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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000442-ME

D.C., FATHER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-J-00615-001

S.T., MOTHER;
M.E.T., MINOR CHILD; AND
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

KELLER, JUDGE: D.C. appeals from the Hardin Circuit Court, Family Division's (family court) order granting supervised visitation to S.T. of the couple's biological child, M.E.T., and denying D.C.'s motion to compel S.T. to submit to a mental health examination. D.C. also objects to the family court's order requiring D.C. to provide

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

transportation costs for the supervised visits between S.T. and M.E.T. For the following reasons, we affirm.

FACTS

These parties have been before this Court before in *S.T. v. Commonwealth of Kentucky, Cabinet for Families and Children,* 2005-CA-001341-ME. Our opinion therein set forth the basic underlying facts, which we adopt below, omitting footnotes and facts that are not pertinent to this appeal.

> S.T. is the biological mother of M.E.T., who was born on August 26, 2004, and D.C. is her biological father. The parties were never married, but cohabited together with D.C.'s natural child, M.C., who died . . . in May 2004. S.T. has been indicted in Fayette County, Kentucky, for the murder of M.C., and is currently out of jail on a conditional bond awaiting trial.
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> On August 26, 2004, Lauren Wells, a social worker with the Cabinet for Families and Children (the Cabinet), filed a juvenile dependency, neglect, and abuse petition in the family court, alleging that M.E.T. was at risk of serious physical harm. Wells also signed an affidavit for an emergency custody order which asserted the same allegations. Based on the testimony of Wells, the Hardin Family Court entered an emergency custody order on August 27, 2004, removing M.E.T. from S.T.'s custody, and placing her in the custody of the Cabinet . . . .
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> By order entered on September 7, 2004, the family court found that M.E.T. was at risk of harm, as S.T. was under investigation for the homicide of another child. By a preponderance of the evidence, the family court found that there were reasonable grounds to believe that it would be contrary to M.E.T.'s welfare to be returned to S.T.'s custody, because she could be neglected or abused . . . .

On September 22, 2004, S.T. filed a motion asking the family court to return M.E.T. to her, or in the alternative, to increase her visitation with M.E.T. On October 28, 2004, D.C. filed a motion requesting the family court to discontinue S.T.'s visitation with M.E.T. until the neglect proceedings were concluded. D.C. argued that discontinuing visitation between M.E.T. and S.T. would be proper to protect the safety and well-being of M.E.T. Another motion to discontinue visitation was filed by D.C. and the Cabinet on November 8, 2004, stating the same grounds as D.C.'s earlier motion . . . . The family court entered an order on December 13, 2004, stating that a "Cabinet worker shall be physically present during visitation and the paternal grandmother shall be present during visitation to be arranged at [the] discretion of [the Cabinet] regarding date and time."

S.T. was indicted by a Fayette County grand jury in December 2004 for the murder of M.C. D.C. filed a third motion to discontinue visitation on December 29, 2004, based on the murder indictment against S.T., stating that her continual harassment of D.C.'s mother, H.C., and her recent outbursts directed at H.C. during the supervised visits "demonstrated a severe disregard for the well-being of [M.E.T.]." On January 4, 2005, S.T. filed a motion accompanied by an affidavit from her mother, C.P., requesting that C.P. be allowed unsupervised weekly visitation with M.E.T. The family court entered an order on January 25, 2005, which denied D.C.'s motion to discontinue visitation, denied S.T.'s motion for unsupervised visits for C.P., and reiterated that a Cabinet worker was to be physically present during S.T.'s visitations with M.E.T.

On January 26, 2005, an adjudication hearing was held. S.T. stipulated that, based on proposed witness testimony, M.E.T. would more than likely be found to be a neglected child. The family court entered an order on February 4, 2005, and, based on that stipulation, made a finding by a preponderance of the evidence that M.E.T. was a neglected child as alleged in the Cabinet's petition. The case was set for a disposition hearing and M.E.T. remained in the custody of D.C. pending the outcome of the disposition. S.T.'s visitation with M.E.T. continued to be at the discretion

