties and in fact from the treating psychologist chosen by the parties visitation is in fact emotionally damaging. Pursuant to KRS 403.320 a parent not granted custody of a child is entitled to reasonable visitation rights unless the Court finds after a hearing that visitation would endanger seriously the child's physical, mental or emotional health. The Court finds at this time that it is in the best interest of the child to restrict the father's visitation rights to telephonic visitation.

We may not set aside the trial court's findings unless they are determined to be clearly erroneous. Cr 52.01. A trial court's finding of fact is not clearly erroneous if the finding is supported by substantial evidence. Black Motor Company v. Greene, Ky., 385 S.W.2d 954, 956 (1964). "[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial

judge were clearly erroneous or that he abused his discretion.”
Cherry v. Cherry, Ky. 634 S.W.2d 423, 425 (1982)

Brahim denies that he ever engaged in inappropriate conduct with Sophia, denies that he ever conceded or stipulated that he did, and repudiates any agreement that would indicate any admission that he had. He claims that Debra has coached Sophia to make these allegations and that Debra's trial counsel and Dr. Abbot acquiesced in Debra's deception. However, there is substantial evidence in the record sufficient to constrain us from concluding that the trial court was clearly erroneous in its determination that face-to-face visitation would expose the children to physical, mental, moral, or emotional endangerment, or in its determination that it would be in the children's best interest to restrict visitation.

There have been allegations of sexual abuse against Brahim since the outset of this case. Psychological experts and therapists have testified that Sophia has been abused and that Brahim is the perpetrator of the abuse. While Sophia has at times contradicted her allegations, she nevertheless has directly accused Brahim of "eating her pee-pee." Brahim, in conjunction with the 1994 dependency proceedings stipulated that, "Sophia has been sexually abused and ... the father Brahim Benmoussa states pursuant to North Carolina v. Alford [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)] that there is sufficient evidence based on the testimony of Dr. Bleidt and Dr. Abbott . . . to sustain a finding that he is the perpetrator." Sophia has engaged in sexual acting-out behavior and the psychology experts have

described her as having been "sexualized." Brahim acknowledges that Sophia has been "sexualized" and thereby sexually abused, though he denies that he has engaged in any inappropriate conduct with Sophia.

In May 1997 an incident occurred which prompted Debra to file the motion which led to the current restrictions on visitation. On that occasion, Brahim was having a supervised visitation with his children at a McDonald's Playland. Sophia, then aged seven, refused to use the restroom and urinated on her clothes. Sophia was escorted to the bathroom by the visitation supervisor and changed her wet pants; however, she refused to change her shirt, which was also wet with urine. Brahim thereafter removed Sophia's shirt in public. Based upon this incident, Dr. Abbot recommended that Brahim's face-to-face visitations with the children be suspended. The supervisor who monitored that visitation filed an affidavit which stated, "I am concerned about the emotional impact on [Sophia] if these visits continue, especially in light of the allegations in this case."

In the final analysis, Brahim is requesting that we believe him when he says that he did not act inappropriately with Sophia and disbelieve the evidence that the appellant has adduced to the contrary. However, we must give due regard to the fact that the trial court was in a better position to observe the credibility of the witnesses. CR 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). Based upon the record as a whole, there is substantial evidence to support the trial court's findings and its corresponding restrictions on visitation.

Brahim's second argument is that the trial court improperly used his stipulation of abuse under an North Carolina v. Alford, supra, "plea" in a separate dependency proceeding as evidence of a stipulation of abuse in the visitation proceedings. The document, captioned "Stipulation of Facts" stated that:

Parents stipulate that Sophia has been sexually abused and that the Father Brahim Benmoussa states pursuant to Alford v. North Carolina [sic] that there is sufficient evidence based on the testimony of Dr . Bleidt and Dr. Abbot . . . to sustain a finding that he is the perpetrator. It is further stipulated that the sibling Lail was present during periods of custody and visitation when the allegations of abuse occurred.

