

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000760-ME

BRANTLEY FAIRCHILD

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 04-CI-00526

KRISTIAN R. FAIRCHILD (NOW ROUP)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: COMBS, CHIEF JUDGE; HOWARD, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Brantley Fairchild (“Brantley”) appeals the March 13, 2007, findings of fact, conclusions of law, order and judgment and the March 15, 2007, order of the Greenup Circuit Court. Those judgments effectively denied Brantley visitation with his and Kristian Fairchild's (“Kristian”) daughter. We reverse and remand.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

The parties were married in 1991 and separated in 1995. At the time of the parties separation, Kristian was residing in Beaverton, Michigan, and Brantley relocated to Branson, Missouri. There was one child born of the marriage, Martha, in 1994. The last time Brantley had contact with Martha was Christmas of 1996.

In 2002, Kristian and Martha moved from Michigan to Kentucky. Kristian filed for divorce in 2004 and on January 10, 2005, a divorce decree was entered. The decree awarded sole custody to Kristian and ordered that Brantley was to have no visitation with Martha, pending further court orders. Brantley became aware of the decree and on September 28, 2006, filed a motion for visitation. The issue was referred to the Domestic Relations Commissioner (“DRC”) and a hearing was conducted on December 19, 2006. A portion of the hearing consisted of an interview between the DRC and Martha.

On January 19, 2007, the DRC submitted his report recommending that Brantley not have any contact with Martha. In support of his conclusion, the DRC concluded that Martha had been traumatized by Brantley's absence in her life and to force reunification would only result in further trauma for Martha. The circuit court entered its findings of fact, conclusions of law, order and judgment on March 13, 2007, overruling Brantley's motion for visitation, ordering him to pay the court costs and attorney's fees of Kristian and ordering that any contact between Brantley and Martha was only to be commenced by Martha. Two days later, the court issued an order confirming and adopting the DRC's report. This appeal followed.

When reviewing a family court's decision regarding visitation, this court will reverse only if the trial court abused its discretion or, in light of the facts and circumstances, its decision was clearly erroneous. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000).

Brantley argues that the court's denial of visitation with Martha violated his fundamental right to visitation under KRS 403.320. The relevant section of KRS 403.320 reads as follows:

(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.

The burden of proving that visitation would harm the child is on the party seeking to deny visitation. *Smith v. Smith*, 869 S.W.2d 55 (Ky.App. 1994). In *Kulas v. Kulas*, 898 S.W.2d 529 (Ky.App. 1995), a panel of this court found that “restrict” means to provide the non-custodial parent with something less than reasonable visitation. The same panel found that modification provisions of the child visitation statute are not to be used in an effort to punish an errant parent. *Id.*

Brantley specifically argues that the circuit court improperly used a best interest standard as opposed to the serious endangerment standard required by the statute. Brantley references that portion of the March 13, 2007, order which states “It is the Conclusion of the Court, it is in the best interest of the infant child, [that] the following

Order and Judgment be entered.” Kristian argues that the serious endangerment standard was met by the DRC's report and dicta therein. We do not agree. In his report, the DRC states “Martha Rose evidences a strong and active resistance to any opportunity to know her father or to have any contact or relationship with him.” He concludes his report by stating:

It is conventional wisdom that a child growing up (even in a divorce) needs both parents and significant contact with both parents. It is not unusual to see children who loose [sic] contact with one or the other parents [sic], to actively seek that parent out after long periods of time even into adulthood. However, this wisdom is sometimes tested by an extreme fact situation, such as in this case. Usually there would be considered some type of restricted visitation in the presence of the child's mother to determine if the relationship can be established and is worth developing from the perspective of the child and the absent parent. However, after the interview it is obvious to the Commissioner, that the 12 year old young lady has dealt with the fact that apparently her father did not care enough for over 10 years to even send her a letter, card, attempted phone contact or come to this area to visit. Given that situation, the Commissioner declines to further traumatize her by ordering her to visit with an individual who is a complete and total stranger to her. Any re-approachment [sic] between the respondent and his daughter, if it ever occurs, should come from the wishes of the daughter, either during her continuing minority or adulthood, not at the insist[e]nce of the respondent who has effectively abrogated any parental claim or entitlement that he might have otherwise had.

