

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000929-MR

KATHY ROBINSON JACKSON

APPELLANT

v. APPEAL FROM MARTIN FAMILY COURT
HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 97-CI-00026

WALTER JACKSON, JR.

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: GUIDUGLI, McANULTY AND MINTON, JUDGES.

GUIDUGLI, JUDGE. Kathy Robinson Jackson (hereinafter "Kathy") has appealed from the Martin Family Court's April 3, 2003, order granting her former husband, Walter Jackson, Jr.'s (hereinafter "Walter") motion to alter, amend or vacate the order granting her visitation with their minor child, Austin Tyler Jackson (hereinafter "Austin"). Having reviewed the record¹ and having determined that the family court utilized the wrong standard to

¹ The certified record does not contain any transcripts or videotapes of any of the hearings held in this case.

restrict Kathy's visitation rights and did not hold a hearing, we must vacate the family court's order and remand the matter for further proceedings.

Kathy and Walter were married on October 11, 1994, in Lawrence County, Kentucky. They separated on May 28, 1996, and their son Austin was born on January 17, 1997. Walter filed a Petition for Dissolution of Marriage on February 3, 1997. At the time Walter filed the petition, Kathy and Austin were living in West Virginia. Walter requested sole custody of Austin, stating in the petition that Kathy posed an immediate threat to Austin's safety and well-being. Kathy disputed Walter's allegations in her response, and also requested custody of Austin. On April 22, 1999, the family court adopted the Domestic Relations Commissioner's recommended Findings of Fact, Conclusions of Law, Decree of Dissolution, Order and Judgment, to which no exceptions were filed. In doing so, the family court dissolved the marriage, ordered joint custody of Austin with Walter being the residential custodian, and recommended time-sharing for Kathy. Following the entry of the decree, Kathy was held in contempt, and apparently jailed, for failing to comply with the terms of the decree. Kathy eventually complied and turned Austin over to Walter on October 1, 1999.

On April 25, 2002, Kathy filed a motion to establish visitation. In the motion, she stated that she had not seen

Austin since January 19, 2000, and that she had been awarded visitation in the decree. The DRC heard arguments on this motion on July 24, 2002, where both parties were represented by counsel. On August 6, 2002, the DRC recommended an order granting Kathy's motion in part, and directing the Lawrence County Division for Protection and Permanency to arrange for supervised visitation between Kathy and Austin and to inspect Kathy's home. A review was then scheduled for September 25, 2002. Following this review, the DRC recommended an order on October 2, 2002, noting that Walter objected to any visitation other than supervised visitation and that Kathy was amenable to supervised visitation, but wanted a gradual reunification to occur leading to unsupervised visits with Austin. The DRC then recommended that Kathy have supervised visitation, which the Lawrence County Division for Protection and Permanency would set up and then evaluate.

On October 15, 2002, attorney Brian Cumbo re-entered an appearance for Walter, in place of attorney J. Thomas Hardin, and filed on motion on his behalf to alter, amend or vacate the October 2, 2002, order. In the motion, supported by his affidavit, Walter asserted that he strenuously objected to visitation between Kathy and Austin in that Kathy was a danger

to her children² and Austin was becoming emotionally troubled due to the court order requiring him to visit with Kathy. On November 27, 2002, Walter filed a supplement to his motion to alter, amend or vacate, consisting of an affidavit from Kathy's father and records from Mountain Comprehensive Care Center regarding treatment Austin had received. The motion was apparently heard by the family court on March 12, 2003, during a status hearing. On April 3, 2003, the family court entered the following order:

This matter came before the Court for a Status Hearing. Pending before the Court was Petitioner's Motion to Alter, Amend or Vacate the Order of the Domestic Relations Commissioner relative to visitation, entered on October 2, 2002.

Present at the Status Hearing was the Petitioner, represented by counsel, the Hon. Brian Cumbo. The respondent was present in person.

The Court designated social worker was previously Ordered to interview the minor child relative to the allegations as set forth in Affidavits and documents supporting Petitioner's Motion to Alter, Amend or Vacate.

The Court having considered the record, the pleadings, and arguments of counsel, and being otherwise duly and sufficiently advised, Petitioner's Motion to Alter, Amend or Vacate is HEREBY SUSTAINED. The Court is convinced that visitation, supervised or otherwise, is contrary to the best interest of the minor child.

² The record reflects that Kathy has had more than one child, but Austin is the only child at issue in this case.

This appeal followed.

