

RENDERED: AUGUST 22, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-001709-ME

KIMIKO LINDSAY (FORMERLY OROSZ)

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JERRY J. BOWLES, JUDGE  
ACTION NO. 04-CI-504188

WILLIAM J. OROSZ

APPELLEE

AND

NO. 2014-CA-000004-ME

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v. APPEAL FROM JEFFERSON CIRCUIT COURT  
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ACTION NO. 04-CI-504188

WILLIAM J. OROSZ AND  
HON. KATHERINE SEREY SNYDER,  
THE GUARDIAN AD LITEM

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Kimiko Lindsay (formerly Orosz) (“Kimiko”) has appealed from an order of the Jefferson Circuit Court, Family Division, setting a permanent visitation schedule which restricted her parenting time with the two minor children produced as a result of her marriage to William J. Orosz (“Bill”). In a related appeal, Kimiko challenges the trial court’s order granting additional fees to be paid to the children’s court-appointed guardian *ad litem* (GAL). Following a careful review of the voluminous record, we affirm.

The present appeal is the latest chapter in a lengthy and contentious divorce proceeding which began with the parties’ separation in 2004. A recitation of the protracted factual and procedural background is unnecessary for purposes of our decision. Because the sole issues to be decided concern only visitation issues, we shall truncate our narration of the facts in an attempt to focus on those matters bearing directly on the questions presented.

Bill and Kimiko’s marriage was dissolved on February 6, 2006. At that time, their children were aged 5 and 2. They were granted joint custody of the children and Kimiko was initially designated as primary residential parent. The children resided with Kimiko in Brentwood, Tennessee, and Bill exercised substantial visitation. Conflicts arose almost immediately with each party making

accusations of poor parenting decisions. The majority of Bill's accusations centered on Kimiko's alcohol consumption. The quarrels continued for several years until a series of events in 2010 dramatically changed the parties' situations.

On September 5, 2010, Kimiko was the victim of a violent assault at the hands of her boyfriend resulting in serious physical injuries which required surgeries and a five-day hospital stay. Following her release, Kimiko suffered from anxiety, panic attacks and other mental and physical maladies and was ultimately diagnosed with post-traumatic stress disorder (PTSD). On December 24, 2010, Kimiko was arrested in Tennessee for driving under the influence after she struck another vehicle and fled the scene; the children were in the car during the events. Representatives from Child Protective Services (CPS) took custody of the children and contacted Bill who travelled from Louisville to Nashville to retrieve the children. Approximately one week later, the trial court entered an order granting Bill temporary sole custody of the children and ordering Kimiko to undergo counseling. Kimiko's visitation was also ordered to be supervised and to occur at the discretion of the children's social worker and GAL.

Throughout early and mid-2011, Kimiko sought treatment from various sources for her PTSD symptoms and other mood disorders. Substance abuse was not addressed by any of the providers nor was it determined to be unnecessary. Her visitation was sporadic due to concerns held by the children's GAL and social worker, the individuals charged with scheduling visitation between Kimiko and the children. On September 7, 2011, in response to a motion filed by

the GAL, the trial court suspended all of Kimiko's visitation because of statements she had made during a joint counseling session which were perceived to be emotionally harmful to the children. Visitation resumed under the direct supervision and at the offices of a family reunification therapist.

In early 2012, Bill was named primary residential parent of the children and Kimiko was given unsupervised visitation from 10:00 a.m to 7:00 p.m. on Sundays and on Tuesdays following family therapy sessions until 7:30 p.m. Due to the high costs of therapy and Kimiko's limited financial resources, on May 9, 2012, the trial court permitted the transition from private-pay therapists to Seven Counties Services (SCS). Once the transition was complete, three different therapists were rendering services to the family; Kimiko and Bill each had separate individual therapists and the third worked with Kimiko and the children toward family reunification. The visitation schedule was modified in May, June and July of 2012 to progressively increase the time Kimiko was permitted to spend with the children.

Based on a motion by Bill for a permanent visitation schedule, the trial court scheduled a hearing for December 5, 2012. The parties agreed the issues to be decided would be limited to: 1) whether Kimiko's visitation would be expanded; 2) whether visitation should include overnight time; 3) determination of a permanent custody order and parenting time schedule; 4) establishment of a holiday visitation schedule; and 5) addressing several pending motions regarding extracurricular and educational matters and Kimiko's alleged continued alcohol

use around the children. At the beginning of the hearing, after expressing its frustration with the parties and their lengthy litigious history which often went beyond legal matters, the trial court expressed its intention to establish a permanent parenting schedule to provide stability for the children. After taking testimony and receiving documentary evidence, the trial court took the matter under advisement. A final written order would not be entered until August 1, 2013.

