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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000774-ME

LAURA DOBBINS

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 10-CI-01195

HOWARD SKAGGS AND
RICHARD DOBBINS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON,¹ MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Laura Dobbins appeals the orders of Boyd Circuit Court denying her motion for joint custody and increased visitation and her motion to alter, amend, or vacate that order. After careful review, we affirm.

¹ Judge Robert G. Johnson concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

The minor child in this case, A.D., was born in April 2003 to Laura and Richard Dobbins. Richard has not participated in the proceedings pertinent to this appeal. In June of 2003, A.D. was removed from her parents following a juvenile proceeding in Boyd District Court. During the district court proceedings, Rhonda Copley was appointed A.D.'s guardian *ad litem*. A.D. was eventually placed with her grandfather, Appellee Howard Skaggs, and has resided with him ever since.

In 2010, Skaggs petitioned for permanent custody as A.D.'s *de facto* custodian. The matter was referred to a Domestic Relations Commissioner (DRC). Because of discovery disputes and multiple continuances, a hearing on Skaggs's custody petition was not held until September 2012. After the hearing, the DRC filed a written report and recommendation that Skaggs receive permanent custody as A.D.'s *de facto* custodian with Dobbins receiving supervised visitation every other weekend. The circuit court adopted the DRC's recommendation in its entirety.

In December of 2012, Dobbins filed what she characterized as a "motion for a final hearing," which the circuit court referred to the DRC. It would take the DRC nearly two and a half years to hold the requested hearing. It appears the interim was spent addressing a flurry of motions concerning, amongst other things, disputes about court-ordered counseling, Copley's role in the litigation,

Dobbins's access to certain records, and Dobbins's request for increased visitation. However, a hearing on the matter was finally held on June 10, 2015. Further motion practice continued before the DRC but by November 2015 she had filed a written report recommending that Dobbins enjoy unsupervised, overnight visitation with A.D. every other weekend. The circuit court then entered an order adopting the DRC's report and recommendation. Dobbins did not appeal this order.

In September 2016, Dobbins moved once again for the circuit court to schedule a final hearing. She also requested Skaggs make A.D. available to testify. Copley filed a response stating the case had been finally adjudicated and there were no pending motions requiring a hearing. Nonetheless, the circuit court elected to refer the matter to the DRC and ordered A.D. be made available to testify. The court ordered stated it would be left to the DRC's discretion whether A.D. would actually be questioned. The DRC then entered an order stating A.D. would not attend the hearing but would be questioned on a different day should the DRC find an interview necessary.

On December 7, 2017, the DRC held a hearing on Dobbins's motion, which was treated as a request for joint custody or increased visitation. Dobbins, Skaggs, and Copley all testified. Dobbins and Skaggs both testified that they had strong differences regarding parenting but did not explicitly state what those differences were. The parties also agreed that A.D. was performing well

academically and was emotionally stable. It was undisputed that A.D. had a positive relationship with Dobbins and Skaggs. Copley testified that she interviewed A.D. and A.D. told her that “Grandpa lies.” Copley also expressed fear that the custody litigation was affecting A.D. because the child had become more argumentative and had acted out during the interview. However, she admitted on cross-examination that A.D. stated she would like to spend more time with Dobbins.

Dobbins testified she had kept A.D. ignorant of the custody litigation, but A.D. had become aware that there was antagonism between the parties. Dobbins denied speaking negatively of Skaggs in A.D.’s presence. Skaggs testified he did not believe it would be in A.D.’s best interest for Dobbins to receive increased visitation given the parties’ strained relationship and disagreements on parenting.

The DRC then entered a written report recommending that Skaggs retain sole custody with the parties maintaining the same visitation schedule. The DRC found that doing so would be in A.D.’s best interest given the parties’ strained relationship, differing views of parenting, and the need for A.D. to remain “sheltered” from the legal proceedings. The circuit court then affirmed and adopted the DRC’s report. The circuit court then denied Dobbins’s motion to alter, amend, or vacate. This appeal follows.

On appeal, Dobbins argues the circuit court committed several errors requiring reversal. First, she argues that the DRC's decision not to interview A.D. amounted to a failure to consider the child's wishes on her motion for joint custody and increased visitation. Second, Dobbins alleges her due process rights under *Morgan v. Getter*, 441 S.W.3d 94 (Ky. 2014), were violated when Copley was permitted to act as both a friend of the court and as an attorney for A.D. Third, Dobbins alleges the DRC inappropriately based its report and recommendation on her conduct in the district court proceedings. Finally, Dobbins accuses the circuit court of dilatoriness requiring reversal as a matter of equity.

