RENDERED: June 16, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002034-ME

CHASITY DAWN MILLER — APPELLANT

v.

APPEAL FROM UNION FAMILY COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
CIVIL ACTION NO. 03-CI-00152

RICHARD ALLEN TURNER and
PEGGY MARIE TURNER — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: Chasity Dawn Miller is the mother of four children. Her second oldest child, R.S.M., is the subject of this appeal.

In the past, Miller experienced great difficulties in her personal life. For this reason, on June 10, 2002, Miller left R.S.M., who was three years old at the time, in the care of her relatives, Richard Allen Turner and Peggy Marie Turner.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Sometime later, Union Family Court temporarily placed Miller's two youngest children in the custody of the Cabinet for Health and Family Services as well.

Over a year later, on June 20, 2003, the Turners filed a petition with Union Family Court seeking permanent custody of R.S.M. On September 4, 2003, the court granted the Turners permanent custody of R.S.M. but granted Miller supervised visitation with the child.

On November 25, 2003, the Turners moved to suspend Miller's visitation. On March 25, 2004, after an evidentiary hearing, the family court found, based on the testimony of R.S.M.'s therapist, Linda Mock, that continued visitation with Miller would seriously endanger R.S.M.'s physical, mental, moral and emotional health, and it suspended Miller's visitation.

In April 2005, Miller moved to reinstate her visitation with R.S.M., but the motion was denied. On July 19, 2005, Miller renewed her motion to reinstate visitation, and she sought discovery of R.S.M.'s mental health records since the Turners' witnesses testified that R.S.M. was too emotionally fragile to resume visitation with her. Although those records were found to be confidential, Farrah Burgess, a licensed professional clinical counselor for Lighthouse Counseling Services and Miller's counselor, reviewed them. In a letter attached to Miller's renewed motion, Burgess opined that

R.S.M.’s records contained nothing that would raise concerns regarding his mental health. Miller also attached a proposed plan, drafted by Burgess, which detailed how supervised visitation could be reestablished.

On September 2, 2005, the family court held an evidentiary hearing to consider Miller’s renewed motion. Miller testified that she had sought and received counseling, had found gainful employment, had secured a three bedroom rental home and had regained custody of her two youngest children. Miller confirmed that she understood that reestablishing visitation with R.S.M. would be a slow process and expressed a willingness to do whatever was necessary to facilitate that process. Burgess testified that, in her opinion, reestablishment of visitation would not endanger R.S.M.’s mental health.

On the Turners’ behalf, Linda Mock testified once again. She said that, years earlier, R.S.M.’s behavior severely deteriorated after spending time with his mother, and she opined that, despite R.S.M.’s improvements in his emotional and mental health, reinstatement of visitation would be detrimental to him. Dr. Lawrence Suess, who also testified, agreed with Mock’s assessment. His professional opinion was that there was little chance of successfully reestablishing visitation and that the risk to R.S.M. far outweighed any possible benefit to him.

In its September 13, 2005 order, the family court relied on *Hornback v. Hornback*,[2] which interpreted Kentucky Revised Statutes (KRS) 403.320 to mean that once a court has found that visitation with a non-custodial parent may seriously endangered a child, the court may not subsequently allow visitation unless it finds that modification would be in the child's best interest. The family court found that Miller presented no evidence that reestablishing visitation would be in R.S.M.'s best interest; therefore, it denied her renewed motion.

On appeal, Miller argues that the family court erred when it used the "best interest of the child" standard to resolve her motion to reinstate visitation. She says that *Hornback*, on which the family court relied, misinterpreted KRS 403.320, and insists that the court should have applied the "serious endangerment" standard language found in the second clause of KRS 403.320(3). In addition, she contends, based on the holding in *Hornback*, that once a non-custodial parent loses visitation, that parent can never present evidence that reestablishment of visitation would be in the child's best interest. Miller maintains that she has shown that she has made undisputed improvements, yet has no chance to reestablish visitation as long as the Turners' experts opine that visitation would be detrimental to R.S.M.

[2] 636 S.W.2d 24 (Ky. App. 1982).