In the months following the hearing, tensions continued to rise between Bill and Kimiko. Following an incident in April, Kimiko's visitation was again suspended pending an emergency hearing. The matter was referred to CPS for investigation and recommendations. On May 22, 2013, the trial court reinstated visitation but limited it to two hours each Sunday afternoon. In a letter to Kimiko dated July 8, 2013, CPS indicated it would not be providing services to the family but included no explanation for that determination.

The trial court entered its eight-page final order on August 1, 2013. After noting the "case has been in active and ongoing litigation now longer than the marriage itself," the trial court detailed the numerous issues related to the parties' actions and the effect of those actions on the children. It stated ten orders had been entered relative to the children since 2011, noting it had been necessary to appoint a GAL to protect the children's interest, a therapist to address the children's trauma, a therapist for Kimiko, a third therapist to work with the other two therapists to develop and promote a family reunification plan, and a parenting coordinator to assist both parents. Despite these efforts, the trial court stated:

[u]nfortunately, the continued actions and conduct of the parties continues to have a traumatic effect on these children. The parties' actions and conduct has now risen to such a level that the Court has found itself in the position of being required to make two (2) separate written reports and/or orders to the Cabinet for Family and Health Services as to determine whether the actions and conduct by the parties has risen to the level of risk of being dependent, neglected, and abused. (July 1, 2010 and April 30, 2013.)

It is generally and consistently this Court's position that it is in a child's best interest that both parents have as much contact with their children and as much involvement in their children's lives as possible. With that objective in mind it has been this Court's desire that the parties would ultimately find some resolution to their conflict and reunification between [Kimiko] and her children could be accomplished. However, issues with [Kimiko's] behavior have persisted and it is time that the children have permanency and stability in their lives.

It is this Court's finding that neither party has been acting or conducting themselves in the children's best interest. Based on credible evidence placed in the record, [Kimiko] continues to exercise poor behaviors with regard to the use of alcohol, her choice of company she keeps, and her care for the children. [Kimiko] continues to fail to fully appreciate and/or demonstrate an understanding of the trauma that her poor personal decisions have had on the children. She has also not accepted the fact that her abuse of the use of alcohol in her life has been at the center of the incidents that have caused significant emotional trauma to the children. The children's therapist continues to treat the children for these issues.

On the other hand [Bill] continues with oppositional control issues. His actions and conduct reflect an attempt to impose his will on [Kimiko] resulting in an understandable negative reaction by [Kimiko]. Additionally, he has maintained inappropriate contact with the children during [Kimiko's] visitation.

The unfortunate result of these two (2) dynamics has created a hostile emotional and physical environment for the children. The children love both parents but the toxic environment created by the parties in their personal war against one another is wreaking havoc on the long term well being of the children, as well as continued safety issues due to [Kimiko's] poor judgment and lack of appropriate care.

Under the current orders and/or agreements in this action the parties have joint custody of the children, their primary residence is with [Bill], and [Kimiko] has parenting time/visitation with the children each Sunday from 1:00 p.m to 3:00 p.m.

These children have had to endure the battle between these two (2) parties in this case for years. The children have been required to witness, be placed in the middle of, and at times had their alliance solicited throughout the constant conflict between, the persons they love most, their parents.

After making these statements, the trial court moved on to determine whether adjusting the parenting and visitation schedule would be in the children's best interests. After again noting its belief that children should have substantial contact with both parents, the trial court indicated it had attempted in excess of three years to provide the parties with adequate resources to resolve their conflict and effectuate reunification.

However, [Kimiko] has continued to be impaired during her parenting time and exercised poor judgment to the detriment of the children and [Bill] continues to use every means available to him to attempt to push [Kimiko].

This case is one that is very troubling and presents issues of concern to the Court regardless of its outcome. The

record is clear that both parties to this case have conducted themselves very poorly, made unbelievably poor decisions, and their conduct toward one another has had a continuing negative impact on their children's ability to grow developmentally and emotionally. Both parties seem so blinded by their animosity for one another and the hurt that they have caused one another that they have lost all conscious reality as to the negative effect that their conduct is having on their two (2) children.

