

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001316-ME

STACY MARIE COLLINS

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 09-CI-00094

KENNETH HAYNES, JR.

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Stacy Collins appeals the order of the Bell Circuit Court reinstating Kenneth Haynes visitation with the parties' minor child, S.H., and the order denying her CR¹ 59 motion to alter, amend or vacate that order. After careful review of the record, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¹ Kentucky Rules of Civil Procedure.

Stacy and Kenneth were never married and had an “on and off” relationship beginning in the spring of 2007 through the end of 2008. Their child, S.H., was born in August 2008. Kenneth filed a petition for custody of S.H. on March 9, 2009. At the time the petition was filed, Stacy was living in Middlesboro, Kentucky, and Kenneth was living in Harrogate, Tennessee. Kenneth stated in his affidavit attached to his petition that Stacy maintained physical custody of S.H. after they stopped living together, but that he was the “primary caregiver and financial provider.” He also stated that Stacy had denied him visitation with S.H. since February 13, 2009.

Stacy filed a response on March 12, 2009, in which she stated that Kenneth had not seen S.H. since February because of alleged acts of domestic violence perpetrated by him against her. She additionally requested sole custody, and limited, non-overnight visitation for Kenneth.

On April 15, 2009, a hearing was held in which the parties and various witnesses testified. The Bell Circuit Court found that both parties were suitable custodians for the child; however, they did not have a history of working well together when it came to S.H. After considering all relevant factors of KRS² 403.270, the court awarded Stacy sole custody of S.H. and visitation to Kenneth every first and third weekend of the month from Saturday at 9:00 a.m. until Sunday at 6:00 p.m. and every Wednesday from 4:00 p.m. until 8:00 p.m., plus holidays according to a visitation schedule.

² Kentucky Revised Statutes.

On July 13, 2009, Stacy filed a motion for an order for Kenneth to show why he should not be held in contempt “for his constant, incessant threatening, and abusive behavior.” She also requested that the exchange of S.H. take place at the Middlesboro Police Department and that Kenneth be required to submit to drug testing. Stacy attached to her motion several protection orders against Kenneth involving other relationships; however, none were in relation to her. On August 27, 2009, the parties entered into an Agreed Order making the exchange location for S.H. at the Middlesboro Police Department and to mutual no contact.

Stacy then filed an abuse petition in the Claiborne County Juvenile Court in Tennessee. A hearing was held by the Tennessee court on July 28, 2010, in response to the petition filed by Stacy in June 2010 stating that S.H. was dependent and neglected and further alleging Kenneth posed a risk of harm to S.H. After the petition was filed, the Tennessee Court entered a no contact order between Kenneth and S.H. The petition was dismissed because the court found that there was no evidence that the child had been abused.³ Visitation between Kenneth and S.H. resumed on July 28, 2010, until November 21, 2011, when Stacy filed a second petition in the Tennessee Court purportedly stating the exact same allegations as the June 2010 abuse petition. At this time, Kenneth’s counsel in Tennessee moved the court to allow for an independent forensic evaluation prior to

³ The Claiborne County Juvenile Court determined that it had limited jurisdiction to acts of abuse committed in Tennessee and that there was no medical evidence of abuse by Kenneth against S.H.

any adjudication of the case. The preliminary hearing and the adjudicatory hearing were continued to allow time for the independent evaluation. The forensic report was completed in November 2012 by Dr. Diana McCoy, Ph.D., ABAP. Dr. McCoy interviewed Kenneth, Stacy, S.H., and Stacy's older minor child. She additionally reviewed several medical records, court documents, and remarks and observations of medical personnel that conducted examinations on S.H. Dr. McCoy found the allegations of abuse of S.H. were untrue and recommended that Kenneth's visitation with the child resume within a "supervised therapeutic setting." The Tennessee court kept the no contact order in place between Kenneth and S.H. throughout its proceedings, so Kenneth had not had any contact with his child since November 2011.