> of the Cabinet, and supervised by the Cabinet with a Cabinet worker present at all times. The family court allowed D.C. and H.C. to be present at S.T.'s visitations with M.E.T., if they desired.
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> A disposition hearing was held on March 2, 2005. By order entered on March 5, 2005, the family court ordered that M.E.T. remain in D.C.'s home, as it was found not to be contrary to her best interests . . . . [T]he Cabinet indicated that it was willing to continue to supervise S.T.'s visitation with M.E.T. However, D.C. objected to S.T. having any visitation with M.E.T. Following a lengthy hearing in which D.C., H.C., Wells, and C.P. testified solely on the issue of visitation, the family court suspended S.T.'s visitation with M.E.T., unless D.C. agreed to allow the visitation . . . . On March 15, 2005, S.T. filed a motion to alter, amend, or vacate the order suspending her visitation rights, but the family court denied the motion on May 26, 2005, stating visitation would be harmful to M.E.T.

S.T. appealed from the family court's order denying her motion to alter, amend, or vacate. In that appeal, S.T. argued that the family court erred in finding that M.E.T. was a neglected child and in discontinuing her visitation with M.E.T. This Court affirmed the family court's finding of neglect, noting that S.T. had stipulated to neglect and that, even without the stipulation, there was substantial evidence to support the family court's finding of neglect. However, this Court reversed the family court's finding with regard to visitation. In doing so, this Court held that D.C., who was attempting to deny S.T. visitation, had the burden of proving that visitation would "endanger seriously the child's physical, mental, moral, or emotional health." KRS 403.320(3). After reviewing the evidence, this Court held that D.C. had not met his burden of proof noting that "the record is completely void of any facts that indicate that supervised visitation was

contrary to M.E.T.'s best interests or put her in serious danger." Furthermore, this Court noted that "the threat of these charges (S.T.'s indictment) was present at the time of entry of the emergency custody order on August 27, 2004." This Court then held that the family court "abused its discretion by failing to make a finding that such visitation would seriously endanger M.E.T."

On May 9, 2006, S.T. filed a motion to reinstate supervised visitation. In August of 2006, that motion was remanded by counsel for S.T., who then apparently withdrew her representation.[2] On October 25, 2006, S.T. filed a motion to establish visitation. The family court heard that motion on November 29, 2006. At that hearing, S.T. testified that she had previously taken advantage of the supervised visitation permitted under the family court's initial order. Although there was some tension when D.C. and/or H.C. were present during visitation, the visits were otherwise uneventful. S.T. testified that she had not had any contact with M.E.T. since the family court put her supervised visitation at the discretion of D.C. Furthermore, S.T. testified that she had not had any contact with D.C.'s family.

D.C. testified that he believed that it would not be in M.E.T.'s best interest for S.T. to have even supervised visitation, in part because M.E.T. had been diagnosed as developmentally delayed. D.C. noted that M.E.T.'s development was progressing rapidly and that M.E.T.'s therapists stated that stress should be avoided in order for M.E.T. to continue to progress. D.C. also testified that he worried that, if S.T. and M.E.T. bonded

[2] We could find no formal motion to withdraw as counsel nor any motion to substitute. However, in the proceedings that gave rise to this appeal, S.T. was represented by new counsel.

and S.T. were ultimately imprisoned, that bond would be broken and M.E.T. would suffer as a result. Finally, although he admitted that he had not seen any inappropriate behavior by S.T. during her prior visits with M.E.T., D.C. stated that he did not believe that S.T. should be entitled to any visitation with M.E.T., absent an acquittal in the death of M.C.

Lauren Wells (Wells), a social worker with the Cabinet, testified that she did not see any inappropriate behavior by S.T. or any behavior that posed a threat of serious danger to M.E.T. during the supervised visits. However, Wells did note that the presence of D.C. and/or H.C. during those visits did cause some tension among those present. Finally, Wells testified that it is important for a child to develop a bond with her mother. Any bond S.T. and M.E.T. had will need to be re-established and it is better to start that process sooner rather than later.

