Cite as 2011 Ark. App. 725

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 11-477

	Opinion Delivered NOVEMBER 30, 2011
BRIAN LOWRANCE and ANNA LOWRANCE APPELLANTS	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. PR-05-250-1]
V.	HONORABLE BOBBY D. MCCALLISTER, JUDGE
JANET SMITH APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellants Brian and Anna Lowrance appeal orders entered by the Saline County Circuit Court, Probate Division, that awarded specific visitation rights to appellee Janet Smith. In this guardianship proceeding, appellants were appointed the guardians of three children after their mother died in 2005; their father was imprisoned for her death. The three children are ZW (male, born in January 1999), MW (female, born in October 2001), and CW (male, born in April 2003). Brian Lowrance is the brother of the deceased mother, thereby the maternal uncle of the children; his wife Anna is their aunt by marriage. Janet Smith, mother of the deceased parent, is the maternal grandmother to the children. We affirm the trial court's order providing for specific visitation privileges.

The Lowrances petitioned for guardianship in June 2005, immediately after the children's mother was killed. Ms. Smith petitioned for guardianship as well. Pending the

final hearing on the petitions, the trial court ordered temporary guardianship to be divided between petitioners.[1] In October 2005, guardianship was awarded to the Lowrances, and Ms. Smith was awarded reasonable visitation, typical of that granted in a divorcing-parents situation.[2] The order set forth minimum reasonable visitation to include: alternating weekend visitation from 6 p.m. Friday to 6 p.m. Sunday, one week during each summer month, and alternating major holidays and the children's birthdays. Some major holiday visitation periods established beginning and ending hours, but some periods did not. The order prohibited the children from riding four-wheelers or similar ATVs.

In January 2007, the Lowrances moved to modify visitation, seeking to terminate any visitation between the children and their grandmother, contending that visitation was no longer in their best interest. In May 2007, the trial court ordered Mr. Lowrance and Ms. Smith to undergo psychological testing and to attend mediation. In October 2007, the parties tendered an agreement they reached through mediation, specifying that:

> Brian and Anna Lowrance shall continue to serve as legal guardians of [the children]. Janet Smith is the maternal grandmother of the three children. Janet Smith shall have reasonable visitation with her grandchildren as she and the Lowrances are able to arrange and agree.
>
> All parties agree that the minor children shall be allowed to ride 4 wheelers and ATVs so long as they are properly supervised by an adult, wear any and all safety equipment as required by the law and in accordance with all traffic laws for the State of Arkansas.

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[1]The children's half sister, Amanda Renee Hobbs, also sought guardianship, but she ceased participation prior to the final hearing. She is not party to this appeal.

[2]The September 20, 2005 hearing (where evidence and testimony was taken to decide who would be guardian) is not included in the record on appeal.

> Brian and Anna Lowrance, acting as parents to the three minor children, shall have the purview of scheduling holiday and birthday events for the children without a set Court schedule. The Lowrances acknowledge that Janet Smith shall be included in various family activities during holiday celebrations and likewise, Janet Smith acknowledges that the Lowrances may need to schedule holidays [sic] events with other extended family on Anna Lowrance's side.
>
> All parties agree to be flexible with one another in maintaining family relations with the three children and all acknowledge that Janet Smith is fit and appropriate to visit with the children for extended periods of time with the approval of the Lowrances, particularly in the summer.

The trial judge approved this agreement, incorporating it into the court's order. The trial court also ordered that, in the event of further conflict, the parties would attend mediation prior to filing any motion in probate court.

Subsequent to the October 2007 agreed order, the parties were able to agree on visitation that resembled the October 2005 schedule until February 2010, when the Lowrances decided to permit only supervised visitation and to suspend any overnight visitation. In early September 2010, the parties attended mediation again, using the same mediator, but were unable to resolve their disagreements.

Ms. Smith filed a motion for contempt against the Lowrances on September 20, 2010, contending that the Lowrances were withholding visitation. The Lowrances generally denied her allegations in their September 2010 response.

The motion for contempt was heard on December 13, 2010. The testimony indicated that Ms. Smith felt excluded from her grandchildren's lives, especially beginning in February 2010. She agreed that she did not exercise some visitation after she moved to Malvern, about twenty miles away from the Lowrance residence, because the commute for the children's

extracurricular events was a hardship. She said she was denied any overnight visitation and was allowed only supervised visits under Brian or Anna's control. Ms. Smith asked the court to enforce her visitation privileges "and I think it needs to be specific." The Lowrances agreed that they had modified Ms. Smith's visitation privileges over time, but they explained it was partially due to the children growing older and becoming more involved with their friends and activities in Benton.

