

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001989-MR

LOREN MALLORY SINGER

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 99-CI-00873

MISTY MARIE PERKINS

APPELLEE

OPINION

AFFIRMING IN PART AND REVERSING IN PART

** ** *

BEFORE: BUCKINGHAM, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Loren Mallory Singer (hereinafter "Singer") has appealed from the Hopkins Circuit Court's September 16, 2002, order denying his motion for a change in venue and granting grandparental visitation rights to his minor child's (hereinafter "Jazz") maternal grandparents. Having reviewed the parties' brief, the record and the applicable case law, we affirm the portion of the order denying the motion to change

venue, and reverse the portion of the order regarding grandparental visitation.

The circuit court action underlying this appeal began with the filing of a Petition for Custody and Support on November 29, 1999, by Misty Marie Singer (hereinafter Misty) regarding Jazz, a minor child born out-of-wedlock to her on January 12, 1998, in Denver, Colorado. In her petition, Misty requested permanent custody of Jazz, that Singer be adjudged Jazz's biological and legal father,¹ that Singer be awarded reasonable visitation, and that Singer pay child support and provide medical insurance coverage. The matter proceeded to a hearing before a Domestic Relations Commissioner, who by Report and Recommendation entered September 8, 2000, recommended establishing paternity, awarding sole custody to Misty as well as child support, and awarding visitation to Singer. On December 29, 2000, the circuit court approved the DRC's Report and Recommendation.

On August 14, 2001, Singer filed a motion pursuant to CR 60.02 to set aside the final order, for a change in custody, and for a modification of child support. In support of this motion, Singer cited Misty's continuing relationship with convicted felon Torre Norman (hereinafter "Norman"). In her deposition the previous year, Misty had testified that she had

¹ Pursuant to the petition, Singer had previously acknowledged paternity upon Jazz's birth, but paternity had never been established by court action.

recently ended the relationship with Norman due to his criminal record. However, she married Norman in January 2001, and gave birth to his child in February 2001. By order entered August 28, 2001, the circuit court ruled that the matter was to be heard by the DRC. An evidentiary hearing was then scheduled for February 4, 2002.

Tragically, Misty passed away on October 5, 2001, prior to the scheduled hearing date.² The DRC held a hearing on October 10, 2001, and entered the following Report and Recommendation on October 24, 2001:

This matter is before the Domestic Relations Commissioner on the Respondent's Motion to Assume Custody of the Minor Child, Jazz. Attorneys for the parties and for the parents of the Petitioner were present. After considering the evidence presented, after hearing the oral arguments of the attorneys, after review of the court record, and after careful deliberation, the Commissioner makes the following findings of fact, conclusions of law, and recommendations to the Hopkins Circuit Court.

The parties are the natural parents of the minor child and have been engaged in this action for legal custody of the child. The Commissioner previously conducted a hearing on the issue of custody and recommended that the Petitioner be granted sole custody of the child. The Respondent filed exceptions to that recommendation[]; the Hopkins Circuit Court adopted the Commissioner's recommendations.

² Norman strangled Misty to death in a Tennessee hotel room, and then fell to his death while pushing her body over the room's balcony.

Subsequently, the Respondent filed a Motion for Reconsideration based on newly discovered evidence. That Motion was referred to the Domestic Relations Commissioner for findings of fact and recommendations of disposition. On October 5, 2001, after the date for the hearing on that motion was set, but prior to the actual hearing, the Petitioner died. The Respondent, being the child's sole surviving parent, requests that the Court acknowledge his superior rights to custody of the child.

The Commissioner finds that, pursuant to KRS 405.020(1), the Respondent is the surviving parent of the child, that the Respondent is suited to the trust of custody, and that the Respondent is entitled to the legal custody of the minor child, Jazz. (Neither the Petitioner's attorney nor the grandparents' attorney presented any evidence to the contrary.) The Commissioner thus recommends that the Respondent be granted legal custody of the child.

The Commissioner further finds that the child, at the time of the hearing, was in the physical custody of the Petitioner's parents, Clarence and Celeste Perkins, and that Mr. and Mrs. Perkins should be required to tender the child to the Respondent's agent and mother, Diana Albert, on or before 6 p.m. October 10, 2001, for delivery to the Respondent. It is so recommended.