The children need for both of their parents to conduct themselves in a mature and adult manner such as to afford them the opportunity to enjoy the love, affection, and security of both parents. Nevertheless, it is time to enter a final order in this action in an effort to provide the children with some sort of permanency and stability in their relationship with their parents, recognizing the parents' conflict is irreconcilable.

Additionally, [Kimiko] continues to fail to fully appreciate and/or demonstrate an understanding of the serious trauma that her poor personal decisions and behaviors have had on the children. She also has not accepted the fact that her abuse of alcohol in her life has been at the center of the incidents that have caused significant emotional trauma to the children. With that in mind, the Court will enter a parenting order that will attempt to minimize the risk of exposure to the children of serious physical, mental, moral, and/or emotional endangerment.

The trial court then ordered Kimiko to have parenting time in six-hour blocks every other Sunday. With the exception of six hours parenting time on Mother's Day, holiday and special day visitation were granted only when they fell on a regular Sunday visitation date. Kimiko was ordered to refrain from using alcohol within twelve hours of exercising her parenting time; transportation responsibilities were to be shared equally; the children were to remain in counseling; the order was



explicitly permanent unless the children's safety or well-being were placed at risk under its terms; and the children's GAL was relieved of further responsibilities.

Kimiko filed a motion to alter, amend or vacate the August 1, 2013, order, which was summarily denied. Her motion to enter an additional twenty-two factual findings was likewise denied.

In a separate order also entered on August 1, 2013, the trial court granted a motion by the children's GAL for payment of fees in the amount of \$10,650.00. Kimiko moved the trial court to alter, amend or vacate the fee award on the ground that the billing statements provided in support of the motion failed to adequately identify and describe the services rendered. She requested the trial court order the GAL to provide further substantiation for the billed charges. The trial court summarily denied the motion. Kimiko now prosecutes separate appeals from the two August 1, 2013 orders. In the interest of judicial economy, we shall address both appeals in a single Opinion.

### **2013-CA-001709**

In this appeal, Kimiko challenges the trial court's order restricting her visitation to a six-hour period every other Sunday. She first alleges the trial court abused its discretion in so ruling without making a finding of substantial endangerment to the children's physical, mental, moral or emotional health as required under KRS<sup>1</sup> 403.320(1), and that the findings it did make were contrary to the evidence. Second, she contends the trial court abused its discretion in

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<sup>1</sup> Kentucky Revised Statutes.

delegating to the GAL and a therapist its authority to schedule visitation. Third, she argues the trial court's decision to modify the schedule constituted an abuse of discretion in light of the July 2013 "report" from CPS indicating it was taking no action because the "family does not need services at this time." Fourth, Kimiko contends the trial court's failure to grant her holiday and special day visitation beyond Mother's Day was an abuse of discretion. Finally, she argues the trial court erred in denying her motion for additional findings.

We begin our analysis by noting our standard of review is governed by CR<sup>2</sup> 52.01 which provides the trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This Court will not disturb those findings unless they are clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). Findings of fact are not clearly erroneous if supported by substantial evidence. *Ky. State Racing Comm'n v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

"Substantial evidence" is 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) (citations omitted). "Clear and convincing evidence does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people." *M.P.S. v. Cabinet for Human Res.*, 979 S.W.2d 114, 117 (Ky. App. 1998) (internal citation

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<sup>2</sup> Kentucky Rules of Civil Procedure.

omitted). Hence, the questions for the reviewing court are not whether it would have come to a different conclusion, but whether the trial court applied the correct law and whether the family court abused its discretion. *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005). *See also, Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005). With these standards in mind, we turn to Kimiko's argument regarding visitation.

The Kentucky Supreme Court has held post-decree motions related to modification of time-sharing in domestic relations cases require a hearing and adjudication on the merits, which includes making findings of fact, and conclusions of law. *Anderson v. Johnson*, 350 S.W.3d 453 (Ky. 2011). Modification of a time-sharing or visitation arrangement is governed by KRS 403.320 which provides that a trial court may modify visitation "whenever modification would serve the best interests of the child." Thus, a parent seeking to modify time-sharing and/or the primary residential parent designation must present evidence that modification is in the child's best interests. *Pennington v. Marcum*, 266 S.W.3d 759 (Ky. 2008). Pursuant to KRS 403.320(1), a non-custodial parent 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.