On November 30, 2012, Stacy returned to the Bell Circuit Court and filed a motion in which she requested that the court modify its April 27, 2009 order to provide that S.H. have no contact with Kenneth. Stacy stated in her motion that Kenneth had not had contact with S.H. in one year. Additionally, Stacy stated that in 2010, allegations came about that Kenneth had sexually abused Stacy's older child, who is not biologically related to Kenneth, and that the case was investigated and substantiated by the Kentucky Department of Community Based Services.⁴

Stacy further alleged in her motion that she began to notice changes in S.H.'s

⁴ After S.H.'s abuse petition was dismissed by the Tennessee court in July 2010, Stacy apparently filed an abuse petition in Kentucky against Kenneth alleging that he had abused her older minor child. According to the parties and their counsel, these allegations concerning Stacy's older minor child were currently on appeal at the time of the April 22, 2013 proceeding. However, we were not able to locate an appeal to this Court regarding this, and the parties have not referenced a case number for the benefit of this Court.

behavior soon after the allegations of abuse of her older child had surfaced. Stacy stated that S.H. would get upset when her diaper was changed, she would not let anyone look at her diaper area, she would point to her diaper area and say “daddy” and cry. Stacy also stated in her motion that she had taken S.H. to East Tennessee Children’s Hospital in February 2012, and S.H. tested positive for Hepatitis C. Stacy stated that she herself was tested and did not have Hepatitis C, indicating that S.H. must have contracted the infection from Kenneth. It was later determined after the motion was filed that S.H. did not in fact have Hepatitis C, and neither did Kenneth. Stacy also noted in her motion that there was a pending action in Tennessee against Kenneth alleging abuse of S.H.

In response to Stacy’s November 30, 2012 motion and Kenneth’s January 9, 2013 motion for a continuance pending the Tennessee court decision, the Bell Circuit Court entered a status quo order on January 25, 2013, enforcing the Tennessee court’s no contact order between Kenneth and S.H. and holding all issues before the Kentucky court in abeyance until final disposition by the Tennessee court of the case before it. The adjudicatory hearing on S.H.’s abuse petition was scheduled in the Tennessee court for February 1, 2013.

At the February 1, 2013 hearing, both parties appeared with counsel. However, the Tennessee Department of Children’s Services relayed the following to the Claiborne County Juvenile Court:

We are simply giving our notice of non-suit. We can explain to the court just a little bit of, um, we have a companion action now going on in Kentucky. There is a

no contact order pending the outcome of this case, so Kentucky has jurisdiction under UCCJEA⁵ in regard to this child. So we are assured that the Kentucky court will be handling all matters in regards to [Kenneth]'s contact so it won't be a situation where we walk out of the court room today and all this court's aware is that the child will have immediate contact. They'll have to go to Kentucky, get that order lifted and some sort of plan put in place.

An order non-suiting the case was entered on February 6, 2013. It is a form order with no boxes checked or lines filled in, but on the last page it states: "The Department of Children's Services voluntarily non-suits its petition in this matter without prejudice to refile."

Kenneth then returned to the Bell Circuit Court in Kentucky and filed a motion on March 20, 2013, to enforce his previously ordered visitation. He attached to his motion an affidavit of his counsel, Lindsey Cadle, in Tennessee, detailing her knowledge of the history of the proceedings in Tennessee. A verified copy of the Claiborne County Juvenile Court Order was filed with the Bell Circuit Court. A hearing was scheduled for April 22, 2013, in the Bell Circuit Court to address Kenneth's motion to enforce visitation.

At the April 22, 2013 hearing, the parties appeared with counsel as well as their respective witnesses. Kenneth argued that it was not necessary to conduct a hearing because the abuse petitions filed in the Tennessee court were both dismissed; the first one on the merits and the second because the Department of Children's Services voluntarily requested its petition be dismissed.

Additionally, Kenneth submitted the evaluation of Dr. McCoy to the court for

⁵ Uniform Child Custody Jurisdiction And Enforcement Act.

consideration with no objection by Stacy's counsel. The court also entertained argument of counsel and got clarification regarding the Hepatitis C allegations made by Stacy.

Stacy argued that the petition of abuse in the Tennessee court was dismissed on jurisdictional grounds, and the Tennessee court expected the Kentucky court to hold a full hearing on the matter before any visitation was reinstated.⁶ In support of this, she submitted the Tennessee court's audio recording of the February 1, 2013 hearing. The circuit court took all of the arguments and evidence presented into consideration, stated it would review the record, and enter an order.

