

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000880-MR

A.D.L.

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 08-CI-00204

C.C. and B.C.

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: A.D.L. appeals from an order of the Greenup Circuit Court restricting her visitation with her minor child. After careful review of the record, we affirm.

A.D.L. (hereinafter the mother) and B.C. (hereinafter the father) are the parents of a minor child, K.N.C., who was born on July 1, 2005. The father

filed a petition for custody in the Greenup Circuit Court on March 17, 2006, and on April 21, 2006, the petition was transferred to the Boyd Circuit Court, as the child was a resident of Boyd County at that time. The mother and father were awarded joint custody of the minor child.

On November 2, 2007, C.C. and B.C., the paternal grandparents (and hereinafter the grandparents), filed a verified motion to intervene and petition for custody. The case was transferred to Greenup Circuit Court upon motion of the grandparents and by order of the Boyd Circuit Court on February 29, 2008. On or about June 6, 2008, the Greenup Family Court awarded custody of K.N.C. to the grandparents by finding that they were the *de facto* custodians of the minor child and/or the parents had waived their superior right to custody. In the order awarding custody, the mother was awarded visitation to be agreed upon by the parties, and if the parties were unable to agree, her visitation would be scheduled pursuant to Schedule A of the Greenup Circuit Court Time Sharing Guidelines.

On or about May 13, 2009, the mother filed a motion for contempt, stating that the grandparents were failing to abide by the visitation guidelines, and requested a hearing. The trial court conducted the hearing on August 4, 2009. In an order entered August 6, 2009, the court denied the motion for contempt based upon a prevention plan that the grandparents had entered into with the Cabinet for Health and Family Services (the Cabinet). In the same order, the court restricted the mother's timesharing pending the completion of an investigation by the Cabinet. In this order, the trial court found that there was an allegation that the

minor child may have been sexually abused by the mother and/or someone with whom she lived. The trial court found that the Cabinet failed to investigate the allegation and ordered an investigation. The mother's visitation was ordered to be supervised pending the completion of the investigation.

Once the investigation was completed and the Cabinet determined the allegations against her were unsubstantiated, the mother filed a motion requesting the trial court to reinstate her unsupervised visitation. The trial court conducted a hearing on that motion on March 23, 2010, and entered an order on March 25, 2010, continuing the supervised visitation based upon a finding that the mother and the minor child had not bonded. The trial court also found that K.N.C. was sexually abused, but by an unknown perpetrator, and that there was no proof the mother had sexually abused the child. At the time the trial court entered the order restricting the mother's visitation to supervised visitation, there were no motions pending to restrict her visitation.

The mother filed a motion to alter, amend, or vacate the trial court's order, which was denied. This appeal now follows.

The mother's first assignment of error on appeal is that the trial court erred in restricting her visitation because there was not a pending motion to restrict visitation before the trial court. The mother argues that the court cannot *sua sponte* restrict her visitation.

Kentucky Revised Statutes (KRS) 403.320(1) provides, in relevant part, that "[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(2) recognizes the broad authority of trial courts in regards to issues of visitation by providing that "[t]he court may modify an order granting or denying rights whenever modification would serve the best interests of the child." The only statutory restriction on the trial court's authority in regards to a non-custodial parent's visitation with her minor children is KRS 403.320(3)'s subsequent prohibition that "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."

Nothing in KRS 403.320(1) or (3) requires the filing of a formal motion requesting that a non-custodial parent's visitation be supervised before the trial court has authority to impose such a restriction. The only procedural requirement established in KRS 403.320(1) and (3) is that the trial court may not restrict the non-custodial parent's visitation unless and until it finds "after a hearing" that restricted visitation is required because unrestricted visitation would seriously endanger the child.

The mother relies on *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999), in support of her argument that the trial court improperly ordered supervised visitation when a motion requesting supervised visitation was not before the court. In *Petrey*, the Kentucky Supreme Court rejected a father's claim that his ex-wife had failed to comply with statutory provisions requiring the filing of two affidavits

in support of a request for modification of a custody decree. *Id.* at 788. In its opinion, the Kentucky Supreme Court observed that “[a]lthough a court may have jurisdiction over a particular class of cases, it may not have jurisdiction over a particular case at issue, because of a failure by the party seeking relief to comply with a prerequisite established by statute or rule.”

When applying *Petrey* to the case at bar, the key phrase to consider is “prerequisite established by statute or rule.” While it is true that trial courts may be deprived of the authority to rule in a specific case due to a party’s failure to comply with prerequisites such as those found in KRS 403.340 and KRS 403.350, the absence of language in KRS 403.320, establishing any such prerequisite other than that a hearing be held by the lower court prior to restricting visitation, is fatal to the mother’s argument. To be sure, the trial court held a hearing on August 4, 2009, and another hearing on March 23, 2010. Because visitation was properly before the trial court based on the mother’s motion for contempt, and because the trial court fully complied with the requirements of KRS 403.320, the mother’s first claim of error on appeal is without merit.

The mother next argues that the trial court’s findings of fact were not supported by sufficient evidence and thus its order restricting her visitation was in error. “[T]his Court will only reverse a trial court’s determinations as to visitation 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 test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004) (citation omitted). Further, “[o]n appellate review of a trial court’s findings of fact, [the reviewing court] is obligated to defer to the lower court’s factual findings and determinations regarding the credibility of witnesses.” *Commonwealth v. Bussell*, 226 S.W.3d 96, 99 (Ky. 2007); Kentucky Rules of Civil Procedure (CR) 52.01.