In *Drury v. Drury*, 32 S.W.3d 521, 524 (Ky. App. 2000), a panel of

this Court held:

What constitutes “reasonable visitation” is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula. When the trial court decides to award joint custody, an individualized determination of reasonable visitation is even more important. A joint custody award envisions shared decision-making and extensive parental involvement in the child's upbringing, and in general serves the child's best interest. *Squires v. Squires*, Ky., 854 S.W.2d 765, 769 (1993). Thus, both parents are considered to be the “custodial” parent, although the trial court may designate where the child shall usually reside. *Aton v. Aton*, Ky.App., 911 S.W.2d 612 (1995). The “residential” parent does not have superior authority to determine how the child will be raised, and major decisions concerning the child's upbringing must be made by both parents. *Burchell v. Burchell*, Ky.App., 684 S.W.2d 296, 299 (1984). A visitation schedule should be crafted to allow both parents as much involvement in their children's lives as is possible under the circumstances.

In the case *sub judice*, the trial court heard extensive testimony regarding the facts relevant to the best interests of the parties' children. The court ultimately concluded it was in the children's best interests to minimize the risk of exposure to harm. This decision was based on the trial court's perception of Kimiko's repeated abuse of alcohol, accompanying poor decision-making, resultant bad relationships and situations, and her failure to “fully appreciate and/or demonstrate an understanding of the trauma” her actions caused to her children. To promote stability and permanency, and in an effort to protect the children from inherent risks associated with Kimiko's behaviors, the trial court found limited

visitation was appropriate. While Kimiko contends the trial court failed to specifically make a finding that visitation would seriously endanger the children's physical, mental, moral or emotional health, a plain reading of the August 1, 2013, order cuts against her allegation.

As is evident from the language quoted previously, the trial court included numerous mentions of the trauma Kimiko's actions had inflicted on the children. The order noted her lack of appropriate care, poor judgment, and unwillingness to admit her ongoing behaviors presented any risk to the children whatsoever. Based on these findings and concerns, the trial court specifically stated it was entering an order which would "attempt to minimize the risk of exposure to the children of serious physical, mental, moral and/or emotional endangerment." This finding is clearly in compliance with the mandates of KRS 403.320 and was supported by substantial evidence. Thus, it will not be disturbed on appeal. CR 52.01.

Kimiko contends the evidence she presented militated against the trial court's purported finding of serious endangerment. She believes the order's language permitting her to transport the children, in conjunction with various reports and discharge summaries from her stints in treatment programs, as well as the CPS report of "no services needed," support her proposition that the trial court could not believe she represented a serious endangerment to the children's physical

health.<sup>3</sup> She alleges in light of these pieces of evidence, the trial court abused its discretion in ruling to the contrary. We disagree.

While some evidence was presented indicating Kimiko completed treatment programs and made some progress toward reunification, she fails to note Bill presented testimony and evidence to the contrary. Clearly, conflicting evidence was presented by the parties reflecting their divergent beliefs regarding the best interests of the children. In reviewing a case on appeal, this Court must “give considerable deference to the trial court’s findings and cannot disturb those findings *unless no substantial evidence exists in the record to support them.*” *K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky. App. 2006) (emphasis added). “[T]he trial court, as the finder of fact, has the responsibility to judge the credibility of all testimony, and may choose to believe or disbelieve any part of the evidence presented to it.” *Id.* (citing *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)). The trial court obviously placed more weight on Bill’s evidence as was its discretion to do. The determination of serious endangerment being supported by evidence of substance, it was not in error. Based on this finding, the trial court acted within its discretion to limit Kimiko’s visitation as it did.

Furthermore, the trial court’s stated goal was to minimize the risk of harm to the children. Therefore, contrary to Kimiko’s contention, a blanket visitation order setting a consistent schedule was reasonable. The restriction on

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<sup>3</sup> Kimiko’s argument focuses solely on the children’s physical health, but fails to mention or acknowledge the relevance of the children’s mental, moral and emotional well-being on the issue of visitation.

holiday visitation was consistent with the trial court's further goal of stability and permanency for the children. Kimiko offers no support for her position that the trial court erred in this respect apart from self-serving statements and a contention that "[t]his order is an abuse of discretion; unfair and unreasonable; is not in the best interest of the children and violates her fundamental liberty interest to participate in the rearing of her children." We cannot say the trial court's restriction on holiday visitation constituted an abuse of its substantial discretion based on the record before us.