The Bell Circuit Court entered its order on May 9, 2013, finding it was in S.H.'s best interests to reinstate visitation with Kenneth in accordance with its April 27, 2009 order after a break-in period. Specifically, there would be no overnight visitation for two months, and in accordance with the recommendations of Dr. McCoy, the first two visits were ordered to occur in a therapeutic setting for one hour, monitored by a counselor. The appointed counselor, Carrie Smith, was to make a report to the court only if there were issues of concern that needed to be addressed by the court. The monitored visits were later extended to four additional visits in the therapeutic setting at the suggestion of the counselor with another report to be filed at the conclusion of those visits. After completion of the

⁶ Stacy disclosed at the April 22, 2013 hearing that she had filed an abuse petition regarding S.H. in Kentucky shortly after the Tennessee court non-suited its case.

therapeutic visits, Kenneth was awarded his previously ordered visitation, except that no overnight visitation was to occur until expiration of the two-month period.

The court additionally found that Kenneth had presented proof that the Tennessee proceedings had been voluntarily dismissed by the Tennessee Department of Children's Services. Also, the court clarified in its order that Kenneth had not given S.H. Hepatitis C. After review of Dr. McCoy's extensive report, the Bell Circuit Court found that there was no evidence that S.H. was sexually abused by Kenneth, and also noted that the allegations were investigated and dismissed twice by the Tennessee court. The court did, however, take into consideration the substantiated allegations by the Kentucky Cabinet for Health and Family Services of abuse relating to Stacy's older minor child, which the parties claim were on appeal at the time.

Stacy filed a CR 59 motion to alter, amend or vacate the court's May 9, 2013 order arguing that she was entitled to a full hearing before the court could enforce Kenneth's previously ordered visitation. Her motion was overruled on July 12, 2013. Stacy now appeals.

STANDARD OF REVIEW

“[T]he change of custody motion or modification of visitation/time-sharing must be decided in the sound discretion of the trial court.” *Pennington v. Marcum*, 266 S.W.3d 759, 769 (Ky. 2008). “[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).

ANALYSIS

Stacy’s sole argument on appeal is that the trial court erred in ruling on her motion requesting to restrict visitation and Kenneth’s motion to reinstate his previously ordered visitation without conducting a hearing. Stacy asserts she was deprived of her opportunity to present evidence that unsupervised visitation with Kenneth would endanger S.H. She contends that there is a statutory right to a hearing in this case under Kentucky Revised Statutes (KRS) 403.320(1) and (2).

Stacy relies on KRS 403.320(1) and (2) because the sections of the statute impose a hearing requirement on the court before a visitation determination is made. However, Stacy’s arguments on appeal are misplaced in her attempt to get yet another appearance in Bell Circuit Court.

KRS 403.320(1) entitles the noncustodial parent, *i.e.*, Kenneth, to visitation unless--after a hearing--there is a finding of serious endangerment to the child. This determination was made by the circuit court in April 2009 in the initial visitation order after a full adjudicatory hearing. The circuit court determined that both Kenneth and Stacy were suitable custodians for S.H., and ultimately awarded sole custody to Stacy and visitation to Kenneth.

The second statute Stacy relies on is KRS 403.320(2), which states that if “abuse, as defined in KRS 403.720, has been alleged, the court shall, after a

hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health." It was clear from the order that the Kentucky court did take into consideration the abuse allegations made regarding S.H. as well as the substantiation of allegations of Stacy's older minor child. And strictly speaking, the Bell Circuit Court held a hearing on Stacy and Kenneth's motions on April 22, 2013. The court heard oral argument of counsel, received evidence regarding the abuse case in Claiborne County, Tennessee, as well as Dr. McCoy's forensic report on the abuse allegations. The court also permitted Stacy to address it informally. Stacy has failed to cite in the record where she asked the court during the proceeding if she could present further evidence or question relevant witnesses⁷ to demonstrate that unsupervised visits with Kenneth would endanger S.H. Additionally, Stacy does not cite to any specific evidence that she wanted to present that would change the outcome of the case, and she has not demonstrated any prejudice with the evidence that was submitted to the court on April 22, 2013, only that she did not get the outcome that she desired.

