

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000824-ME

MARIANITA ADAMS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI BOYD, JUDGE
ACTION NO. 13-CI-04814

GWENDOLYN BOWKER;
BEN HURT; AND
JIMMY VANOVER

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

MAZE, JUDGE: Marianita Adams appeals from an order of the Fayette Family Court overruling her motion for unsupervised visitation with her two minor children. We hold that the Fayette Family Court did not abuse its discretion in

taking such action and that substantial evidence supported its findings in favor of Appellee, Gwendolyn Bowker. Therefore, we affirm.¹

Background

Marianita Adams (formerly Sanchez and hereinafter “Marianita”), is the biological mother of two minor children, J.V. and M.V. Both children resided with her from each child’s birth until June 13, 2012. On that date, the Fayette Family Court (hereinafter “the trial court”) awarded temporary emergency custody to Appellee, Gwendolyn Bowker, the maternal aunt of the children. This followed allegations of neglect against Marianita for failing to provide medical care to then three-year-old M.V. after Marianita’s current husband, Frank Adams (hereinafter “Frank”), hit the child in the face. At that time, the trial court permitted Marianita to have limited supervised visitation with the children and ordered Frank to have no contact with the children. In a concurrent criminal case, Frank entered an *Alford* plea to Second-Degree Criminal Abuse and was sentenced to two years of supervised probation, a condition of which was that he continue not to have contact with Marianita’s children.

¹ Pursuant to Kentucky Rules of Civil Procedure (CR) 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case. Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision.

On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record.

Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

Concerning the allegations against Marianita, the trial court made a finding of neglect and ordered her to comply with a case plan comprised of parenting classes, domestic violence counseling, and a psychological assessment and risk analysis conducted by Dr. David Feinberg. Dr. Feinberg subsequently issued his conclusions in the form of a report (hereinafter “the Feinberg Report”) on June 15, 2013. In his report, Dr. Feinberg concluded that, at that time, Marianita lacked the capability to ensure the physical and mental safety of her children.

On November 22, 2013, Bowker filed a Petition for Child Custody seeking permanent sole custody of the children and child support from their parents. Marianita filed a Motion for Visitation on December 13, 2013, requesting that the trial court establish a visitation schedule and that her visits be unsupervised. The trial court allowed Marianita supervised visitation for the holiday and ordered Frank to vacate Marianita’s residence and not have contact with the children. The court reserved the remaining requests, including a more permanent visitation schedule, for later proceedings. Following two hearings on the matter, the trial court ordered that Marianita’s visitations with her children continue to be supervised.

In October 2014, Marianita again asked the trial court to modify her visitation schedule, permit unsupervised visitation, and allow Frank to return to Marianita’s home. After an April 9, 2015 hearing, during which Marianita and others testified, the trial court entered a brief order concluding that Marianita’s

visitations with her children should remain supervised. Marianita now appeals from this May 11, 2015 order.

Standard of Review

On appeal, Marianita alleges that the trial court's decision to maintain supervised visitation constituted an abuse of discretion and that substantial evidence did not exist to support the trial court's factual findings. She asserts that:

- 1) She appropriately and adequately addressed the concerns outlined in the Feinberg Report;
- 2) She consistently visited with her children which went well;
- and 3) Frank should not have been a factor that influenced the appropriateness of unsupervised visitation between Marianita and her children.

As an appellate court, we will reverse a trial court's decision concerning visitation only if that decision "constitute[s] a manifest abuse of discretion, or [was] clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000). A trial court abuses its discretion if its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Additionally, we will only cast aside a trial court's findings of fact if they prove to be clearly erroneous. *See* CR² 52.01. Findings of fact are clearly erroneous when they are unsupported 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). Hence, the questions for

² Kentucky Rules of Civil Procedure.

this Court are not whether we would have come to a different conclusion, but whether the trial court applied the correct law and whether the family court abused its discretion. *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005).

Analysis

This Court analyzes visitation arrangements pursuant to KRS³ 403.320. Pursuant to this statute, a parent is entitled to reasonable visitation unless the trial court finds it to not be in the child's best interest, as it would "endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(1). Reasonable visitation is "decided based upon the circumstances of each parent and the children, rather than any set formula." *Drury*, 32 S.W.3d at 524.

Marianita first alleges that the trial court abused its discretion in maintaining supervised visitation because she has appropriately and adequately addressed the concerns outlined in the Feinberg Report by completing her case plan and attending individual counseling. However, while Marianita's completion of her case plan is undisputed, the record is unclear on whether the six months of counseling sought by Marianita to address the aforesaid concerns resulted in tangible progress with respect to fostering relationships to ensure the physical and mental safety of the children. Her counselor, David Waters, failed to produce evidence illustrating Marianita's improvement on that subject during his testimony. Moreover, at the same hearing, held after this counseling, Marianita continued to

³ Kentucky Revised Statutes.

exhibit a protectiveness of her husband rather than her own children when she recanted a previous statement that she would divorce Frank if it were necessary to have her children returned. She even testified that M.V.'s injury resulted from the child's "decision" "to fall down some steps," not from Frank's actions.

As such, we hold that there was sufficient evidence of record to support the trial court's apparent decision that Marianita had not adequately addressed the concerns outlined in the Feinberg Report concerning Marianita's ability to protect her children. While she acknowledged that she should have sought medical treatment for M.V., Marianita's testimony supported a conclusion that Marianita still fails to comprehend Frank's culpability in her child's injury and the risk he may continue to pose to her children. Therefore, we cannot say that the trial court's findings constituted clear error or that it abused its discretion in concluding that unsupervised visitation would "seriously endanger" the children in this case. KRS 403.320(1).

Marianita next alleges that the trial court abused its discretion given her assertion that visits with the children had been consistent and successful. She also argues that Frank should not have played a determining role in the trial court's ruling. The frequency and success of her visits notwithstanding, we cannot agree that the past conduct of a person to whom Marianita is married and who could easily come into contact with the children if unsupervised is irrelevant or non-determinative of the ultimate question in this case.

Again, the record indicates that both Marianita and Frank continue to refrain from taking responsibility for Frank's actions against M.V., calling the injuries the child sustained accidental. This is troubling, and it establishes that, though supervised visits may have been successful, it was not unreasonable for the trial court to conclude that unsupervised visits would not be as successful, or safe, for the children.

Conclusion

The trial court did not abuse its discretion in maintaining supervised visitation, as supervised visitation was reasonable and in the best interest of the children. Accordingly, the order of the Fayette Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
GWENDOLYN BOWKER:

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