On appeal, Kathy argues that the family court erred in applying the best interest of the child standard rather than the serious endangerment standard when it restricted her right to any type of visitation. Furthermore, she asserts that the family court erred in failing to hold an evidentiary hearing pursuant to KRS 403.320(1) or to issue any specific findings of fact. On the other hand, Walter argues that Kathy did not properly preserve the issue regarding the denial of visitation because her counsel did not attend the hearing or ask the family court to revisit the issue. He also argues that the certified record supports a finding of endangerment to the minor child, and that the family court's error, if any, in applying the wrong standard was harmless. We disagree with Walter's preservation argument, and shall consider the merits of the appeal.

KRS 403.320 sets out the applicable law relative to visitation:

- (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health. Upon request of either party, the court shall issue orders which are specific as to the frequency, timing, duration, conditions, and method of scheduling visitation and which reflect the development age of the child.

- (2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.
- (3) The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health.

The appellate courts have addressed the proper standard a lower court must apply in determining visitation. In Hornback v. Hornback, Ky.App., 636 S.W.2d 24 (1982), this Court reviewed a case in which the mother, in the judgment, was temporarily denied visitation with her three minor children, but was afforded the opportunity to request reconsideration once she was mentally and emotionally stable. In rewarding her efforts to improve, the lower court found that she should be allowed some visitation. Holding that the lower court did not comply with either the judgment entered in the case or KRS 403.320, this Court reversed. In doing so, the Court addressed the requirements of KRS 403.320 as follows:

Under K.R.S. 403.320(1), the noncustodial parent has absolute entitlement to visitation unless there is a finding of

serious endangerment. No "best interests" standard is to be applied; denial of visitation is permitted only if the child is seriously endangered. . . .

Under subsection (2)[³] of the statute, a "best interests" of the child standard is required when a judgment is sought to be modified. In modifying a previous denial of visitation to allow visitation, there is no presumption, as in subsection (1), of entitlement to visitation. Instead, the child's best interests must prevail. . . .

We interpret the second clause of subsection (2) as referring to a situation where a party seeks to modify visitation rights that have been previously granted. In such a situation the court may not take away a parent's visitation rights without a showing that the child would be seriously endangered by visitation. The standards for modifying a judgment to disallow visitation are no less stringent than the standards to deny visitation at the outset of the case. Once a finding has been made that the children's welfare is endangered, however, the court may not modify the judgment without finding that the best interests of the child are served.

Hornback, 636 S.W.2d at 26. In the present case, Kathy was awarded time-sharing, or visitation rights, with Austin in the decree. Because she was originally granted visitation rights, the proper standard to apply is the serious endangerment standard. It is clear from the order on appeal that the family court erred in improperly applying a best interest of the child standard rather than the serious endangerment standard in

³ In the current version of the statute, this is subsection (3).

denying Kathy any visitation rights. Because the family court applied the wrong standard, we must vacate this order.

As to the issue of whether Kathy was entitled to a hearing, we look to the case of McNeeley v. McNeeley, Ky.App., 45 S.W.3d 876 (2001), for guidance. In McNeeley, the lower court granted an incarcerated father visitation with his four minor children without first holding a hearing, when he had not previously been granted visitation. After noting that KRS 403.320(3), which provides for the modification of a visitation order, does not specifically address the requirement of a hearing, this Court stated it had previously "observed that the modification provision of the statute contains the same 'stringent' requirements for determining the appropriateness of visitation." McNeeley, 45 S.W.3d at 877. The Court went on to "infer from the statute that a hearing is required for the purpose of determining the best interests of these children." Id. at 878. Furthermore, this Court previously held, "one may not be deprived of the right to visit his child without a hearing." Smith v. Smith, Ky.App., 869 S.W.2d 55, 56 (1994). In the present matter, we cannot ascertain from the record that Kathy was afforded the right to a hearing prior to being deprived of her right to visitation with Austin, where she could contest Walter's assertion that she should not be afforded any

visitation. This is contrary to both statutory and case law, and is error on the part of the family court.

Additionally, we cannot agree with Walter's assertion that the family court's error in this case is harmless. Although the medical treatment and evaluation records, as well as other documents, filed regarding Kathy and Austin are disturbing, we cannot make a determination that visitation with Kathy would seriously endanger Austin; this determination is left to the family court after a hearing.

On remand, the family court must afford Kathy the right to a full hearing, and determine whether Austin's visitation with her would seriously endanger his physical, mental, moral or emotional health prior to allowing or restricting her visitation rights. KRS 403.320(3); McNeeley v. McNeeley, Ky.App., 45 S.W.3d 876 (2001).

For the foregoing reasons, the April 3, 2003, Order of the Martin Circuit Court is vacated, and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael T. Hogan
Louisa, KY

BRIEF FOR APPELLEE:

Brian Cumbo
Inez, KY