

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001758-ME

SCOTT HORNBACK

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NOS. 02-CI-01861 AND 99-D-00027

PRISCILLA SPEARS,
(FORMERLY ESTREMARA)

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Scott Hornback appeals from the September 20, 2012, Amended Findings of Fact, Conclusions of Law and Order whereby the family court below permitted Priscilla Spears (formerly Estremara) to relocate to South Carolina with the parties' minor children. Finding no error, we affirm.

The parties are the parents of two minor children. Spears and Hornback were never married but custody was established by the Hardin Circuit Court in a final order entered September 2, 2003. The parties were awarded joint custody. Hornback was designated the primary residential parent and Spears was awarded visitation pursuant to the local rules.

Thereafter, the parties brought forth numerous motions seeking to modify custody and/or visitation. First, Spears sought a modification of custody in November 2003, after she alleged that an act of domestic violence had occurred in Hornback's home with this then-wife, Angela. Spears's motion was overruled after a hearing before a domestic relations commissioner.

Next, Hornback brought a motion to modify custody and to limit Spears's visitation in August 2004. After a hearing in which Spears appeared *pro se*, the court denied Hornback's request to modify custody but did restrict Spears's visitation. The court appeared to be concerned about Spears's then-husband (and now her ex-husband) who had been indicted in Jefferson County.

Spears then made a second request for change of custody based on alleged domestic violence in Hornback's home in March 2006. Prior to the hearing, the court ordered the Cabinet for Health and Family Services to investigate both parties and to file a report. The report expressed no concerns about Spears but noted that she had moved multiple times due to finances. The report noted that the children reported hearing yelling and arguing at Hornback's home and were aware of an altercation between Hornback and his wife which

resulted in a glass door being broken. The report further stated that Hornback had been charged with possession of methamphetamine and drug paraphernalia in Hancock County in 2005, but concluded that despite these circumstances, the children were safe and happy in their present surroundings. Spears's motion to modify custody was denied but she was granted a return to visitation in accordance with local rules.

Spears next filed a motion to modify parenting time on July 7, 2010, based on alleged domestic violence in Hornback's home. We note at this point the parties' litigation becomes somewhat confusing because two actions were proceeding simultaneously: one with case number 02-CI-01861 in family court regarding parenting time and a second one, also in family court, initiated by Spears for a domestic violence order (DVO) against Hornback on behalf of herself and the children in case number of 99-D-00027.

We additionally note that the same judge heard both cases and eventually cross-referenced the cases in later orders but did not formally merge the two. The DVO¹ was entered on December 27, 2010, and is in effect until December 27, 2013. It maintains joint custody between Hornback and Spears but limits Hornback to supervised visitation by the Cabinet for Health and Family Services. The DVO was not appealed. In addition, Hornback was ordered to complete a batterer's intervention program, parenting classes, a drug and alcohol assessment, and a mental health evaluation. Hornback attended twelve batterer's

¹ Initially, the DVO was denied. Spears then filed a new domestic violence petition on December 13, 2010, under the 99-D-00027 case number.

intervention classes but was unable to complete the other required classes and assessments due to his incarceration.²

The court order entered February 21, 2011, ordered Spears and Hornback to remain joint custodians and alternate parenting time on a monthly basis but did not address the DVO and its custody/visitation order. Thereafter, Spears asked the court to alter, amend, or vacate the February 21, 2011, order. This motion was denied. Spears then asked the same court in the domestic violence case to enter an order prioritizing the DVO superior to the order entered February 21, 2011. The court granted this request, and on June 9, 2011, entered an order whereby the court's prior ruling regarding custody and visitation was to be consistent with the DVO. This order was not appealed.

Spears married a member of the U.S. Army and on May 4, 2012. As the children's primary residential parent, Spears filed a motion to relocate to South Carolina because her husband had been assigned there. The motion was filed and heard on the domestic violence docket as the controlling custody and visitation order arose out of that case. The motion included attachments and affidavits indicating that the contemplated relocation would occur on or about August 10, 2012.

² Hornback was terminated from Drug Court in Hancock Circuit Court and was incarcerated in July 2011. Between December 2010 and January 2011, Hornback was charged with new criminal offenses including operating a motor vehicle under the influence of illegal drugs on two separate occasions and felony fleeing and evading the police. He was convicted of those offenses.

Hornback, through counsel, filed motions to set a hearing date to appoint a guardian *ad litem* and to allow visitation between Hornback and his children at the Breckinridge County Detention Center. The court held a hearing on the motion to relocate at which Spears testified. Hornback did not testify due to his incarceration. From the bench, the court ruled that Spears could relocate to South Carolina and ordered Spears's counsel to draft and tender a proposed findings of fact, conclusions of law, and order. The court's written order reflected its ruling from the bench and was entered on May 16, 2012, with separate findings of fact, conclusions of law, and decree entered May 24, 2012.