It has long been held in custody hearings that the wishes of the child, although warranting consideration, are not binding on the court. *Bowman v. Bowman*, 313 Ky. 806, 233 S.W.2d 1020 (Ky. 1950). We find the same to be true in a visitation hearing. This is especially true because the visitation statute is specifically concerned

with the non-custodial parent's *entitlement* to visitation, whereas the child's wishes are never mentioned. This court has regarded a parent's right to visitation as natural, sacred and exceedingly important. *Smith*, 869 S.W.2d at 57.

The non-custodial parent is not required to show visitation is in the child's best interest . . . clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both its parents.

Id at 56. KRS 403.320(1) states that visitation should not take place if it would seriously endanger the child mentally or physically. While we recognize that there are situations in which a child could be endangered by being forced to have a relationship with a previously absentee parent, we are not satisfied that such a situation exists here.

After reviewing the hearing transcript, it appears as though the DRC's report is based almost entirely upon his own testimony, not Martha's. In the six pages of transcription covering the interview between the DRC and Martha, Martha only manages to get out about half a dozen complete sentences. The only statements which she makes in regards to her father are "He's a stranger to me, sir." and "I have never met him. I don't really want to get to know him, sir." Martha never states that she is afraid of Brantley or afraid to begin a relationship with him. She simply states that she does not wish to. Nor does she ever state or even imply that she has or will be traumatized by a relationship with her father.

There is no testimony by Martha which we believe "evidences a strong and active resistance to any opportunity to know her father or to have any contact or

relationship with him.” In fact, the bulk of Martha's contribution to the discussion focused on her mother, not her father. When asked by the DRC if she would like to say anything else, she asked if she could speak about her mother. She then stated “My mom is a good mom. I love my mom very much. She's never dated or partied or anything. She's always taken good care of me and loved me.” Martha also states “I just wanted to say that my mother was a really good person to me.” This rant suggests that Martha was unclear about why she was there and possibly seemed to believe that she was at risk of being taken from her mother.

On the other hand, the DRC contributed greatly to the conversation between himself and Martha. The first thing he tells Martha is:

Your mother said something about that you've really been scared about all this, and so I wanted to talk to you for a minute. There's one thing that's not going to happen. Of course, I'm not going to order you to go off with somebody that's basically a stranger with you. Okay? Forget that. That's not on the table. All right?

Instead of asking Martha if she is scared, the DRC testifies for her. He also assures her that he will not order unsupervised visitation, testifies that Brantley is a stranger to Martha and that she does not “even know who he is as a person” and continues to assure Martha that he will not require that she have visitation with Brantley. Other than this testimony, given largely by the DRC, the only other testimony relating to Martha's well-being was given by her mother who stated that Martha had been experiencing nightmares and had become physically ill. No proof was offered supporting this testimony. Not even Martha herself testified as such. There was no expert testimony

concluding that Martha faces danger if forced to spend time with her father. It is our conclusion that Kristian failed to meet her burden of proving that visitation with Brantley would cause harm to Martha. Martha's statement that she does not "really want to get to know him" fails to rise to the standard of serious endangerment.

We do not believe the circuit court's finding that the best interests of Martha were served by terminating Brantley's visitation was supported by sufficient evidence or the appropriate findings. Nor are we satisfied that the DRC's conclusion that Martha has been traumatized and will continue to be traumatized is supported by sufficient evidence, if any at all. The statements made by the DRC to Martha suggest he had already formed an opinion, fashioning his claim that it was his interview with Martha which brought about his decision, as unconvincing. Lastly, this court questions the validity of an unbiased fact-finder in this case, given a statement by the DRC to Martha that he is acquainted with her uncle who had testified on behalf of Kristian just moments before.

For the foregoing reasons, the March 13, 2007, and March 15, 2007, judgments of the Greenup Circuit Court are reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

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