RENDERED: DECEMBER 2, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001535-ME
AND
NO. 2011-CA-000357-ME

REBECCA MARIEA MAGGARD — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE JOHN R. COX, SPECIAL JUDGE
ACTION NOS. 01-CI-00027 AND 06-J-00007

ROBERT A. FRALEY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Appellant, Rebecca Maggard, appeals from an order of the Carter Family Court that reinstated Appellee, Robert Fraley's, visitation with the parties' minor daughter S.F., as well as granted him the right to make up the days missed when visitation was temporarily suspended. In a separate case, Rebecca

appeals from the family court's denial of her motion to modify visitation. Finding no error, we affirm both orders.

The parties herein were married in 1998. A week after S.F. was born in 2001, Rebecca moved out of the marital residence. A decree of dissolution of marriage was subsequently entered on November 13, 2001. Rebecca was awarded sole custody of S.F., with the parties having fifty-fifty timesharing.

In May 2010, the Cabinet for Health and Family Services opened a sexual abuse investigation after receiving a report that Robert was touching S.F. in an inappropriate manner while at a Grayson County restaurant. As part of the investigation, Robert agreed to sign a prevention plan with the Cabinet, which included a stipulation that he have no contact with S.F. during the investigation. However, on June 21, 2010, Robert filed a motion in the family court to reinstate visitation on the grounds that over five weeks had passed since he signed the prevention plan yet the Cabinet had never followed through with its investigation. As a result, the Cabinet filed a juvenile petition on June 21, 2010, seeking a temporary removal order.

On July 2, 2010, the parties appeared at a hearing on the juvenile petition.[1] At that time, the Carter County Attorney moved to dismiss the petition on the grounds that the allegations were unsubstantiated. In granting the motion to dismiss the petition, the family court inquired whether the county attorney's office had been consulted prior to the Cabinet's filing the petition. The assistant county

[1] In his brief to this Court, Robert cites extensively to the video of this hearing. However, such is not found in the record on appeal.

attorney acknowledged that it had not. As a result, the family court ruled that given the history of this case, the Cabinet was required to contact the county attorneys' office upon the receipt of any request, notification or report relating to S.F. that could lead to a juvenile petition. Finally, the family court reinstated Robert's visitation, as well as ordered that he was permitted to make up the visitation days that were missed in the prior seven weeks. Following the denial of her motion to alter, amend or vacate, Rebecca appealed to this Court.

Subsequently, while the first matter was on appeal, Rebecca filed a motion on August 30, 2010, to modify visitation, once again seeking to restrict Robert's visitation to the standard schedule. Following an extensive hearing, wherein both parties presented expert medical testimony, the family court entered an order denying a modification of visitation. Rebecca thereafter appealed that order to this Court as well.

In Appeal No. 2010-CA-001535-ME, Rebecca argues that the family court abused its discretion by: (1) allowing Robert to make up the visitation that he missed over the seven week period; and (2) requiring the Cabinet to contact the county attorney's office before filing any further petitions involving S.F. In Appeal No. 2011-CA-000357-ME, Rebecca additionally argues that the family court's order denying her motion to modify Robert's visitation was contrary to S.F.'s best interests and against the mandate of Kentucky Revised Statutes (KRS) 403.320.

"[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. *Owens-Corning Fiberglas Co. v. Golightly,* 976 S.W.2d 409, 414 (Ky. 1998). In reviewing the family court's decision, we must give due regard to that court's judgment as to the credibility of the witnesses. "Unfortunately, in custody proceedings it is seldom possible for a trial court to impose a visitation regime which makes both parties happy. For this reason, matters involving visitation rights are held to be peculiarly within the discretion of the trial court." *Drury*, 32 S.W.3d at 526. With this standard in mind, and having reviewed the record, we hold that the family court did not abuse its discretion.

Citing numerous decisions relating to custody determinations and grandparent visitation, Rebecca argues that the family court's *sua sponte* determination that Robert was entitled to make up missed visitation time equated to an erroneous modification of the parties' visitation agreement. Rebecca contends that to properly invoke the family court's jurisdiction under KRS 403.320, a party must move for additional visitation and the court must thereafter make findings that such modification is in the child's best interest. We find Rebecca's arguments to be misplaced.

