

RENDERED: NOVEMBER 30, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003056-MR
NO. 2000-CA-002170-MR

DEBORAH GRAY BERBERICH

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
v. HONORABLE DOUGLAS J. STEPHENS, JUDGE
ACTION NO. 97-CI-02503

ROBERT A. BERBERICH

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND KNOPF, JUDGES.

DYCHE, JUDGE: Deborah Gray Berberich brings two appeals from orders of the Kenton Circuit Court dealing with the issue of visitation of Robert A. Berberich with her two infant children:

a son adopted by Deborah during an earlier marriage, and a daughter adopted by Deborah and Robert during their marriage. As the two appeals are taken from two separate orders, and Deborah is represented on appeal by two different lawyers, we will deal with the appeals separately.

The dissolution action between Deborah and Robert was drawn out and contentious, especially in matters concerning the children.

We will suffice it to say that we think the trial judge showed admirable patience and restraint in handling this protracted struggle.

Appeal No. 1999-CA-003056 was taken from an order dated November 17, 1999, which allowed Robert, following the accomplishment of certain definite requirements, visitation as follows:

4. In the event petitioner satisfies the above order, petitioner shall be granted visitation with the children for eight (8) weekends, on one (1) day of each weekend for no longer than six (6) hours, in a public place and/or supervised by petitioner's extended family;

5. Upon the successful completion of the above eight (8) weekends of visitation, petitioner shall have eight (8) additional weekends of visitation, one (1) day per weekend, not exceeding six (6) hours, of unsupervised visitation; and,

6. That all further and future visitation shall be ordered by the court as is appropriate at the time.

Deborah first complains that the trial court made no ruling on the custody of their daughter in the November 17, 1999, order. As Robert correctly points out, that issue was not considered at the hearing, and was not before the court at that time. Deborah does not cite us to the place in the record where she made a request for such a ruling, so the error is not preserved for our review. This matter can be easily rectified, if necessary. Deborah next asserts that it was not in the best interest of the child for Robert to be granted visitation with his stepson, and that Robert is without "jurisdiction" to make such a request. We have examined the record and find that it supports the trial court. The psychological testimony in the record, including the report of the witness upon whom Deborah relies, recommends

gradually introduced visitation by Robert with the children. We find from that evidence, and the testimony of the parties, that there was no error in the trial court's ruling on this issue. We will assume that Deborah's "jurisdiction" argument is that Robert, as a non-parent, has no standing to request visitation with his stepson. We disagree. The consideration of visitation for Robert with the stepson was proper, under Simpson v. Simpson, Ky., 586 S.W.2d 33 (1979).

Deborah asserts that the trial court abused its discretion in granting Robert visitation, and that the court failed to consider all of the facts set out in KRS 403.270 in making such a decision. The sole ground for making such an argument is that the children did not want to visit with Robert. The trial court clearly considered this "fact" and its origins, as well as the other statutory factors and made a sound decision. There was no abuse of discretion.

Nor do we find abuse of discretion in refusing to grant another continuance to Deborah after her witness failed to appear to testify. CR 43.03 is clear on the requirements necessary to obtain a continuance due to an absent witness. Deborah's counsel apparently made no attempt whatsoever to comply with the rule. The final argument in this appeal is that the trial court erred in dictating its findings of fact into the record and then adopting them by reference in its written order. No request for additional findings was made by Deborah's counsel pursuant to CR 52.04. We find no error.

In No. 2000-CA-002170, Deborah challenges an order granting Robert overnight visitation with the children on a limited basis.

Although couched in terms of "abuse of discretion," the first argument claims that such visitation is not in the best interest of their daughter. Again, we have considered the evidence in the record, and can find no clear error. CR 52.01. The trial court conducted a hearing on the issue, and made findings based upon that evidence. The findings are supported by the whole record. The second argument again asserts that overnight visitation is not in the best interest of the stepson, and that such an award is "clearly outside the proper jurisdiction of the trial court."

We have previously considered the jurisdiction issue, and will not revisit it. The record herein indicates a sufficient *in loco parentis* relationship between Robert and his stepson to allow visitation. Simpson, supra.

Whether it is in the child's best interest is a much closer issue. Again, however, considering the **whole** record, and especially the scientific testimony at the earlier hearing that it was desirable for both children to have a relationship with Robert, we cannot find clear error. CR 52.01.

That scientific testimony is the focus of the final argument propounded by Deborah, wherein she claims that it was error for the trial court to "completely and totally disregard" the testimony of the children's counselors at the August 11, 2000, hearing. As the finder of fact, the trial court is entitled to believe or disbelieve testimony brought before it. Dyche v. Scoville, 270 Ky. 196, 202, 109 S.W.2d 581, 585 (1937). The

trial court was entirely within its proper function in finding facts, which are not to be set aside unless clearly erroneous.

We do not find the trial court's actions to be such.

The orders of the Kenton Circuit are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT IN
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