The attorneys for the parties acknowledge that, as the Respondent resides in California, it might be difficult for the child to maintain a relationship with the Petitioner's family. Mr. Singer has agreed that, in order to maintain the relationship between the child and her maternal grandparents, he will allow the child to visit Clarence and Celeste Perkins at mutually agreeable times and places whenever the child may be in the Commonwealth. The Commissioner so recommends.

The Commissioner further finds that the Respondent's continuing child support obligation, as owed to the Petitioner, should be terminated effective October 10, 2001. This does not alter any obligation that the Respondent may have to the Commonwealth of Kentucky or to any third parties, such as childcare providers and health insurers. It is so recommended.

The costs associated with this Motion are assessed at \$60.00 and have been paid by the Respondent.

At the hearing, the DRC questioned whether her notation regarding visits with the grandparents would have any binding legal consequence, as they had not petitioned the circuit court for grandparental visitation. No exceptions were filed, and the circuit court approved the Report and Recommendation on December 17, 2001. No appeal was taken from the order approving the DRC's recommendations.

On July 11, 2002, Celeste and Clarence Perkins, Misty's parents and Jazz's maternal grandparents, (hereinafter "the grandparents") filed an Ex Parte Motion for Rule, requesting that the circuit court order Singer to show cause why he should not be held in contempt for violating the portion of the previous order regarding visitation. In her affidavit attached to the motion, Celeste Perkins stated that she believed that Jazz was residing in McCracken County with her paternal grandmother, Diana Albert, and that she and Singer were

intentionally hiding the child from her. In particular, the grandparents wanted the circuit court to establish a specific visitation schedule.

Singer filed a response to the grandparents' motion on August 6, 2002, arguing, in part, that the original order only permitted visitation at mutually agreeable times and places, and that there had never been a mutual agreement between him and the grandparents regarding visitation. Additionally, Singer filed a motion to change venue from Hopkins Circuit Court to McCracken Family Court, asserting that both he and Jazz currently lived in McCracken County. The grandparents objected to the motion to change venue, arguing that they were solely seeking enforcement of a prior visitation order rather than a re-litigation of the custody action itself. Therefore, a change in venue would be unwarranted.

The circuit court held a hearing on the two pending motions on August 19, 2002. At that time, Singer, through new counsel, continued to argue that grandparental visitation was inappropriate and not in Jazz's best interest, and indicated that there were several factual issues to be decided. Furthermore, he argued that there was never any type of mutual agreement as to visitation. At the close of the hearing, the circuit court decided to enforce the original order, but not hold Singer in contempt. The circuit court also denied the

motion to change venue. On September 16, 2002, the circuit court entered an order memorializing its bench rulings:

This matter is before the Court on a motion by Celeste and Clarence Perkins, the maternal grandparents of Jazz, concerning Respondent's failure to allow visitation with said child and the respondent's motion for a change of venue. The Court being duly and sufficiently advised orders as follows:

1. The respondent's motion for change of venue is untimely. The parties submitted to this court's jurisdiction by having a hearing on the issue of grandparent visitation before the Domestic Relations Commissioner. It was not until Mr. and Mrs. Perkins tried to enforce the resulting order that the respondent claimed that venue should be changed. Had said motion been brought before the Court prior to said hearing and order, the Court would have been more inclined to grant the same. But as that did not happen, said motion to change venue is hereby DENIED.
2. As to the issue of visitation, Mr. and Mrs. Perkins shall be awarded visitation with Jazz, the minor child, once a month beginning on Saturday at 10:00 a.m. until Sunday evening at 4:00 p.m. It is strongly suggested that the parties communicate with each other to decide upon a weekend each month that best suits their respective schedules, otherwise the Court will be forced to pick a set weekend per month. The parties shall pick up and drop off Jazz at the respondent's home in Paducah.

This appeal followed.

On appeal, Singer argues that the circuit court erred in granting visitation to the grandparents because they were not parties to the action and did not file a petition for visitation. Additionally, the circuit court did not hold an evidentiary hearing prior to awarding visitation. Singer also argues that the circuit court erred in denying his motion for a change in venue. On the other hand, the grandparents argue that this Court's review is limited only to a review of the contempt charge, and that Singer should not be permitted to collaterally attack the validity of the order granting visitation. Furthermore, they argue that they were not required to file a petition or move to be substituted as parties because Singer agreed to the visitation. Lastly, the grandparents argue that the circuit court did not abuse its discretion in denying the motion for a change in venue because Singer had previously waived venue by voluntarily submitting himself to the Hopkins Circuit Court. Additionally, logic and judicial economy dictate that the judge who issued an order preside over the show cause hearing regarding the contempt charge.