During the first hearing, the trial court heard the testimony of three separate employees of the Cabinet regarding investigations each had conducted in regards to K.N.C. Vanessa Fannin, a social worker based in Boyd County, Kentucky, testified that she had investigated an initial allegation received on February 6, 2009, that the minor child had claimed that the mother had placed cigarettes in his bottom. During the course of her investigation, Ms. Fannin spoke with the mother, who, in turn, expressed her own concerns about the grandparents’ ability to care for K.N.C. Ms. Fannin thereafter contacted Centralized Intake and provided the information the mother had reported. In regards to the initial allegation of abuse made on February 6, 2009, Ms. Fannin testified that the allegations were unsubstantiated based in part upon the lack of physical findings of any evidence of abuse by staff at King’s Daughters Medical Center.

Based upon the information Ms. Fannin provided to Centralized Intake, a second cabinet worker, Elizabeth Strong, was assigned to check on the child to determine whether he was being properly supervised by the grandparents.

Ms. Strong, a cabinet worker from Greenup County, Kentucky, where the child resided, testified that after receiving a Family in Need of Services (FINSA) report on February 26, 2009, she made an initial visit to the grandparents' home on February 27, 2009. During this visit, Ms. Strong spoke with the grandmother, who reported that after she had admonished K.N.C. for putting his finger in his butt, the child had stated that "[his mother] and [her boyfriend] put stuff in his butt and said it was good for him." After briefly leaving the home in order to contact Centralized Intake to report this information, Ms. Strong then returned to the home where she had the grandparents sign a written prevention plan in which they agreed that they would not allow any contact between K.N.C. and his mother or the named male individual (the mother's boyfriend) until such time as the sexual abuse investigation had been substantiated or unsubstantiated. Ms. Strong testified that she did not investigate the sexual abuse claims because it was her understanding that Ms. Fannin was investigating those allegations.

The trial court also heard testimony during the first hearing from Lana White, a third cabinet worker who, prior to taking a position in Centralized Intake, had investigated the March 27, 2009, report of possible abuse. This report was based upon the physical findings of Dr. Gail Feinberg at Hope's Place that K.N.C. had a tear in the rectum area which purportedly was not present when the child was examined by the staff at King's Daughters Medical Center. Although Ms. White confirmed that she had not substantiated any allegations of sexual abuse against K.N.C. by his grandfather, she testified that she had not investigated allegations of

sexual abuse by the mother. In fact, per Ms. White's testimony, no investigation of the allegations of sexual abuse by the mother or her former paramour had ever been performed.

Based upon the testimony of these witnesses at the first hearing, the trial court ordered that until such time as an investigation into the allegations of sexual abuse against the mother was concluded, her visitation should be supervised in order to protect the child from serious endangerment.

During the second hearing on March 23, 2010, the trial court heard additional testimony regarding K.N.C.'s physical, mental, emotional, and moral well-being. Carol Taylor, a licensed professional counselor employed by Pathway's, Inc., testified that she had been treating K.N.C. since April 2009, after he had been referred to her for counseling by Hope's Place. Ms. Taylor testified that she saw K.N.C. every two weeks for the first six months, and then approximately every three weeks until the end of 2009. In 2010, up until the time of the hearing, Ms. Taylor was meeting with K.N.C. once a month. When asked if she had any type of opinion as to whether K.N.C. should be visiting unsupervised with his mother, Ms. Taylor stated:

My opinion is that as long as there is a possible chance that he's being victimized, that he should only have supervised visitation. That's not even taking into account his behavior, which apparently is atrocious when he—when he's having contact with mom. I have noticed a change in his behavior from the time I started see [sic] him until now. And, you know, he's—he's much better behaved. He has much more control over his behavior

and emotions than he did when first he started coming to me. A major change.

When asked whether she had been able to speak with K.N.C. during his counseling sessions about his relationship with mother, Ms. Taylor testified:

Well, anytime I've asked him—I've asked him probably three or four times about how visits have gone with mom or his conversations. He calls her Ashlee. And he says, I hate Ashlee. That's it. I don't pursue that. And that's really all that he says about it. He doesn't want to talk about her.

Most significantly, when the grandparents' counsel asked if she had any concerns about K.N.C. visiting with his mother outside of the concerns the grandparents had expressed to her, Ms. Taylor stated:

Yes. He doesn't seem to have any warm or bonded relationship with her. And so that would concern me. You know, I'd wonder about that.

Ms. Taylor's observations about K.N.C.'s tendency to refer to the mother by her first name rather than Mom or Mommy were echoed by Amanda Hutchinson, an ongoing worker with the Cabinet who had been supervising visits between the mother and K.N.C. since November 2009. When asked if she noticed anything about K.N.C.'s behaviors which concerned her, Ms. Hutchinson replied that he seemed aggressive with his mom at times and referred to her as [A.D.L.] rather than Mom.

In rebuttal, the mother points to the testimony of the Cabinet employees who supervised her weekly visits with her son. However, their testimony reveals a limited opportunity to observe the mother and K.N.C., as the testimony reflected

that the visits were terminated early on three or four occasions and that the mother did not exercise her visitations on five occasions.

As this court has observed, “[the] trial court, rather than an appellate court, is in the best position to weigh the evidence and the credibility of the witnesses.” *First Nat. Bank of Cincinnati, Ohio v. General Assembly Mission Bd. of Presbyterian Church in U.S., Inc.*, 610 S.W.2d 927, 929 (Ky. App. 1980). In the instant case, the trial court’s order makes it clear that it found Ms. Taylor’s testimony regarding K.N.C.’s relationship with his mother more persuasive than the testimony offered by the Cabinet workers who supervised the mother’s visitations. In light of Ms. Taylor’s extensive training as a professional counselor, this is a reasonable conclusion for the trial court to have made. The trial court’s decision to require the mother’s visitation to remain supervised was not clearly erroneous and was supported by substantial evidence.

Discerning no reversible error on appeal, we hereby affirm the orders of the Greenup Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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