After hearing the preceding testimony, the family court judge noted that she had granted supervised visitation because she recognized the need for M.E.T. and S.T. to develop a bond. The judge stated that she was attempting to balance that need to bond with the justifiable concerns D.C. and his family had for M.E.T.'s well being. However, the judge recognized that permitting D.C. and/or H.C. to be present during the supervised visits was probably a mistake because of the stress it created for all involved. Instead of putting S.T.'s visitation at the discretion of D.C., as it did in an order entered on March 5, 2005, the family court stated that it should have continued the supervised visits, but excluded D.C. and/or H.C. from the room during the visits. That being said, the family court then set forth a visitation schedule for S.T., initially providing for supervised

visitation, then transitioning into non-supervised visitation over a period of several years. In doing so, the family court noted that it had to use its best judgment as D.C. had not put on any expert testimony regarding the issue of visitation.

D.C. timely filed a motion to alter, amend, or vacate, a motion to discontinue S.T.'s visitation, and a motion to compel S.T. to attend a mental health evaluation to determine her emotional stability. The family court conducted a hearing on those motions on January 24, 2007. Over S.T.'s objection, the court permitted D.C. to present testimony from Kimberly Maugans-Smith (Maugans-Smith), a licensed clinical social worker, and from Deborah G. Blair, Ph.D. (Dr. Blair), a clinical psychologist.

Maugans-Smith testified that she had reviewed the reports regarding the death of M.C., that she had spoken with D.C. and H.C., and that she had observed M.E.T. Maugans-Smith also spoke with the Guardian Ad Litem and with S.T.'s attorney. During her conversation with S.T.'s attorney, Maugans-Smith asked if he would permit S.T. to undergo psychological evaluation to determine S.T.'s emotional stability. Because of the pending criminal trial, S.T.'s attorney indicated that he would not permit his client to do so.

Based on the above, Maugans-Smith stated that she believed that M.E.T. was at risk of both physical and mental harm from S.T. In reaching that conclusion, Maugans-Smith noted the criminal charges pending against S.T., an indication in the records that S.T. had physically abused her mother, and the accusations that S.T. had stalked H.C. Based on that evidence and the absence of a psychological evaluation,

Maugans-Smith stated that she had no reason to believe that S.T. had any emotional stability. Maugans-Smith noted that the previous supervised visits between S.T. and M.E.T. had gone well, except for the tension among S.T., D.C., and H.C. However, she stated that she had personal experience with children being at risk during visits she was supervising in her office, which caused her concern about S.T. visiting with M.E.T. even in a supervised setting.

On cross-examination, Maugans-Smith admitted that she was not aware that the stalking charges had been dismissed. That information would be important to know; however, Maguans-Smith stated that her opinion that S.T. needed to undergo a psychological evaluation would not be altered by that fact.

Dr. Blair testified that she has worked with children and families and has done numerous custody evaluations. Dr. Blair met with D.C., H.C., and M.E.T. and reviewed the file materials provided to her by D.C. Based on her review of the file materials, Dr. Blair testified that S.T. should not have any visitation with M.E.T. and that the initial supervised visitation had not been appropriate. Furthermore, Dr. Blair testified that any such visitation would present a risk of harm to M.E.T.'s emotional and physical well-being. In reaching her conclusions, Dr. Blair relied on evidence in the records of S.T.'s history of alcohol and drug abuse, S.T.'s history of domestic violence in her family, S.T.'s serial relationships, and S.T.'s lack of remorse or guilt regarding the death of M.C. Finally, Dr. Blair stated that she had not spoken with or evaluated S.T. and that a

psychological evaluation of S.T. would be appropriate to determine S.T.'s symptoms, personality structure, and whether S.T. suffered from any psychosis.[3]

Following the hearing, the family court judge stated that the experts were "strong" in their opinions that visitation between M.E.T. and S.T. should be suspended pending a psychological evaluation of S.T. Furthermore, the court noted that the experts opined that developing a bond between S.T. and M.E.T. only to have that bond severed by S.T.'s conviction and imprisonment, would be detrimental to M.E.T. However, the family court judge also noted that she could not readily determine how the experts arrived at those opinions. Furthermore, the judge noted that S.T. appeared to have learned to cope with her stress and that her demeanor was good. Finally, the judge stated that she did not hear any evidence that M.E.T. would be seriously endangered if supervised visitation with a Cabinet worker in the room were reinstated. Therefore, the judge ordered supervised visitation effective the week of March 5, 2007. In the event S.T. agreed to and underwent a psychological evaluation, the judge would consider altering the visitation order if appropriate.

