

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000277-ME

HANNAH BAILEY

APPELLANT

v. APPEAL FROM MADISON FAMILY COURT
HONORABLE JEFFREY M. WALSON, JUDGE
ACTION NO. 04-CI-01453

MARY TURNER

APPELLEE

OPINION AND ORDER

1. AFFIRMING IN PART AND REMANDING
2. DENYING MOTION TO DISMISS
AND MOTION FOR ATTORNEY FEES

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; PAISLEY,¹ SENIOR JUDGE.

WINE, JUDGE: Hannah Bailey appeals from an order of the Madison Family Court denying her motion to terminate or reduce

grandmother, Mary Turner's, visitation of Bailey's minor child.

Bailey contends that the trial court erred in denying her motion

because Turner's continued visitation with her son violates her

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

constitutional right to raise her child as she sees fit. For the reasons stated below, we affirm in part and remand for further orders consistent with this opinion.

Hannah Bailey is the biological mother and sole custodian of her son, Elijah Turner, born February 15, 2001. Appellee, Mary Turner, is the paternal grandmother of Elijah. On December 28, 2004, Turner petitioned the trial court for grandparent visitation. On February 10, 2005, the trial court entered an order granting visitation to Turner and specified a schedule the parties were ordered to follow.

On September 15, 2005, Turner filed a motion to enforce the court's visitation order because Bailey was not following the court ordered visitation schedule. Shortly thereafter, on September 22, 2005, Bailey filed a motion to modify the visitation schedule because Elijah had started school. Bailey also alleged that Turner: (1) refused to let Bailey know where she will be taking the child during visitation; (2) made derogatory remarks to the child about Bailey and her family; (3) discussed the custody or visitation cases with the child; (4) refused to let Bailey pick up the child if he became ill; (5) refused to allow Bailey to call her child when he is with Turner; (6) failed to give the child regular naps; and (7) bought lavish gifts for the child. Bailey asserted in her motion to modify that Turner was not complying

with these requests and Bailey was concerned with the child's resulting emotional and mental health.

On October 25, 2005, the court entered a final and appealable order denying Bailey's motion to modify and directing the parties to participate in mediation concerning the visitation issues. The court's order also provided that both parties are not to discuss the case with the child or make disparaging remarks about the other to the child. Finally, the court emphasized that Bailey is in charge of all child-rearing decisions.

The mediation proved unsuccessful and Turner re-noticed her motion to enforce on October 28, 2005. On December 1, 2005, the trial court entered an order granting Turner's motion to enforce visitation and further ordered Bailey to allow Turner make-up visitation for the times she missed with Elijah during the pendency of the parties' motions. The trial court made no order regarding Turner's obligation to take the child to church or to his extracurricular activities during her visitation periods, but encouraged Turner to do so. The court ordered Turner to obtain prior permission from Bailey before taking the child outside of the state or outside of Madison and Fayette Counties.

Thereafter, on December 27, 2005, Bailey filed a new motion to terminate or reduce visitation, alleging that Turner

was not complying with the family court's order to allow Bailey to be the decision maker on behalf of Elijah. Bailey alleged Turner had resorted back to her old habits of secret keeping, spoiling the child with gifts, making Bailey the "bad guy," refusing to allow the child to talk to Bailey during visitation, refusing to tell Bailey where the child will be during visitation, failing to take the child to extracurricular activities, failing to give the child naps or bring him home when he is ill, and refusing to take the child to Bailey's church. Bailey also asserted that the \$1,000.00 attorney fee award she was ordered to pay is excessive and should be modified or eliminated completely after testimony by the parties on attempts made to schedule visitation with the child.

On January 4, 2006, Turner filed a response to Bailey's motion, asserting that Bailey's claims were barred by *res judicata* because the issues raised in the current motion were essentially the same arguments already adjudicated by the trial court. In an order entered on January 31, 2006, the trial court denied Bailey's motion to terminate or modify visitation without addressing the issue of *res judicata*. Rather, the trial court reiterated its prior visitation ruling and again held that Turner was entitled to make-up visitation as to not interfere with the child's school schedule.

The trial court also set out the following guidelines for visitation: (1) Bailey and the child are allowed to converse by telephone during visitation at Turner's; (2) Turner is not to travel with the child outside of Madison or Fayette Counties without permission from Bailey; (3) Turner is not to engage in secret keeping with the child; (4) the parties are not to discuss court proceedings with the child; (5) the parties are not to disparage each other to the child; (6) Turner has a \$10.00 limit on gifts for the child; and (7) Turner is not allowed to pick the child up from school. The trial court declined to make an order regarding the obligation of Turner to take the child to extracurricular activities but encouraged Turner to do so. Likewise, the court did not order Turner to take the child to church, but stated that Turner may only take the child to the church he regularly attends with his mother. The trial court again reiterated that Bailey has the decision-making rights concerning the child and Turner is to abide by and respect the decisions of Bailey concerning the rearing of the child. It is noteworthy that these guidelines are, for the most part, a restatement of visitation provisions set out in the trial court's previous orders.

