

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002535-MR

MARY BETH KAMER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY BOWLES, JUDGE
ACTION NO. 93-FD-000051

CHARLES C. MATTINGLY, JR.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS, EMBERTON, and GUIDUGLI, Judges.

COMBS, JUDGE: The appellant, Mary Beth Mattingly (now Kramer), appeals from the order of the Jefferson Circuit Court granting the appellee, Charles C. Mattingly, Jr. (Mattingly), overnight visitation with the parties' minor daughter. Finding no error, we affirm the circuit court's decision.

On May 5, 1993, the Jefferson Circuit Court entered a decree dissolving the Mattinglys' marriage. That decree incorporated by reference their settlement agreement, which resolved the issues of property disposition, maintenance, child support, and custody of their minor daughter, V.C.M. Mary Beth

was given custody of V.C.M., and Charles was granted "reasonable, but liberal visitation." The agreement did not set out a specific visitation schedule. V.C.M. was approximately two years of age at the time of the divorce.

Following the dissolution, Charles generally had visitation with V.C.M. for two to three hours on Wednesdays and occasionally on weekends for a couple of hours. The parties followed this visitation schedule for several years with no apparent conflict. In the fall and winter of 1997, Charles sought to increase his visitation with V.C.M. to include overnight visitation. Mary Beth refused to allow V.C.M. to have overnight visitation. On December 31, 1997, Charles filed a motion with the circuit court to expand his visitation with V.C.M. and to require Mary Beth to keep him informed of V.C.M.'s school, church, and extracurricular activities. The case was transferred to family court and was referred to Domestic Relations Commissioner (DRC).

After conducting a hearing on the matter, the DRC filed a report with the court on March 4, 1998 and recommended that it was not in the best interest of V.C.M. to increase Charles's visitation with her. In reaching this conclusion, the DRC relied heavily upon the testimony of Julie Schultz, a therapist specializing in expressive therapy, who had seen V.C.M. on four occasions prior to her testimony before the DRC. Ms. Shultz testified that V.C.M. had expressed concern over her visits with her father. She stated that V.C.M. indicated that she was confused and conflicted as to her father's sexual

orientation. (V.C.M., born on April 23, 1991, was nearly seven years of age at this time). Ms. Shultz was of the opinion that Charles's visitation should not be increased at the present time and that V.C.M. should continue in therapy in order to address any issues associated with her father's homosexuality.

Mary Beth and Charles also testified at the hearing before the DRC. Mary Beth testified that V.C.M. seemed to be "in a shell, a different child" after visits with Charles and that V.C.M. was aware that Charles was involved in a relationship with another man, "Greg." Charles testified that V.C.M. seemed to enjoy her time with him and that V.C.M. had not questioned him about his homosexuality; he stated that had always planned on discussing his sexual orientation with her when she older. He also clarified that he did not live his partner, who has had little contact V.C.M.

Charles filed exceptions to the DRC's report. On April 9, 1998, the court entered an order in which it declined to follow the recommendations of the DRC, finding specifically that testimony presented at the hearing had failed to show that visitation with Charles was a "serious endangerment" to V.C.M.. The court noted that Charles had been given "reasonable and liberal" visitation under the parties' settlement agreement and that, in effect, his motion "was not for an order expanding his visitation but an order specifying minimal times under" the language of the settlement agreement. The court set forth a specific visitation schedule, giving Charles visitation with

V.C.M. every Wednesday night and every other weekend from 6:00 p.m. on Friday to 6:00 p.m. on Sunday.

Mary Beth filed a motion for reconsideration. The court accordingly suspended Charles's overnight visitation pending reconsideration and also appointed an expert, Dr. Sally L. Brenzel, a licensed clinical psychologist, to review the case. Dr. Brenzel filed a report with the court, stating that the visitation schedule set out in the court's previous order should be implemented – including the overnight visitation. She also recommended that Charles become involved in V.C.M.'s therapy to establish a gradual pattern of increasing her visitation with him – with full compliance to occur within ninety days. On September 23, 1998, the court entered an order reinstating its order of April 9, 1998. This appeal followed.

Mary Beth argues on appeal that the court erred in allowing Charles extended, overnight visitation with V.C.M. She contends that the court's decision was not supported by substantial and probative evidence. Mary Beth maintains that the evidence shows that V.C.M. has exhibited emotional difficulties due to Charles's homosexuality and that more visitation with him would not be in her best interest. Mary Beth challenges the court's reliance on Brenzel's report and contends that it gave more weight to that report than was appropriate since Dr. Brenzel had not spent any time alone with V.C.M. as contrasted with the earlier testimony of Ms. Schultz, who had had several individual sessions with V.C.M.

Pursuant to KRS 403.320, the non-custodial parent is entitled to reasonable visitation rights unless the court finds that visitation would "endanger seriously the child's physical, mental, moral, or emotional health." The burden of proving that visitation would harm the child is on the parent who seeks to deny or to restrict visitation. Smith v. Smith, Ky. App., 869 S.W.2d 55 (1994).

In this case, the court carefully found that Mary Beth has failed to prove that extended, overnight visitation with Charles would endanger V.C.M.'s physical, mental, moral, or emotional health. There is substantial and competent evidence of record to support the court's finding that extended, overnight visitation with Charles does not present an endangerment to V.C.M.'s health or well-being. Dr. Brenzel, the court-appointed expert, reported that overnight and extended visitation presented no danger to V.C.M. She stated in her letter to the court that: "[Charles] has a suitable home, he is comfortable with the needs and interests of a 7 year old child, he has prioritized time for her, and has dealt successfully with any mental health issues which may impact her." The court's findings were not clearly erroneous nor did the court abuse its discretion.

As to Mary Beth's contention that the court gave undue weight to testimony of Dr. Brenzel over the testimony of Ms. Schultz, we are guided by the principle that "the trier of fact has the right to believe evidence presented by one litigant in preference to another The trier of fact may believe any witness in whole or in part.." Commonwealth v. Anderson, Ky.,

934 S.W.2d. 276, 278 (1996). We have no basis for disturbing the discretion exercised by the trial court.

We therefore affirm the order of the Jefferson Circuit Court.

GUIDUGLI, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS BY SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTING. Contrary to the majority, I believe the findings of the trial court were clearly erroneous in that there was not substantial and competent evidence supporting its holding. On the other hand, Mrs. Kamer's evidence establishes that, as a result of her father's abandonment of her and her mother in pursuit of a homosexual relationship, the child presently is experiencing emotional injury that requires regular counseling. The counselor recommends that extended visitation not be commenced "at this time." In addition Dr. Brenzel, the court appointed evaluator, recommended that overnight visitation be commenced only on a gradual schedule.

Very significant is the fact that the Domestic Relations Commissioner, following initial hearings, recommended there be no extended visitation. Further, it seems certain from the evidence that the child will eventually be exposed to her father's friend as a part of his household (and, of course, to their relationship).

Finally, this case should not turn on the rights of a gay parent to have overnight visitation with his child, but

whether such visitation will endanger seriously the child's emotional health. It is evident that it has already done so and that extended visitation will only deepen that injury.

I would reverse the trial court.

BRIEF FOR APPELLANT:

Wallace N. Rogers
Louisville, KY

BRIEF FOR APPELLEE:

Kenneth J. Bader
Louisville, KY