We shall first review the circuit court's denial of Singer's motion to change venue. Through this motion, Singer was attempting to change venue from Hopkins Circuit Court to McCracken Family Court because he and Jazz lived in McCracken County. The grandparents objected, and the circuit court denied

the motion, noting that the parties had already submitted themselves to its jurisdiction and that the motion was therefore untimely.

KRS 452.050, regarding change in venue, provides that:

A change of venue shall be made to the Circuit Court of the adjacent county most convenient to the parties, their witnesses and their attorneys, and to which there is no valid objection. The order of change of venue may be made subject to any equitable terms and conditions that safety to the rights of the parties requires and the court, in its discretion, prescribes.

A trial court's decision on a motion to change venue will not be disturbed unless there was an abuse of discretion. Big Sandy Realty Co. v. Stansifer Motor Co., Ky., 253 S.W.2d 601 (1952). Therefore, we shall uphold the circuit court's decision unless Singer can establish an abuse of discretion.

In reviewing the parties' arguments, we agree with the grandparents that the circuit court did not abuse its discretion in refusing to change venue for purposes of ruling on the motion for a rule. The matter came before the circuit court on the grandparents' motion for a rule, in which they were attempting to have a prior ruling regarding visitation enforced. It is logical to go before the same court for enforcement of one of its prior orders. Therefore, we cannot hold that the circuit court abused its discretion in its ruling on venue.

We shall next address the grandparental visitation issue. KRS 405.021(1) establishes a right to reasonable visitation rights for grandparents, and provides in relevant part: "The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so." KRS 405.021(2) requires an action for grandparental visitation to be brought in the circuit in the county where the child lives. In King v. King, Ky., 828 S.W.2d 630 (1992), the Supreme Court of Kentucky addressed grandparental visitation, and stated that, "visitation cannot be granted until an action is filed in Circuit Court, a hearing conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation." Id. at 632.

The matter before us is by no means a normal grandparental visitation case. We are aware that when the DRC made her original Report and Recommendation, she indicated that her notation regarding Misty's parents being able to visit with Jazz might not be legally binding because they had not filed any type of petition or entered the case. We are also aware that no exceptions to the Report and Recommendation were filed, and that the circuit court subsequently adopted it in full. Only with

difficulty can we even call the DRC's notation regarding visitation as an order. However, whether or not this notation was an order is not before us, nor is not crucial in this appeal.

When Singer and the grandparents returned to court on the grandparents' motion for a rule, which was in essence a motion to hold Singer in contempt for failing to abide by the terms of the original visitation order, the circuit court opted not to hold Singer in contempt and to "enforce" the visitation order. However, we believe that the circuit court went too far in its enforcement. The original visitation order indicated that Singer would allow Jazz to visit the grandparents "at mutually agreeable times and places whenever the child may be in the Commonwealth of Kentucky." In the September 16, 2002, order, the circuit court went much further, and in actuality entered a new order awarding visitation to the grandparents one weekend per month. We find several problems with this new order, which require reversal.

The statutory and case law is clear that grandparents are required to petition the circuit court in the county in which the child resides for visitation rights. Here, the grandparents never filed a petition in either Hopkins Circuit Court or McCracken Family County, nor did they ever enter an appearance in the circuit court action below. Even if they had

petitioned the circuit court for visitation rights, the circuit court failed to hold an evidentiary hearing or to make any findings of fact and conclusions of law as to Jazz's best interest. Therefore, we must reverse the portion of the circuit court's September 16, 2002, order specifically awarding the grandparents visitation with Jazz one time per month. However, this holding does not prevent the grandparents from seeking visitation pursuant to KRS 405.021 in a properly filed action in the county where Jazz resides.

For the foregoing reasons, the order of the Hopkins Circuit Court is affirmed in part and reversed in part.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anne M. Smith
Calvert City, KY

BRIEF FOR APPELLEE:

Natalie Moore White
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