Alternatively, Miller distinguishes the facts in *Hornback* from the facts in the present case to justify disregard of the *Hornback* decision. Miller points out that, in *Hornback*, the trial court ordered the non-custodial parent, who had been denied visitation, to obtain a certificate from comprehensive care that she had achieved mental and emotional stability prior to requesting to reinstate visitation.[3] The non-custodial parent moved to reinstate visitation before obtaining the necessary certificate and had not achieved the stability required by the court.[4] In contrast to *Hornback*, Miller points out that the family court did not set any requirements for her to follow in order to reestablish visitation. However, despite this, Miller, on her own initiative, has made dramatic improvements in her life in order to become a better parent to her children. In fact, she has improved so much that the same family court has returned custody of her two youngest children to her.

Finally, in the alternative, Miller argues that, by requiring her to show that visitation would be in the best interest of the child, the family court has, in effect, constructively terminated her parental rights without giving her the due process to which she is entitled.

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[3] *Id*.

[4] *Id*. at 25.

When this Court reviews a family court's decision regarding visitation, we will reverse only if the court abused its discretion or, in light of the facts and circumstances, its decision was clearly erroneous.[5]

KRS 403.320 controls a non-custodial parent's visitation with a minor child. The relevant portions of the statute are set forth below:

> (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.
>
> . . .
>
> (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.

Interpreting the statute's first subsection, the *Hornback* court said "the noncustodial parent has absolute entitlement to visitation unless there is a finding of serious endangerment to the child. No 'best interests' standard is to be applied; denial of visitation is permitted only if the child

[5] *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky. App. 2000).

is seriously endangered."[6] But, regarding the third subsection, the *Hornback* court held that "[i]n 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.**"[7] In addition, the *Hornback* court held that

> [T]he second clause of subsection [(3)] [refers] 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.[8]

The *Hornback* court concluded that once a trial court has found that visitation with a non-custodial parent seriously endangers a child, the court cannot subsequently modify visitation unless it is in the child's best interest.[9]

When we interpret a statute, we attempt to ascertain and effectuate the intent of the General Assembly.[10] We may neither add to nor subtract from the statute. Neither are we

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[6] *Hornback v. Hornback, supra,* note 2, at 26.

[7] *Id.* (emphasis supplied.)

[8] *Id.*

[9] *Id.*

[10] Ky. Rev. Stat. (KRS) 446.080(1); *Commonwealth v. Reynolds,* 136 S.W.3d 442, 445 (Ky. 2004).

permitted to interpret the statute in such a way to produce an absurd result.[11]

Applying these rules of statutory interpretation, the *Hornback* court properly interpreted KRS 403.320(3). It ascertained the legislature's intent in drafting the statute and gave effect to all of the language found in subsection (3). In contrast, if we were to adopt Miller's interpretation, the language found in the first clause of subsection (3) would be rendered moot. The rules of statutory interpretation prohibit such an outcome.[12]

This Court has reaffirmed the *Hornback* interpretation in two subsequent cases: *Smith v. Smith*[13] and *McNeeley v. McNeeley.*[14] Citing *Hornback*, the *McNeeley* court held that "[w]hen visitation has already been denied, the standard for modification is not serious endangerment; rather, the best interests of the [child] governs."[15] Furthermore, the *McNeeley* court concluded that once the non-custodial parent's visitation

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[11] *Reynolds, id.* at 445.

[12] *Id.*

[13] 869 S.W.2d 55, 57 (Ky. App. 1994).

[14] 45 S.W.3d 876, 878 (Ky. App. 2001).

[15] *Id.*

has been denied, he or she bears the burden of proving that reinstating visitation is in the child's best interest.[16]

The family court was bound to following the holding in *Hornback* interpreting KRS 403.320 and apply the best interest of the child standard in resolving Miller's motion to reinstate visitation. While we applaud Miller's efforts and her accomplishments, a review of the testimony clearly shows that the family court's decision was supported by substantial evidence. Although the court neither abused its discretion nor acted erroneously when it denied Miller's motion, we assume that it will reconsider its decision when additional time has passed and R.S.M. has achieved a level of physical and emotional maturity that will enable him to resume contact with his mother.

Miller's two remaining assignments of error lack merit, so it is not necessary that we address them.

The decision of the Union Family Court to deny Miller visitation with R.S.M. is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan E. Neace
KENTUCKY LEGAL AID
Madisonville, Kentucky

BRIEF FOR APPELLEES:

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[16] *Id*.