

RENDERED: JANUARY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001109-ME

TRACY L. MACKINNON (NOW JONES)

APPELLANT

v.

APPEAL FROM UNION FAMILY COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 04-J-00146

EDDIE RICKETTS

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Tracy L. Mackinnon (now Jones), appeals from an order of the Union Family Court granting Appellee, Eddie Ricketts, overnight unsupervised visitation with the parties' minor child, M.R. Finding no error, we affirm.

Appellant and Appellee are the biological parents of M.R., who was born on October 20, 2003. The parties were not married at the time of M.R.'s birth. Shortly

¹ Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

thereafter, the parties separated and, in July 2004, the Union Family Court entered a DVO, wherein it specified that Appellee was entitled to supervised visitation with M.R. at Appellant's home. However, Appellant relocated to Allen County and Appellee rarely, if ever, exercised his right of visitation. The record indicates that Appellee pled guilty to several drug-related felonies and was incarcerated for a period of time.

After approximately three years of no contact and no monetary support from Appellee, Appellant contacted the Allen County Attorney's office, who in turn contacted the Union County Attorney's office, about having the case transferred to Allen County and/or attempting to collect past child support from Appellee. The Union County Attorney's office determined that Appellee was in arrears in the amount of \$3,631.91 and filed a motion in the Union Family Court to hold Appellee in contempt.

On April 4, 2007, two days prior to the scheduled contempt hearing, Appellee filed a motion for visitation. During the hearing, the family court permitted Appellee to purge himself of the contempt charge by paying \$1,600 that day and setting up a payment schedule for the remainder of the arrearage. Further, the court ordered that Appellee could visit M.R. for three consecutive Saturdays at Appellant's home for a period of two hours. Thereafter, Appellant could take M.R. for an overnight unsupervised visitation for the following three Saturdays. Barring no problems, the court ruled that visitation would then be set according to the local guidelines.

Appellant subsequently retained counsel who filed a motion to alter, amend or vacate on the grounds that the family court had not considered Appellee's criminal

history and drug use in determining his fitness to take M.R. for overnight unsupervised visitation. The family court denied the motion and this appeal ensued.

Appellant first argues that either her request for a change of venue should have been granted or the Union Circuit Court should have refused to hear the merits of the case since neither of the parties had any contacts with Union County. Appellant points out that she and M.R. have resided in Allen County since 2004 and Appellee's residence is Crittenden County. Further, she argues that because of Appellee's incarceration in other counties, his only contact with Union County was the 2005 judgment of paternity. Although Appellant claims that she requested the matter to be transferred to Allen County, we find no such motion or request in the record. In fact, there is no mention of venue until counsel filed the motion to alter, amend or vacate.

Contrary to her argument herein, Appellant clearly waived any right to have the case transferred to Allen County. Notwithstanding, it is within the discretion of the court to accept or decline jurisdiction. *Hummeldorf v. Hummeldorf*, 616 S.W.2d 794, 798 (Ky. App. 1981); *Williams v. Williams*, 611 S.W.2d 807 (Ky. App. 1981); KRS 452.470. Such a determination will not be reversed absent an abuse of discretion. *Lancaster v. Lancaster*, 738 S.W.2d 116, 117 (Ky. App. 1987); *Williams, supra*. The judgment of paternity, the order requiring Appellant to pay child support, and the DVO that initially established Appellee's visitation rights were all issued in Union County. Thus, we must conclude that the family court did not abuse its discretion in adjudicating the Union

County Commonwealth's Attorney's motion for contempt or Appellee's motion for visitation.

Appellant next argues that the family court erred in ruling on Appellee's visitation motion because it was untimely filed under the local rules. Pursuant to Union County Family Court Rule 4(A), motions must be filed at least seven days prior to the scheduled hearing date and served on the opposing party at least three days prior to the hearing. Appellee's motion was filed on March 30, 2007, and the certificate of service states that a copy was mailed to Appellant that same day. However, Appellant claims she did not receive notice of the motion until less than 24 hours prior to the April 4, 2007, hearing.

Appellant alleges that during the hearing she objected to timeliness of Appellee's visitation motion. However, this Court has carefully reviewed the videotape of the hearing and finds no such objection. Accordingly, Appellant is deemed to have waived the issue.

Finally, Appellant argues that the family court erred in failing to hold a hearing to establish Appellee's fitness, in light of his criminal and drug history, before awarding unsupervised visitation. Appellant notes that during the May 3, 2007, hearing on her motion to alter, amend or vacate, the family court referenced Appellant's mother's criminal history as a justification for allowing Appellee unsupervised visitation. She argues that such was erroneous and prejudicial. However, that hearing was apparently not made part of the record on appeal and thus we are unable to review the proceeding.

KRS 403.320(1) sets forth the proper standard to be applied by the trial court in establishing visitation. The statute provides, in pertinent part, as follows:

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.

The statute has been interpreted to mean that “the non-custodial parent cannot be denied reasonable visitation with his [] child unless there has been a finding that visitation will seriously endanger the child.” *Smith v. Smith*, 869 S.W.2d 55, 56 (Ky. App. 1994) (*Citing Hornback v. Hornback*, 636 S.W.2d 24, 26 (Ky. App. 1982)) (“No ‘best interests’ standard is to be applied; denial of visitation is permitted only if the child is seriously endangered.”)). The burden of proving that visitation would harm the child is on the one opposing visitation. *Smith, supra*.

In her brief to this Court, Appellant focuses on Appellee's criminal and drug history as grounds for denying Appellee unsupervised visitation. However, when questioned by the court during the April 7, 2007, hearing as to why she opposed visitation, Appellant merely responded that she was afraid Appellee would scream at her in front of M.R. There was absolutely no reference to Appellant's incarceration and drug use.

Furthermore, we find no evidence in the record to show that Appellee is currently involved in drug use or is in any other manner unfit to take M.R. on an unsupervised visit. Again, we do not have the benefit of reviewing the second hearing on

the issue, but where the evidence does not support a finding of serious endangerment, such supervision can impede the development of the relationship between parent and child, and is “simply a source of aggravation.” *Schwartz v. Schwartz*, 382 S.W.2d 851, 852 (Ky. 1964).

The family court was very conscious of the fact that Appellee had not seen M.R. in over three years and emphasized that it was important for father and child to become reacquainted in a familiar environment. To accomplish that, the family court scheduled three supervised Saturday visits between Appellee and M.R. Thereafter, the court ruled that Appellee could take M.R. overnight, but specifically noted that Appellant could return to court if any problems with visitation arose. We are of the opinion that the family court did not abuse its discretion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dax R. Womack
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Henderson, Kentucky

BRIEF FOR APPELLEE:

No brief filed.