Thereafter, Hornback filed multiple motions to alter, amend, or vacate the order entered May 24, 2012, and motions asking the court for visitation between Hornback's parents and the children. As the hearing on June 18, 2012, the court listened to arguments of counsel. Initially the court agreed with Hornback's counsel that Spears did not comply with Kentucky Family Court Rules of Procedure and Practice (FCRPP) 7 and interpreted the rule to require sixty days' notice before a hearing could be held on a request to relocate. On July 3, 2012, the court vacated its order entered May 24, 2012, on this ground and ordered that the motion to relocate be scheduled for a hearing on December 3, 2012, along with Hornback's motions for visitation. Spears then filed a motion to alter, amend, or vacate the order entered July 3, 2012. Hornback filed yet more motions related to the children and visitation between Hornback and the paternal grandparents.

The court held a hearing on August 21, 2012, and listened to arguments from counsel. The court ordered that the domestic violence case and the circuit court case be merged and that all motions not specifically related to domestic violence to be heard on the circuit court docket.

Hornback then filed a motion requesting visitation with the children and requiring Spears to transport the children from South Carolina to the Breckinridge Detention Center once a month. The court heard arguments by counsel on September 11, 2012. No evidence was presented. At no time was there a motion before the court for Hornback to be transported to testify or for telephonic testimony.

The court entered its Amended Findings of Fact, Conclusions of Law, and Order on September 20, 2012, sustaining Spears's motion to alter, amend or vacate the order entered July 3, 2012, and reinstating the order entered May 24, 2012, as amended by the order of September 20, 2012. This amended order permitted Spears to relocate with the children to South Carolina, noting Spears had complied with FCRPP 7, in that she gave more than sixty days' notice to Hornback in anticipation of the relocation and that the court had erred in its interpretation regarding FCRPP 7. The court denied Hornback's motions for visitation but did permit him to have telephonic visitation with his children both at his own expense and pursuant to the rules of the detention center. It is from this order that Hornback now appeals.

On appeal, Hornback presents two arguments which he believes mandate reversal of the amended order. Hornback argues: (1) the trial court's order erroneously allowed Spears to relocate out of state with the parties' two minor children; and (2) the order below erred because it deprived Hornback of any visitation rights with his two sons.

Spears disagrees with Hornback's arguments and responds that the trial court acted within its discretion and the law in granting Spears's motion to relocate to South Carolina. In support thereof, Spears argues that: (1) Hornback was provided sufficient notice of the intent to relocate under FCRPP 7; (2) the court was correct in finding that relocation was in the best interests of the children; and (3) Spears's relocation to South Carolina does not impact Hornback's current parenting time.

Spears also argues that Hornback received a hearing on his motion for visitation and his request for visitation was granted. In support thereof, Spears argues: (1) the court expanded Hornback's visitation with his children by ordering that he receive periodic telephonic visitation with them; and (2) Hornback was not entitled to an evidentiary hearing on modification of his visitation.

In addressing the issues raised by the parties, we note that our standard of review is set forth in Kentucky Rules of Civil Procedure (CR) 52.01, and that findings of fact shall not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *See Murphy v. Murphy*, 272 S.W.3d 864 (Ky. App. 2008). Thus, the

question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). We review the arguments of the parties with this in mind.

As to the first issue presented by the parties, whether the court below erred in permitting Spears to relocate to South Carolina with the parties' minor children, *Pennington v. Marcum*, is controlling in this matter:

[I]f the only interest of the opposing party is to object to relocating the child, but not to alter joint decision-making, then he is seeking to have the existing visitation/timesharing arrangement changed, and need only establish that it is in the child's best interests not to relocate, which would thereby change the existing visitation/timesharing situation. While this may appear to undercut the purpose of the two-year limitation in KRS 403.340 on modification of the custody decree, when only visitation/timesharing modification is sought, the specific language of KRS 403.320(3) controls, which allows modification of visitation/timesharing “whenever modification would serve the best interests of the child,” and specifically directs that a court “shall not restrict a parent's visitation rights” unless allowing visitation would seriously endanger the child.

Pennington v. Marcum, 266 S.W.3d 759, 769 (Ky. 2008).

Sub judice, Hornback did not seek to change the custody arrangement between the parties, and instead objected to the relocation. Thus, the trial court was effectively presented with a motion to modify visitation/timesharing which permits said modification whenever the modification would serve the best interests

of the child. *See Pennington, supra.* We agree with Spears that the trial court did not err in its determination that the relocation to South Carolina was in the best interests of the children based on the testimony of Spears and the arguments of counsel. We note that there was no serious argument presented that the relocation was not in the best interest of the children based on the fact that Hornback was incarcerated for the foreseeable future.

While Hornback directs this Court's attention to the hearing held by the trial court on this matter and states his concerns with said hearing, we are unclear as to what further evidence Hornback wished to present the court below in support an argument that the relocation to South Carolina would not be in the best interest of the children.

Additionally, our review of the record shows that Spears complied with the notice requirements of FCRPP 7 and gave Hornback notice of her intention to relocate with the children more than sixty days prior to the relocation. FCRPP 7 at the time required Spears to give notice to Hornback at least sixty days prior to the relocation, not prior to a hearing as argued by Hornback.³ Accordingly, we decline to reverse on this ground.

³ FCRPP 7 has since been amended. At the time FCRPP 7 stated:

(2) Residency within Kentucky/Moving to Another Location.