This matter was before the Bell Circuit Court on Kenneth's motion to enforce his previously ordered visitation. Stacy had moved the court to modify its

⁷ Stacy did assert that a Ms. Shaw from the Kentucky Cabinet for Health and Family Services was ready and willing to testify regarding the substantiation of abuse claims regarding Stacy's older minor child. Apparently those claims were brought in Kentucky on the same day that Stacy's June 2010 Tennessee petition alleging abuse by Kenneth of S.H. was dismissed, and were on appeal at the time of the April 22, 2013 hearing. Ms. Shaw never testified, but the circuit court did take the substantiation of the claims and pending appeal into consideration of Stacy's older minor child when the case was submitted for review.

original order of April 27, 2009, to restrict visitation and order no contact between Kenneth and S.H. Any decision regarding visitation must be in the best interests of the child pursuant to KRS 403.320. The court did not grant Kenneth any additional visitation that was not previously ordered. But, the court did slightly modify his visitation with the two month break-in period and monitored visits. KRS 403.320(3) allows a court to 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 the visitation would endanger seriously the child. This subsection of the statute does not explicitly impose a hearing requirement on the court.

Kenneth presented proof to the circuit court that the abuse petitions were dismissed by the Tennessee Court, and additionally, that there was no evidence of abuse as detailed in Dr. McCoy's report. There was no objection to the submission of this evidence. Stacy addressed the court informally, but did not proffer any relevant witnesses or additional evidence that visitation with Kenneth was not in S.H.'s best interests or was seriously endangering to her physical, mental, moral, or emotional health. The requirement of monitoring the initial visits and the break-in period were appropriate under the circumstances given the extensive history of this case, Kenneth had not seen S.H. since November of 2011, and the fact that the child is such a young age. Accordingly, the circuit court did not abuse its discretion in its decision to reinstate visitation between Kenneth and S.H. in the manner ordered.

Stacy further claims that it was not clear at the conclusion of the April 22, 2013 proceeding what the circuit court was going to do. We find this argument unpersuasive. She claims that she did not waive her right to a hearing even though she may not have insisted on the same. The court concluded the hearing by stating the “court will take everything into consideration, review the record, and enter an order.” There was no objection made to the submission of the case. It was clear from the court’s order that it took into consideration the evidence and argument presented on April 22, 2013, when it reinstated Kenneth’s visitation with a break-in period and monitored visitation.

Stacy further contends that the Bell Circuit Court was misled regarding the proceedings in Tennessee as she believed the 2012 abuse petition to be dismissed based on jurisdictional grounds. Stacy asserts that the Tennessee court expected the Kentucky court to hold a full evidentiary hearing regarding the abuse petition before any visitation would be reinstated because the Kentucky court had jurisdiction over the child. However, the issue of whether the child had been abused by Kenneth was not before the Kentucky court to decide as that action was filed and adjudicated in Tennessee. The Bell Circuit Court was provided with a copy of the order stating that the Tennessee Department of Children’s Services was voluntarily non-suiting its case as well as a copy of the audio recording from that proceeding. Additionally, the circuit court has been familiar with these parties since at least 2009 and the competing allegations they throw at each other. It is by far in the best position to weigh and judge the credibility of the parties and the

evidence before it. The court found that Kenneth had presented proof that the Tennessee abuse proceedings had been dismissed twice. Kenneth also provided Dr. McCoy's report, with no objection from Stacy, to the court in which it stated the abuse allegations were not true and recommended that visitation be reinstated. The Kentucky court was fully informed of the disposition of the proceedings in Tennessee when it reviewed the case and entered its order. Based on our review of the record, we pause to note that we fully agree with Dr. McCoy's overall assessment of this situation as she concluded in her report:

This child is unfortunately in a tragic situation where she has now seemingly become a pawn in the ongoing war between Stacy, Ms. Warren [the paternal grandmother of Stacy's older minor child], and Mr. and Mrs. Haynes [Kenny's estranged father and step mother] versus Kenny Haynes. Kenny has certainly done his part in this blood feud to fan the flames, but it is unconscionable to include a helpless, innocent child in this seething cauldron of strife and mutual hatred among the adult. Doubtless allegations will continue to be made no matter the outcome of this hearing, with [S.H.] likely making whatever choices will give her the most peace and security at the time.

In conclusion, the circuit court did not abuse its discretion in reinstating Kenneth's visitation with S.H. after monitored visits and a break-in period as well as overruling Stacy's motion to alter, amend or vacate its order. Accordingly, the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marcia Smith
Corbin, Kentucky

BRIEF FOR APPELLEE:

Shea Dunn Yoakum
Middlesboro, Kentucky