We review a trial court's visitation and custody orders under an abuse of discretion standard. *T.A.N. v. M.J.*, 266 S.W.3d 251, 255 (Ky. App. 2008); *Kelsay v. Carson*, 317 S.W.3d 595, 598 (Ky. App. 2010). A trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). The trial court's factual findings will not be disturbed unless clearly erroneous. *Hudson v. Cole*, 463 S.W.3d 346, 350 (Ky. App. 2015).

Whether the trial court correctly applied the law to the facts is reviewed *de novo*.

Id.

A trial court may modify a custody decree or a visitation order only

when doing so would serve the best interests of the child. KRS² 403.340(3); KRS 403.320(3). The factors the trial court should consider include the following: the wishes of the parents and child; the interpersonal relationships of the child with its parents, siblings, and others; the child's adjustment to home, school, and community; the extent to which the child has been cared for by a *de facto* custodian; and circumstances under which the child was placed with a *de facto* custodian. KRS 403.270(2).

We find no abuse of discretion in the procedural history of this case or the DRC's final report and recommendation. Although Dobbins complains A.D. was not interviewed, we have previously held that it is discretionary whether a child should be interviewed before making a best-interests determination. *Miller v. Harris*, 320 S.W.3d 138, 144 (Ky. App. 2010). In this case, Copley testified that A.D. expressed an interest in spending more time with her mother. Moreover, the DRC made an expressed finding that A.D. enjoyed a positive relationship with both parties. We can discern no reason why it was necessary to interview the child in order to consider her wishes regarding visitation and custody.

We also reject Dobbins's argument that her due process rights under *Morgan* were violated. In *Morgan*, the Kentucky Supreme Court distinguished the roles performed by a guardian *ad litem* and a *de facto* friend of the court in a

² Kentucky Revised Statutes.

family law proceeding:

Importantly, the guardian *ad litem* should not be confused with the *de facto* friend of the court. Whereas the friend of the court investigates, reports, and makes custodial recommendations on behalf of the court, and is subject to cross-examination, the guardian *ad litem* is a lawyer for the child, counseling the child and representing him or her in the course of proceedings by, among other things, engaging in discovery, in motion practice, and in presentation of the case at the final hearing. The guardian *ad litem* neither testifies (by filing a report or otherwise) nor is subject to cross-examination.

Morgan, 441 S.W.3d at 119. The Court found that due process required that a party be able to cross-examine a guardian *ad litem* who investigated and filed a report as if they were a *de facto* friend of the court. *Id.*

In this case, Copley participated in the proceedings as A.D.’s designated guardian *ad litem*. Although Copley engaged in some motion practice, her participation mostly consisted of filing reports for the DRC’s consideration. After the Kentucky Supreme Court’s opinion in *Morgan* was rendered, the DRC entered an order requiring Copley continue as a *de facto* friend of the court and refrain from practicing law in the case. Copley continued to act as a *de facto* friend of the court; the only possible exception being her “response” in which she referred to herself as guardian *ad litem* and objected to Dobbins’s request for a final hearing. Nonetheless, the circuit court ignored this objection and Dobbins was able to cross-examine Copley at the subsequent hearing. Although Copley’s

participation in this case might not have strictly adhered to *Morgan*, it did not violate Dobbins's due process rights in any way.

Dobbins also argues the DRC's report and recommendation improperly considered the district court proceedings, which she contends did not affect her relationship with A.D. Having carefully reviewed the record, we find no support for this allegation. Rather, the DRC's report makes clear that it believed it would be in A.D.'s best interest to maintain the status quo regarding the parties' visitation schedule. It specifically noted that A.D. had been in Skaggs's care most of her life and was performing well under the current schedule. The DRC also noted that the parties' antagonism and differing views on parenting made it difficult to keep A.D. ignorant of the continuing custody litigation. It also specifically referenced Copley's testimony that A.D. had begun acting out in ways she had not previously. Under these circumstances, we hold the visitation order adopted by the circuit court was based on the proper statutory factors and was not an abuse of discretion.

Finally, we hold we cannot reverse the circuit court as a matter of equity. Dobbins argues the circuit court should be reprimanded because its order adopting the DRC's latest recommendation was entered four years after her motion for a final hearing. This allegation misrepresents the procedural history of the case. The delays in this case were due to the parties' motion practice and not

unreasonable delays by the court or the DRC. Regardless, Dobbins's argument is not supported by any authority and is inconsistent with the statutory requirement that custody and visitation orders be based on the best interest of the child.

Accordingly, the orders of the Boyd Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brandon M. Music
Grayson, Kentucky

BRIEF FOR APPELLEE:

Howard Skaggs, *pro se*
Louisa, Kentucky