(a) If either parent intends to move with the child(ren) from the Commonwealth of Kentucky to another state, or more than 100 miles from the present residence of the child(ren), he or she shall give notice to the other parent at least sixty (60) days prior to such move. Either parent may file a motion for change of custody or time sharing if the other parent is not in agreement with the move, or an agreed order if they are in agreement. No relocation of the children shall occur unless the court enters an order modifying the status quo.

Last, Hornback argues that the order below erred as it deprived him of any visitation with his children. Hornback contends that the court below erred in failing to make the necessary findings restricting visitation per Kentucky Revised Statutes (KRS) 403.320 and by denying Hornback's repeated requests for visitation due to his incarceration. We disagree with Hornback's interpretation of the trial court's order.

Our review of the court's order shows detailed findings regarding the visitation. The court in the Amended Findings of Fact, Conclusions of Law, and Order of September 20, 2012, noted that there was an active⁴ Domestic Violence Order entered on behalf of the children and Spears which only permitted Hornback visitation with the children under the supervision of the Cabinet.

Since the DVO required supervised visits with the Cabinet, Hornback has been unable to utilize his visitation with the children due to his incarceration. The court determined that Hornback was granted reasonable visitation in light of the DVO. Moreover, the court stated that it was reluctant to grant Hornback expanded visitation until he had shown a good faith effort to comply with the court's order. The court noted that Hornback had failed to act in compliance with the DVO.⁵ The court further determined that to change the supervised visitation by

⁴ The DVO is in effect until December 27, 2013. Hornback did not appeal the entry of the DVO in 2010; as such, we shall not now address any argument that it was wrongfully entered.

⁵ Hornback argues that prior to his incarceration he had complied with the court's DVO requirements of a batterer's intervention program, parenting classes, drug and alcohol assessment and mental health evaluation. However, his incarceration terminated his further participation in any court ordered programs/assessments/treatments. Moreover, Hornback does not argue on appeal that he has fully satisfied the DVO requirements by completing the programs/assessments/treatments. As such, we find no error in the trial court's statement in its

the Cabinet and permit visitation where Hornback is incarcerated was not reasonable, because the supervision provided by the penitentiary⁶ would be designed to address security concerns and not designed to address the welfare of children. Hornback presented evidence of his inconvenience to exercise his visitation with his children but failed to present evidence regarding the best interest of the children and, thus, did not sustain his burden of proof. Thus, the trial court overruled Hornback's motion to increase his visitation with his children as he desired, i.e., having the children transported to the penitentiary.

Instead, the court stated that it would not alter, amend, or vacate the visitation provisions in the DVO entered December 27, 2010. However, the trial court ordered, without making a finding that this would be in the best interest of the children, that Hornback would be entitled to telephonic visitation with his minor children once every two weeks for a maximum of fifteen minutes if permitted by the facility where he is incarcerated.⁷ Hornback was instructed to not use any type of threatening, demeaning or derogatory comments to his children and he was prohibited from discussing the case with them.⁸

order.

⁶ Hornback argues that he is now an inmate in a jail and not a penitentiary. We find such a distinction to be without merit, as Hornback is incarcerated and the trial court's concerns apply to both a jail and a penitentiary.

⁷ We note that Spears has not appealed this grant of telephonic visitation.

⁸ Hornback argues that the trial court's grant of telephonic visitation is a nullity as the jail does not permit inmates to place long distance phone calls to other people at the jail's expense. We again find such an argument to be unpersuasive. Hornback argued to the court below that he should be permitted to have phone calls with his children, which he contended would be made with Hornback's parents' cell phones when Hornback's parents came to visit him at the jail.

Of import, KRS 403.320 states:

- (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.
- (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 to the issue of whether Hornback was entitled to a hearing, we look to the case of *McNeeley v. McNeeley*, 45 S.W.3d 876 (Ky. App. 2001), for guidance. In *McNeeley*, the lower court granted an incarcerated father visitation with his four minor children in the first instance without first holding a hearing. After noting that KRS 403.320(3), which provides for the modification of a visitation order, does not specifically address the requirement of a hearing, this Court stated it had previously “observed that the modification provision of the statute contains the same ‘stringent’ requirements for determining the appropriateness of visitation.” *McNeeley*, 45 S.W.3d at 877. The Court went on to “infer from the statute that a hearing is required for the purpose of determining the best interests of these children.” *Id.* at 878. Furthermore, this Court previously

held, “one may not be deprived of the right to visit his child without a hearing.”

Smith v. Smith, 869 S.W.2d 55, 56 (Ky. App. 1994).

We believe that *sub judice* the court did not err in holding a hearing at the bench without Hornback because Hornback never moved the court for a transport order to testify nor moved the court to allow him to make a telephonic appearance.

Sub judice, the court made the appropriate findings that Hornback failed to sustain his burden of proof regarding his desired expansion of the DVO’s permitted visitation and what was in the best interest of the children. Accordingly, the court below did not err in maintaining the visitation set forth in the DVO and denying Hornback’s motions for modified visitation. We decline to reverse on this ground.

In light of the aforementioned, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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