

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000194-ME

M.Y.¹

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 14-CI-00257

W.L.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JONES, MAZE, AND STUMBO, JUDGES.

MAZE, JUDGE: M.Y. appeals from an order of the Rowan Circuit Court denying her motion seeking grandparent visitation over the objection of the child's legal custodian, W.L. We agree with M.Y. that the trial court erred in finding that the

¹ In accordance with this Court's policy and in the interest of protecting the child's privacy, we will refer to both parties and the child only by their initials.

motion was subject to the two-year limitation on motions to modify custody set out in KRS² 403.340(2). Hence, we reverse and remand for additional proceedings.

The underlying facts of this matter are not in dispute. M.S. (Child) was born to C.O. (Mother) in November 2010. C.S. (Father) was the father of the child. In March 2013, Father murdered Mother. After his arrest, the Cabinet for Health and Family Services took custody of Child and initiated a dependency action in the Rowan District Court. Shortly thereafter, the Cabinet placed Child with W.L., Child's paternal grandmother. The custody order, entered by the district court on March 27, 2013, provided that any visitation for M.Y., Child's maternal grandmother, would be at the discretion of and supervised by the Cabinet.

Subsequently, M.Y. filed a petition in district court seeking increased and unsupervised visitation with Child. The district court appointed a guardian *ad litem* for Child, and conducted an evidentiary hearing on November 7, 2013.

Based upon evidence of M.Y.'s history of mental illness, substance abuse, and other conduct, the court concluded that additional visitation with M.Y. would not be in the best interest of the child. Consequently, the district court denied M.Y.'s motion to modify visitation in a written order dated March 4, 2014.

On October 2, 2014, M.Y. filed a petition for increased visitation with Child in the Rowan Circuit Court. The trial court initially granted the motion. But thereafter, the court vacated that order and dismissed M.Y.'s petition. The trial court found that KRS 403.340(2) precluded M.Y. from filing a motion to modify

² Kentucky Revised Statutes.

visitation unless supported by affidavits alleging that the child's present environment may seriously endanger her physical, mental, moral, or emotional health; or the custodian appointed under the prior decree has placed the child with a *de facto* custodian. In the absence of any such allegations, the trial court concluded that it could not consider M.Y.'s motion. This appeal followed.

The only question presented is whether KRS 403.340(2) acts to limit the filing of a motion to modify visitation within two years from the entry of a custody order. This is a question of law which we review *de novo*. *Wahlke v. Pierce*, 392 S.W.3d 426, 429-30 (Ky. App. 2013). The trial court relied upon *McCary v. Mitchell*, 260 S.W.3d 362 (Ky. App. 2008), which holds that a permanency order in a dependency action brought pursuant to KRS Chapter 620 and which otherwise complies with KRS 403.270(2) qualifies as a custody decree under the *de facto* custodian provisions of KRS 403.270(2). *Id.* at 364. The trial court concluded that the district court's custody and visitation orders were likewise subject to the two-year limitation of modification set out in KRS 403.340(2).

However, *McCary* involved motions to terminate guardianship of the child and for a modification of custody of the child. Moreover, *McCary* did not involve the application of KRS 403.340(2), but addressed the application of the *de facto* custodian statute to a guardianship proceeding under KRS 387.032. *Id.* By contrast, the current case is strictly a motion for visitation. In *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008), the Kentucky Supreme Court held that a motion to modify visitation is different from a motion to modify custody. When

only modification of visitation is sought, the two-year limitation on modification of custody in KRS 403.340(2) does not apply. *Id.* at 769. Rather, in matters involving visitation between parents, the Court held that KRS 403.320(3) allows modification of visitation “whenever modification would serve the best interests of the child,” and specifically directs that a court “shall not restrict a parent's visitation rights” unless allowing visitation would seriously endanger the child. *Id.*

The current case involves a motion for grandparent visitation under KRS 405.021, but the same reasoning applies. M.Y. seeks additional and unsupervised visitation over the objections of Child’s legal guardian. M.Y. has the burden of establishing a right to such visitation as set out in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012). The prior ruling by the Rowan District Court is certainly relevant to the trial court’s determination on M.Y.’s current motion for visitation. However, we conclude that the trial court erred in finding that M.Y.’s motion is subject to the requirements of KRS 403.340(2) for bringing a motion to modify custody within two years.

Accordingly, the order of the Rowan Circuit Court is reversed, and this matter is remanded for additional proceedings on the merits of M.Y.’s motion for grandparent visitation under KRS 405.021.

ALL CONCUR.

BRIEF FOR APPELLANT:

No Brief for Appellee

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