In addition to the above, the record contains transcripts of the depositions of Dr. Knisely[4] and Dr. Nethers. Dr. Knisely testified that he had cared for S.T.'s oldest child, A., and had never seen any reason to be concerned about S.T. mistreating A. Dr.

[3] We note that Christie Riley, a social worker for the Cabinet, also testified. However, her testimony, which concerned the Cabinet's visitation guidelines, is not relevant to this appeal.

[4] We note that D.C. objected to the admission of Dr. Knisely's deposition. The family court overruled that objection; however, the judge stated that she had not relied on Dr. Knisely's testimony in making her findings.

Nethers treated S.T. during her pregnancies with A. and M.E.T. Although Dr. Nethers noted that S.T. was distraught regarding the death of M.C., he did not note any inappropriate behavior by S.T. or any evidence of emotional instability. Dr. Nethers did prescribe Prozac for S.T. during her pregnancy with M.E.T. due to S.T.'s situational depression regarding the death of M.C. Finally, Dr. Nethers stated that he did not have any concerns about S.T.'s relationship with either A. or M.E.T.

In this appeal, D.C. argues that the family court abused its discretion in permitting supervised visitation for S.T., in failing to order S.T. to undergo a psychological evaluation, and in ordering D.C. to be responsible for transportation of M.E.T. to supervised visitation.

STANDARD OF REVIEW

"[T]his Court will only reverse a trial court's determinations as to visitation if they constitute a manifest abuse of discretion, or were clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury,* 32 S.W.3d 521, 525 (Ky.App. 2000); *see also Bales v. Bales,* 418 S.W.2d 763, 764 (Ky. 1967). The trial court's findings of fact are not erroneous if supported by "evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Sherfey v. Sherfey,* 74 S.W.3d 777, 782 (Ky.App. 2002). In reviewing the family court's decision, we must give due regard to that court's judgment as to the credibility of the witnesses. *Id.* at 782. With this standard in mind, and having reviewed the record, we hold that the family court did not abuse its discretion. Therefore, we affirm.

ANALYSIS

A. Visitation

As we noted in our previous opinion in this matter, KRS 403.320 provides that:

> (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.
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> (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.

As the parent who is attempting to deny visitation, D.C. bears the burden of proving that visitation with S.T. would endanger seriously M.E.T's physical, mental, moral, or emotional health. *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky.App. 1994).

D.C. argues that the evidence established that visitation with S.T. would endanger seriously M.E.T.'s physical, mental, and emotional health. In support of his argument, D.C. offered testimony from Maugans-Smith and Dr. Blair. Both experts

testified that, based in part on allegations regarding S.T.'s part in the death of M.C. and allegations that S.T. abused her mother, S.T. should not have any visitation with M.E.T., at least until S.T. underwent a psychological evaluation. D.C. argues that this expert testimony was unrebutted and that the family court therefore should have followed the recommendations of Maugans-Smith and Dr. Blair. However, we note that the family court had before it evidence that contradicted the opinions of Maugans-Smith and Dr. Blair. Wells testified that she had not seen any behavior by S.T. with regard to M.E.T. that caused her concern for M.E.T.'s well-being, testimony which even D.C. confirmed. In addition, D.C. testified that he did not see any such behavior. Furthermore, Dr. Knisely, who had treated S.T.'s older child, A., had seen nothing that caused her concern that S.T. might be abusing A. Finally, Dr. Nethers testified that, while he did see evidence of situational depression, he saw no need to refer S.T. to a mental health professional and did not have any concerns that S.T. might be unstable. Therefore, we hold that the family court's decision to grant S.T. visitation in a highly supervised setting was supported by evidence of substance and cannot be reversed on appeal.

B. Psychological Evaluation

D.C. argues that the family court erred when it failed to order S.T. to undergo a psychological evaluation to determine her emotional stability. In support of his position, D.C. again points to the testimony of Maugans-Smith and Dr. Blair. Both witnesses stated that they believe that S.T. should undergo a psychological evaluation to determine her emotional stability before any visitation could be permitted. As noted

above, those opinions were based, in large part, on S.T.'s pending criminal prosecution and on allegations in the record that S.T. had physically abused her mother. We note that there has been no adjudication of the pending charges and S.T.'s mother testified that the alleged abuse was a one-time occurrence when S.T. pushed her while she was trying to comfort S.T. following M.C.'s death.