Certainly, any decision regarding visitation must be in the best interests of the child. KRS 403.320. However, we do not agree that the family court herein modified the parties' visitation agreement. The court did not grant Robert anything that was not previously ordered. Rather, it was simply an attempt to allow Robert to recover some of the visitation he missed. We would note that the family court even stated that any make-up time would be scheduled by agreement of the parties.

Nor do we find that the trial court's directive that the Cabinet contact the county attorney before filing any additional petitions related to S.F. was erroneous or, as Rebecca claims, a violation of the separation of powers doctrine. At the outset, we would question Rebecca's standing to raise this issue since the family court's order affected the Cabinet, not Rebecca. Notwithstanding, we conclude that the order substantially mirrored the applicable provisions of KRS 620.040, which states in pertinent part:

> (1) (a) Upon receipt of a report alleging abuse or neglect by a parent . . . pursuant to KRS 620.030(1) or (2), the recipient of the report shall immediately notify the cabinet or its designated representative, the local law enforcement agency or the Department of Kentucky State Police, and the Commonwealth's or county attorney of the receipt of the report unless they are the reporting source.
>
> (b) Based upon the allegation in the report, the cabinet shall immediately make an initial determination as to the risk of harm and immediate safety of the child. Based upon the level of risk determined, the cabinet shall investigate the allegation or accept the report for an assessment of family needs and, if appropriate,

> may provide or make referral to any community-based services necessary to reduce risk to the child and to provide family support. A report of sexual abuse shall be considered high risk and shall not be referred to any other community agency.
>
> (c) The cabinet shall, within seventy-two (72) hours, exclusive of weekends and holidays, make a written report to the Commonwealth's or county attorney and the local enforcement agency or the Department of Kentucky State Police concerning the action that has been taken on the investigation.

The trial court noted that the reason for its directive was the extensive history of this case and the acrimony between the parties.[2] We conclude that based upon the record herein the trial court did not abuse its discretion, and certainly did not usurp the legislature's authority in any manner.

In Appeal No. 2011-CA-000357-ME, Rebecca challenges the family court's denial of her motion to modify visitation from the parties' fifty-fifty timesharing to a standard visitation schedule. Rebecca contends that not only did the court consider improper testimony, but also that its decision violates KRS 403.230 because it was contrary to S.F.'s best interest. Again, we find no merit in Rebecca's claims.

KRS 403.230 provides in relevant part:

> (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

[2] The record reflects that these parties have exhibited a tremendous amount of animosity toward each other since S.F. was born. In fact, the trial court referenced a prior 2006 juvenile petition filed after Rebecca accused Robert of the sexual abuse of S.F. The same trial judge dismissed that case on the grounds that the allegations were not substantiated.

> 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.

As the parent who is attempting to restrict visitation, Rebecca bears the burden of proving that visitation with Robert would endanger seriously S.F.'s physical, mental, moral, or emotional health. *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994). We conclude that Rebecca has failed to satisfy such burden.

At the hearing on the modification motion, Rebecca presented the testimony of psychologist Dr. Peter Schilling, who opined that S.F. was in "crisis" and suffered from depression and anxiety. Robert presented testimony from Dr. Diana Harley, a clinical psychologist with a practice in Lexington, Kentucky, who disagreed with some of Dr. Schilling's findings and methodologies. Rebecca's counsel refused to stipulate to Dr. Harley's qualifications and Rebecca now argues that because the family court did not specifically certify Dr. Harley as an expert, she was not qualified to give an expert opinion and should have been treated as a lay witness.

"The decision to qualify a witness as an expert rests in the sound discretion of the trial court. Further, it is not a qualification in the abstract, but whether the witness's qualifications provide the necessary foundation to respond to

the specific question asked." *Kemper v. Gordon*, 272 S.W.3d 146, 154 (Ky. 2008). Dr. Harley clearly possessed the specialized knowledge, skill, experience, training and education that would assist the family court. Kentucky Rules of Evidence (KRE) 702. Sadly, Rebecca's attempt to disqualify Dr. Harley's testimony is yet another example of how these parties are unable to cooperate in any manner whatsoever. Moreover, we fail to perceive how Rebecca was prejudiced by such, since the family court did not rely on Dr. Harley's testimony in rendering its decision.

