

RENDERED: November 12, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002353-MR

PATRICK THOMAS HERTWECK

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 02-CI-00046

KIMBERLIE ESKRIDGE HERTWECK

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Patrick Hertweck appeals from the decision of the Ohio Circuit Court granting Kimberlie Eskridge Hertweck's motion to terminate visitation with the minor child Parker Hertweck. Patrick argues that the circuit court relied on insufficient evidence in granting the motion. Having reviewed the record and the briefs, we disagree with Patrick's assertion and hold that the circuit court did not abuse its discretion in granting Kimberlie's motion.

The parties were married in 1993, and soon after marrying, Patrick convinced Kimberlie to allow him to adopt Kimberlie's son Parker. But the parties separated in 1997, and were divorced in 1999; the question of visitation has been litigated in the state of Florida before, and was reviewed again by the mother's request in this action. The lengthy procedural history has been related by the parties; we will not recite it here, but the motion was filed in November 2002 and came to a hearing in January, 2003 and another hearing in July, 2003. An order granting the motion was finally entered in October, 2003, and this appeal followed.

At the time of the hearing, Parker was thirteen years old. He was described by the counselors who testified as a bright, intelligent boy, and counselor Sally Denton particularly stated that "he has a mind of his own" and was mature enough to know what he wanted. Denton stated that she had established a rapport with Parker and had gained his trust; he had revealed to her that he did not wish to continue visitation with Patrick because he was afraid of him, and was intimidated into pretending that things were all right between them. Denton related one incident Parker described wherein Patrick refused to drop him off at his mother's house because Parker would not tell him that he loved him, and would repeatedly pass by the house, refusing to stop the car. She also related that before the

joint visit with Parker and Patrick, Parker had told her that he would have to say some things that were not true in front of Patrick because he was afraid of what Patrick would do later, and during the visit Denton observed Patrick periodically tap Parker on the head, as if to say to Parker, "I'm here." Denton characterized the relationship between them as one of intimidation, and said that Patrick had grown to dread visitation. Patrick, for his part, had secretly taped telephone conversations between Parker and his mother, and had spliced them together into a 25-segment tape which he played for Denton, using that to try and convince Denton that Parker was not really unhappy and that his mother was just trying to manipulate him into saying the right things to get Patrick's visitation terminated. But Denton said she was suspicious of the recording, not only because it was done surreptitiously but because Patrick obviously has some skill in editing audio tapes, so there is no way to determine the context from which the spliced portions were taken. Denton opined that Parker's relationship with Patrick was very unhealthy and that visitation needed to cease in order to protect Parker's emotional well-being.

The court relied extensively on Denton's testimony in holding that visitation should be terminated. The court also ordered that counseling for the child alone should continue, and

not a custodial evaluation over a 6 month period as suggested by Patrick, with the court noting that it was taking the counseling issue "one step at a time". This appeal followed.

The court did not abuse its discretion in terminating Patrick's visitation. The standard on appeal is difficult to meet, and Patrick has not demonstrated clear error on the court's part. That the testimony of Denton was at times contradicted by the testimony of the other counselors, it was the court's prerogative to assign greater weight to the testimony of Denton over the other counselors, particularly in light of Denton's more extensive contact with the child and her testimony that she had gained the child's trust. Given the testimony of the child himself, the parties, and the counselors, it is sufficient to say that the court relied on substantial evidence in deciding that the visitation seriously endangered Parker's mental and emotional health as required by KRS 403.320(3), and we will not substitute our judgment for that of the circuit court in determining the weight and credibility of the evidence, even if we were inclined to do so. We hold that the court's judgment with respect to both the termination of visitation and the type of counseling that the parties will receive must be affirmed.

For the foregoing reasons, the judgment of the Ohio Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carol Y. Boling
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BRIEF FOR APPELLEE:

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