In support of his position, D.C. cites *Hornback v. Hornback*, 636 S.W.2d 24 (Ky.App. 1982); however, that case is distinguishable. In *Hornback*, the trial court issued an order temporarily denying the mother visitation of her infant children. The court stated that, in order for the mother to obtain visitation with her children, she was required to obtain certification from Comprehensive Care that she was mentally and emotionally stable. The mother filed a subsequent motion for visitation, which the trial court granted. In doing so, the trial court noted that the mother had not obtained the necessary certification from Comprehensive Care but that she had undertaken treatment and made some improvement. Therefore, the trial court ordered visitation. In pertinent part, this Court reversed the trial court because of its failure to require the mother to obtain the certification from Comprehensive Care mandated by the court's initial order.

At the outset, we note that D.C. correctly stated that this Court indicated that the trial court's requirement of psychological treatment for the mother in *Hornback* "was not [] unreasonable." *Id.* at 25. However, nothing in *Hornback* mandates such an evaluation. Furthermore, unlike the mother in *Hornback*, S.T.'s visitation has never been contingent on a psychological evaluation. In fact, when the court effectively terminated

S.T.'s visitation rights in early 2005, it did so because of tension among S.T., D.C., and D.C.'s mother, not because of any threat of harm to M.E.T.

We can find no legal authority, and D.C. has cited no legal authority, that would require a family court to order S.T. to undergo a psychological evaluation. Furthermore, we note that the family court did take into consideration the opinions of the experts. In her initial order reinstating visitation, the family court judge gradually increased visitation to the point that S.T. would eventually have been permitted some unsupervised visitation. Following the hearing on D.C.'s motion, the family court limited S.T. to one hour of supervised visitation per week and made any changes in that visitation contingent on S.T. undergoing a psychological evaluation. As did this Court in *Hornback*, we hold that this condition is not unreasonable.

C. Transportation Costs

Finally, D.C. argues that the family court abused its discretion when it ordered him to provide transportation costs for S.T.'s visits with M.E.T. In support of his argument, D.C. states that the "rising gasoline costs" and the fact that he lives in Louisville, "nearly an hour away,"[5] coupled with the fact that S.T. "was found to be neglectful of her child" impose an "unfair and unduly burdensome" obligation on D.C. However, D.C. cites no legal authority to support his position. Taking into consideration the fact that S.T. is not permitted to be alone with M.E.T., that visitation was ordered to take place in Hardin County, that S.T. was not employed at the time of the hearing, and

[5] We note that this differs from D.C.'s testimony that while M.E.T. was in his mother's physical custody, it was no burden to drive to Hardin County several nights per week because the drive only took one-half hour.

that the family court ordered S.T. and her mother to stay away from D.C. and his mother, we cannot say that the family court's order is unreasonable.

CONCLUSION

We have discerned no abuse of discretion by the family court with respect to its order granting S.T. supervised visitation and its order requiring D.C. to pay the transportation costs for that visitation. Furthermore, we discern no abuse of discretion by the family court with respect to its failure to require S.T. to undergo a psychological evaluation. Therefore, we affirm the Hardin Circuit Court, Family Division, in all respects.

HENRY, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I believe the unrebutted testimony of appellant's two expert witnesses was sufficient to restrict all visitation with M.E.T. by S.T. at this time, and thus, the trial court's findings are clearly erroneous, in my opinion. CR 52.01.

Visitation cases like this place our trial courts in a very difficult and unenviable position. However, given that S.T. stands indicted for the murder of M.E.T.'s half-sibling, coupled with the expert testimony, is more than sufficient to establish that S.T.'s visitation would pose a serious danger to M.E.T. at this time. If the court is to err, it should be on the side of caution and should not allow visitation until the murder indictment is resolved.

Based upon the circumstances of this case and the expert testimony, at minimum, I would reverse and remand this case for S.T. to have a comprehensive mental health examination before the trial court considers even restricted visitation by S.T.

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