With regard to this issue, the trial court, in its October 31, 1997, order, the trial court reviewed the case history and stated that "[t]he court, consistent with the case plan which arose out of a finding of sexual abuse stipulated in the dependency proceedings, required for a period of time that visitation would be held at the Cabinet of Human Resources or a third place as determined by the Cabinet and Dr. Abbott. In the proceedings both at the trial of the divorce and in the dependency matter [Brahim] availed himself of stipulation and agreement rather than be subject to the judgment of the Court during the course of those hearings which concluded with a Court order of January 10, 1996, on the basis of psychological recommendations recommending a suspension of visitation." It is apparent that the trial court's only reason for bringing up the 1994 stipulation in its order dated October 31, 1997, was to explain the procedural background of the case. The trial court's

January 8, 1997, order denying Brahim's motion to vacate contained no reference to the 1994 stipulation.

The issues of the December 1994 stipulation and its application in orders prior to October 31, 1997, are not preserved for our review in this appeal. To the extent that the trial court may have used this stipulation as a basis for a decision in prior orders, those orders were not appealed and we may not review them now. See CR 73.02(1)(a). Even if we were inclined to agree with Brahim regarding the use of an Alford "plea" made in a dependency proceeding in child custody litigation,² that issue is not before us. The trial court's mere mention of the stipulation in the order entered on October 31, 1997, does not allow us to review previously unappealed orders.

We considered Brahim's third argument relating to an absence of proof that he has committed harmful acts toward the children along with his first argument, supra. Brahim's fourth argument is that the trial court improperly delegated visitation determinations to Debra and/or Dr. Abbott. In its order dated December 21, 1994, the trial court issued an order incorporating a purported agreement of the parties. The order, consistent with the purported agreement, gave Dr. Abbott broad authority to oversee visitation arrangements in this case. Brahim filed a

² We note that under Kentucky Rule of Evidence 410(2), an Alford plea is not admissible in civil proceedings against the defendant who made the plea. In criminal proceedings an Alford plea is not admissible as a statement against interest, but may be admitted for sentencing purposes or to determine PFO status. Pettitway v. Commonwealth, Ky. 860 S.W.2d 766 (1993); Whalen v. Commonwealth, Ky. App. 891 S.W.2d 86 (1995).

motion to modify or amend, which was denied on March 10, 1995. Brahim did not appeal those orders.

Brahim contends that he did not agree to the "agreement" as incorporated in the December 1994 order. However, following the trial court's refusal to modify or amend, Brahim did not appeal the orders. We agree with Debra that this issue is not preserved for our review. This issue was previously litigated by the parties and final and appealable orders were issued determining the issues. The orders were not appealed. We have no basis for reviewing the December 21, 1994, order. See CR 73.02(1)(a).

Brahim's fifth argument is that denial of visitation must be separately considered for each of his children. He argues that since most of the allegations which have resulted in the visitation restrictions have concerned his alleged abuse of Sophia, there has been no "determination as to whether the visitation of Mr. Benmoussa with Lail would endanger his son."

It is true that most of the litigation in this case has concerned the allegations against Brahim as they concern Sophia. Further, the October 31, 1997, order is ambiguous as to whether it even applies to Lail. For example, the trial court states, "[t]he court finds at this time that it is in the best interest of the child to restrict the father's visitation rights to telephonic visitation." (emphasis added). The trial court goes on to say, however, that "[t]he telephone visitation applies to both children."

Brahim did not raise this issue in his motion to alter or amend, nor did he file a motion requesting the trial court to clarify its October 31 order. Brahim has not directed us to that portion of the record wherein he sought a separate ruling as to his rights to visitation with Lail under KRS 403.320 and the issue is not preserved for our review. See Elwell v. Stone, Ky. App., 799 S.W.2d 46 (1990); CR 76.12(4)(c)(iv).

For the foregoing reasons, the order of the Jefferson Family Court restricting Brahim's visitation with the parties' children is affirmed.

ALL CONCUR.

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