Bailey now appeals from the trial court's January 31, 2006 order arguing that it violates her constitutional rights to raise her child as she sees fit. Turner has filed a motion to

dismiss Bailey's appeal, arguing that Bailey's appeal improperly attempts a collateral attack on the trial court's judgment entered in February 2005. Consequently, Turner asserts that Bailey's notice of appeal should have been filed thirty days after the trial court's order awarding grandparent visitation entered February 1, 2005, CR 73.02, and her subsequent effort to raise the issue now is untimely. Turner further argues that *res judicata* also bars a reconsideration of her rights to grandparent visitation. Finally, Turner argues that Bailey's appeal is frivolous and has the sole purpose of thwarting the trial court's ordered visitation that has been held to be in the best interests of the child. As such, Turner argues she is entitled to attorney fees. See Leasor v. Redmond, 734 S.W.2d 462 (Ky. 1987).

We find these arguments to be without merit. On appeal, Bailey is not attempting to bring an untimely constitutional challenge against the trial court's original order granting visitation to Turner on February 1, 2005. Rather, Bailey is appealing the court's denial of her motion to terminate or modify visitation entered on January 31, 2006. The constitutional issues are relevant to a motion to modify to the same extent as they were under the original motion to grant visitation. Because Bailey filed her notice of appeal within

thirty days from entry of the January 31, 2006 order denying her motion, her appeal is timely.

The central issue in this case concerns the trial court's denial of Bailey's motion to modify Turner's visitation. KRS 403.320(3) states, "[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child[.]" The Court in Vibbert v. Vibbert, 144 S.W.3d 292 (Ky.App. 2004), lists a number of factors the court should consider in determining whether grandparent visitation would be in the best interests of the child. These factors include: (1) the nature of the relationship between child and grandparent seeking visitation; (2) the amount of time they have spent together; (3) the potential detriments and benefits to the child from granting visitation; (4) the effect the visitation will have on the child/parent relationship; (5) the physical and emotional well-being of all parties involved; (6) the stability of the child's school and living arrangements; and (7) the child's preferences.

In its original visitation order, the trial court determined that it was in Elijah's best interests to maintain contact with Turner. Bailey argues that the trial court overlooked the fact that her relationship with her son has been adversely affected because of the visitation with Turner. She contends that Turner's visitation should be reduced or

terminated because of Turner's conduct since the entry of the original visitation order.

Bailey first argues that the trial court erred in finding that Turner not be required to take the child to extracurricular activities because it is inconsistent with the trial court's ruling that Bailey is in charge of child-rearing decisions. We agree. While the trial court properly found that Bailey has sole authority to make child-rearing decisions, the trial court should have directed Turner to follow through with the scheduled extracurricular activities during her visitation with the child. Consistency is important in rearing a child. If the child is involved in regularly scheduled extracurricular activities while with Bailey, he should be allowed to attend those activities when in the care of Turner.

Secondly, Bailey argues that Turner should be required to always take the child to his regularly attended church during his visitation with Turner. Bailey contends that the trial court's order providing that if Turner takes the child to church, she has to attend the church that he normally attends with this mother, did not satisfy her constitutional right to raise her child in the religion of her choice pursuant to Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). While there is no evidence of record indicating that Turner is attempting to impose a religious affiliation on

Elijah, the weekly schedule of attending church should not be disrupted. Like the child's extracurricular activities, Sunday church activities should be consistent regardless of the custodial guardian.

Although the trial court's order reasonably protects Bailey's parental right to make religious decisions for her child, it does not go on to strongly enforce that decision.

Bailey's most recent motion did not raise any new allegations or conditions warranting a change in visitation. In its prior orders, the trial court addressed Bailey's allegations that Turner was engaged in secret keeping with the child, that Turner did not allow Elijah to have phone conversations with Bailey during his visits, and that Turner was buying the child gifts and spoiling him, and ordered Turner to stop. The trial court reiterated that Bailey was the sole custodian of the child and Turner was to conform to Bailey's wishes in decision-making situations regarding the child. Thus, the trial court has addressed all of the issues on visitation which Bailey has raised. Matters involving visitation are within the sound discretion of the trial court, and the court's determinations regarding the best interests of the child will not be disturbed unless they are clearly erroneous or constitute an abuse of discretion. Drury v. Drury, 32 S.W.3d 521, 525 (Ky.App. 2000).

At this point in time, we cannot find that the trial court's decision constitutes an abuse of its discretion.

Accordingly, the January 31, 2006 order of the Madison Family Court denying Bailey's motion to modify or terminate Turner's visitation is affirmed in part, and this matter is remanded to the Madison Family Court for further orders consistent with this opinion. Further, Turner's motion to dismiss and motion for attorney fees is hereby DENIED.

ALL CONCUR.

ENTERED: December 15, 2006

/s/ Thomas B. Wine
JUDGE, COURT OF APPEALS

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