We likewise find no merit in Rebecca's claim that the family court's order was against the weight of the evidence and contrary to S.F.'s best interests. We are of the opinion that the family court thoroughly and thoughtfully considered the evidence in reaching the following conclusions:

> Dr. Schilling urges that there must be some intervention to save [S.F.] from harm, but he has not seen [S.F.] since August due to his relocation to Florida and acknowledges that he has not referred her to another psychologist for continued treatment.
>
> This Court finds Dr. Schilling's testimony regarding the harm to [S.F.] not credible. Dr. Schilling himself testifies that the present visitation schedule would be fine if Robert would stop his detrimental conduct, such as losing his temper and making remarks regarding Rebecca. However, by his own records no such conduct has occurred for over a year.
>
> There was no testimony by this witness as to any behavior by [S.F.] witnessed by him, her mother, teachers, or other family members that would indicate [S.F] suffers from depression or anxiety disorder
> . . .

> Other than Dr. Schilling's opinion, there is no evidence that [S.F] has been harmed under the current visitation schedule that has been adopted by this Court.
>
> The [guardian ad litem (GAL)] failed to note in any way that this child was in crisis, at risk, or suffering from anxiety.
>
> To the contrary, the GAL found the child to be quite mature and vocal relating to the state of her parent's relationship.
> . . .
> Depression and anxiety are serious illnesses, especially for a 9 year old child. These allegations were not substantiated by evidence of any behavior that would indicate such or any proof of continued treatment. The testimony is proof positive that treatment ceased with Dr. Schilling's relocation to Florida. The fact that the mother chose not to corroborate the testimony of Dr. Schilling raises a real question as to the validity of his opinion. The GAL report mentions nothing of the sort.
>
> There is no credible evidence to show that S.F.'s current visitation schedule endangers her physical, mental, moral or emotional health. There is no credible evidence that the current visitation schedule is not in S.F.'s best interest. In fact this current schedule is in [S.F's] best interest, providing her parents are capable to take into account her wishes as she grows older. (Emphasis in original).

The family court further noted that the evidence clearly established that Robert and S.F. have a strong, close relationship. We are of the opinion that Rebecca failed to meet her burden of demonstrating that a modification of visitation was warranted. As such, the family court acted well within its discretion in denying Rebecca's motion. *Drury*, 32 S.W.3d at 525.

As the trial court observed, these parties have essentially been in contentious and continuous litigation since [S.F.] was born. Indeed, they have already been before this Court on several prior occasions. In *Fraley v. Fraley*, 2006-CA-001888-MR (October 12, 2007), a panel of this Court noted:

> While the courts recognize an inability of parents to often get along, it is no excuse for parties to bicker and abuse the court system in an effort to anger or undermine the other. This court takes note that the briefs of both parties were less than successful in determining proper law because they were more concerned with mud-slinging and stone-throwing than developing relevant legal arguments. This court also takes notice that the difficult nature in which these parties deal with each other has lasted over six years now. As this minor child continues to grow, we can only hope that her parents will grow up and recognize that their inability to communicate and cooperatively parent can only negatively affect their child. These parties have a long road ahead of them, well beyond emancipation. It is our hope that these parties will cease their immature behavior and, in the best interest of their child, attempt to resolve matters amicably and without the constant use of the courts.

Nevertheless, four years later these parties are still unable to cooperate with each other. In her report, the GAL observed, that "[S.F.] has been in the midst of a constant domestic battlefield since her birth." We would again implore these parties to take to heart the recommendation of the GAL and "make the effort to gain a proper perspective of their actions and realize that both parents created [S.F], both parents should have an active role in her life, and that it is not only okay, but natural and emotionally healthy, for [S.F] to love both of her parents."

For the reasons stated herein, the orders of the Carter Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael Davidson
Lexington, Kentucky

BRIEFS FOR APPELLEE:

Earl Rogers, III
Morehead, Kentucky