The trial judge announced his ruling at the conclusion of the hearing. He expressed displeasure that the Lowrances effectively modified the court's order on their own. The judge stated that he could not comprehend why Ms. Smith was suddenly deemed unfit for anything but supervised visitation, stated that the remedy would be a very specific visitation schedule to avoid further threats of litigation, and urged the parties to get along and support the children's need for their entire family. He remarked that there was no "parent" so that this was "a strange situation." He told Ms. Smith that she would either have to accommodate the children's activities by driving as necessary or forfeit visitation. The judge then recited the specific minimum visitation Ms. Smith would have since they were not getting along and not having the family time contemplated in their agreement.

The trial court entered an order reflecting these findings in January 2011, which is on appeal. The trial judge found that Ms. Smith's visitation had become supervised at the behest of the Lowrances and that it would be remedied by specific court-ordered visitation. The order required Ms. Smith to accommodate the children's regularly scheduled activities or forego her visitation. The order also permitted the parties to increase or decrease visitation,

but only if the parties agreed. The schedule was similar to Ms. Smith's visitation periods ordered in October 2005, although it shortened her alternating weekend visitation to 12:00 p.m. Saturday to 6:00 p.m. Sunday, and it excluded specific visitation for July 4th, Halloween, Christmas Eve and Christmas Day, and the children's birthdays.

On December 30, 2010, the Lowrances filed a petition titled, "Emergency Petition for Ex-Parte Order Suspending Visitation or, in the Alternative, Petition to Suspend or Modify Visitation." The Lowrances asserted that Ms. Smith had recently permitted the boys (then ages eleven and seven) to use a chain saw to cut down a tree and tree limbs; they wanted her visitation suspended or restricted to supervised visitation. A hearing was conducted on January 7, 2011, in which Ms. Smith freely admitted that she allowed the boys to use a battery-operated saw to cut tree limbs. She realized she was under scrutiny by the Lowrances, so she agreed not to ever allow the children to use any power tool again. At the conclusion, the trial judge stated that this situation should have been handled with a telephone call, that he wished he could do something to fix the relationship, but that he would order no power tools to be used by the children during visitation. With that, he dismissed the parties from court. An order was entered to reflect these findings.

The Lowrances argue that the trial court clearly erred in ordering "a concrete and confining visitation schedule" and removing their discretion regarding visitation. They assert that they did nothing wrong, flexibility is required to accommodate the children's activities as they age, and that there was no material change in circumstances to warrant a change from their agreed terms. We hold that the trial court did not clearly err.

On appeal from probate proceedings, including guardianship proceedings, we perform a de novo review, but we will not reverse unless the findings are clearly erroneous. *Graham v. Matheny*, 2009 Ark. 481, 346 S.W.3d 273. This necessarily turns in large part upon credibility determinations, and we give special deference to the superior position of the trial judge to evaluate the witnesses, their testimony, and the children's best interest. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a firm and distinct impression that a mistake was made. *Id.* This is the same standard of review used in visitation-modification cases in domestic-relations proceedings. *Boudreau v. Pierce*, 2011 Ark. App. 457. The children's best interest is of paramount consideration. *Stout v. Stout*, 2011 Ark. App. 201.

The Lowrances sought control over how and when Ms. Smith would be permitted to see her grandchildren, leading to progressively limited access by Ms. Smith to the children. The Lowrances altered visitation due to the change in ages and activities of the children, and clearly they did not want Ms. Smith to have anything less restrictive than supervised visitation. Ms. Smith presented a request to set specific visitation in order to end the constant disagreements about visitation. These diametrically opposed positions constitute material changes in circumstances with regard to visitation. *See Harris v. Tarvin*, 246 Ark. 690, 439 S.W.2d 653 (1969); *Martin v. Scharbor*, 95 Ark. App. 52, 233 S.W.3d 689 (2006).

The trial court did not clearly err in setting out exact visitation privileges in order to cease repeated litigation between these parties, and the trial court addressed the children's additional activities by making Ms. Smith commute or forfeit visitation. The order on appeal

achieved the best interests of the children by fostering continued relationships, by eliminating continued litigation, and by crafting visits to fit with the children's busy lives. We are not left with a distinct and firm impression that a mistake was made in this instance.

Affirmed.

GLADWIN and HOOFMAN, JJ., agree.