Kimiko next contends the trial court erred in delegating its decision-making authority to the GAL and the children's therapist. However, our review of the record reveals this issue was not placed in issue at the December 5, 2012, hearing nor the resulting August 1, 2013, order which is the subject of this appeal. These actions of the trial court were taken in January and May of 2011. No request for corrective action was taken, nor was an appeal prosecuted, from the orders effectuating this alleged improper delegation of authority. It is axiomatic that a party may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321, 327 (Ky. 2010) (citations omitted)). As the trial court was not presented with these additional arguments, nor given the opportunity to rule on them, we shall not consider them for the first time on appeal. Therefore, we conclude the question is not properly before us and requires no further discussion.

Kimiko next alleges the trial court erred in modifying the visitation schedule and restricting her parenting time in light of the CPS report indicating the family was not in need of services. Again, she fails to offer support for her position and we cannot determine from her argument how or why she believes this single piece of evidence rendered the trial court's ruling infirm.

As an important initial observation, Kimiko's assertion that CPS "returned a report to the court" is factually incorrect. The document is, in actuality, a letter addressed to *her* informing her CPS had concluded its investigation and determined it did not need to provide services. Further, Kimiko fails to recognize the myriad of services being provided by other professionals at the time of the CPS assessment such that CPS would have little, if anything, to add to the host of activities surrounding the ongoing reunification and protection efforts for this family. Nevertheless, Kimiko makes only an uncorroborated assertion that the letter renders the trial court's ruling unfair, unreasonable, not in the children's best interest, and constituted an abuse of discretion. Bald assertions, lacking any evidentiary support and deficient in legal and logical reasoning, carry no weight and form an insufficient basis for relief. We discern no error.

Finally, Kimiko argues the trial court erred in summarily denying her motion to make additional findings of fact. As with many of her other arguments, we are presented with only a skeleton rattling noisily but completely devoid of meat. No authority supportive of her position is cited. As best we can tell, Kimiko believes the trial court's failure to make the requested findings—all of which were



consistent with her testimony and position and contrary to Bill's position—was erroneous because, had it done so, the outcome would have been substantially different. The trial court obviously disagreed with the correctness or necessity of the requested additional findings. Kimiko believes the trial court was incorrect. However, mere disagreement with a trial court's ruling is insufficient to warrant a finding that the trial court abused its discretion in making its ruling. This argument is without merit.

#### **2014-CA-000004**

In this related appeal, Kimiko challenges the trial court's August 1, 2013, order granting additional fees to the children's GAL. She contends the fees awarded were unreasonable and the trial court erred in not so finding. Kimiko further alleges the trial court abused its discretion in failing to require the GAL to submit more detailed statements regarding services rendered. Neither of these contentions have merit.

First, Kimiko argues it was an abuse of discretion for the trial court to award \$10,650.00 in additional GAL fees, essentially positing that the fees awarded were simply not reasonable under the circumstances. The requested fees covered a period of nearly twenty months during which the GAL billed a total of 71.0 hours for professional services rendered. Kimiko admits the GAL's tendered billing statements evidences substantial and nearly daily involvement by the GAL but says such efforts were unnecessary and unreasonable under the circumstances. She posits the lack of defined standards surrounding the role of a GAL permits

unnecessary involvement without regard to the associated costs, seemingly granting the GAL “*carte blanc* (sic) authority to take any action under the circumstances.” As before, Kimiko cites no authority supportive of her position other than her own “logic and beliefs.” We are convinced no authority exists. The record contains no indication Kimiko lodged a timely objection to the GAL’s motion for a fee award or the amount of the award requested. Nevertheless, based on the record before us—and in light of the highly contentious nature of the parties, coupled with the important nature of the matters entrusted to the GAL—we are unable to conclude the trial court abused its substantial discretion in awarding fees to the GAL. Kimiko has failed to convince us otherwise.

Finally, Kimiko alleges the trial court abused its discretion when it failed to require the GAL to produce additional and more detailed billing information. She offers no explanation of her argument other than her disagreement with the contrary ruling and her belief that more detailed billing would have made it easier to object to certain items not being plausibly necessary—all the while apparently not apprehending her failure to timely object to the award in the first instance. Again, Kimiko cites absolutely no authority in support of her position. With no factual or legal basis presented, we are loathe to create an argument for a party and will not practice the case for them. *See Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. 1979).

For the foregoing reasons, the August 1, 2013, judgments of the Jefferson Circuit Court, Family Division, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEFS FOR APPELLEE,  
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BRIEF FOR GUARDIAN  
AD LITEM:

Kathleen Serey Snyder  
Louisville, Kentucky