

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000054-ME

GARY TIPTON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 04-D-500057

LEAH MOODY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, JUDGE; HENRY AND ISAAC,¹ SENIOR JUDGES.

ISAAC, SENIOR JUDGE: Gary Tipton, *pro se*, appeals from the order of the Jefferson Family Court which denied his motion to establish visitation rights with his minor child. For the following reasons, we affirm.

¹ Senior Judges Michael L. Henry and Sheila R. Isaac sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

Tipton and Leah Moody are the parents of a son born on September 8, 2004. The parties were divorced by decree of dissolution of marriage on March 30, 2007. The decree reserved adjudication of custody and visitation. Subsequently, on April 21, 2008, Tipton filed a motion to establish visitation rights with the child. The trial court denied Tipton's motion without a hearing and Tipton appealed. This court vacated the trial court's order due to the trial court's failure to conduct a hearing, and remanded the matter for further proceedings (No. 2008-CA-001762-ME). A hearing was held on September 16, 2009 regarding Tipton's motion.

At the hearing, Tipton testified that he is currently serving a twelve-year sentence for assault in the third degree on a police officer, possession of a firearm by a convicted felon, possession of a controlled substance, and criminal mischief. Tipton was in prison when his child was born, and has been in prison all but 69 days of his child's life.

The court noted that Moody was granted a domestic violence order (DVO) against Tipton in January 2004 which expired in January 2007. In July 2007, Moody again petitioned the court for a DVO on behalf of herself and their child based upon Tipton's threats to kill her and anyone she was with and take their child if Moody attempted to keep the child away from Tipton. This second DVO entered against Tipton will expire in October 2010. At the hearing, Tipton

admitted to making threats to Moody, as well as Moody's parents, and on one occasion becoming physical with Moody, but denied making any threats after the birth of their son.

In its order denying Tipton visitation rights, the court referenced a report filed by Child Protective Services on October 8, 2007 which reported that Moody took the child to visit Tipton in prison in September 2007, and that during that visit, Tipton refused to give the child back to Moody and prison guards had to assist in returning the child to Moody. Tipton denied the incident. The court also referenced a letter sent to the court from the child's therapist recommending that Tipton's and the child's relationship should develop in a setting other than prison. Further, the therapist stated the child had difficulty adapting to change and suggested that the child not be taken to prison to visit Tipton. Based on the record and its findings, the trial court concluded that the child's physical, mental, and emotional health would be seriously endangered if Tipton was provided with visitation rights and therefore denied his motion to establish visitation. This appeal followed.

Tipton argues the trial court erred by denying his motion because it relied on the Child Protective Services report which Tipton claims is incorrect and not supported by substantial evidence. We disagree.

We will only reverse a trial court's determinations as to a party's visitation rights if they constitute "a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32

S.W.3d 521, 525 (Ky.App. 2000) (citing *Wilhelm v. Wilhelm*, 504 S.W.2d 699, 700 (Ky. 1973)). The trial court’s findings of fact are not clearly erroneous if supported by “evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002) (citations omitted). Due regard must be given to the trial court’s determination as to the credibility of witnesses. *Id.*

KRS² 403.320(1) provides: “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.” In this case, the trial court based its decision to deny Tipton’s motion for visitation on the previous instances of physical and verbal abuse, the active domestic violence order, the report filed by Child Protective Services, and the recommendations contained in the letter sent to the court by the child’s therapist. Even if we disregard the Child Protective Services report, as Tipton requests, the record is sufficient to support the trial court’s finding that visitation would seriously endanger the physical, mental, and emotional health of the minor child. Accordingly, the trial court did not abuse its discretion by denying Tipton’s motion to establish visitation rights.

The order of the Jefferson Family Court is affirmed.

ALL CONCUR.

² Kentucky Revised Statutes.

BRIEF FOR APPELLANT:

Gary Tipton, *Pro se*
Eddyville, Kentucky

BRIEF FOR APPELLEE:

No brief for appellee filed.