RENDERED: APRIL 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000748-ME

LARRY SPENCER — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 09-CI-00162

KYLE RICHARDSON AND
KAREN RICHARDSON — APPELLEES

OPINION
REVERSING, VACATING AND
REMANDING

** ** ** ** **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Larry Spencer (Spencer) appeals from the family court's order denying him visitation with his grandchildren. On appeal, Spencer argues that the family court erred when it denied his request for visitation without holding a hearing. Kyle and Karen Richardson (the Richardsons) argue that a hearing was

not required and that the family court properly denied Spencer's request. Having reviewed the record, we reverse, vacate, and remand.

FACTS

Because the family court did not hold an evidentiary hearing, we take the facts from the parties' pleadings.

Spencer filed a verified complaint on March 3, 2009, seeking visitation with his two grandchildren. In his complaint, he alleged that the children were ages nine and five and that permitting him to visit with them would be in their best interest. Spencer also asked the court to appoint a guardian *ad litem* to represent the children.

On March 27, 2009, the Richardsons filed a response stating that the children were ages eleven and eight; that Spencer had a long history of domestic violence, which included using belts on the children; that Spencer had given the older child a firearm when the child was only seven; that the parties had been alienated for two years; and that Spencer failed to establish that visitation would be in the best interest of the children.

On June 11, 2009, Spencer filed a motion asking the court to refer the matter to mediation and to set a hearing date. It appears that a proceeding of some sort took place on July 15, 2009. In their briefs, the parties discuss what transpired at that proceeding but neither party provided a transcript or recording of the proceeding. According to Spencer, the family court did not hear any testimony regarding Spencer's entitlement to visitation. Rather, the court ordered the parties

to submit briefs outlining whether the court had jurisdiction to rule on a motion for grandparent visitation when there was no underlying dissolution action.

The Richardsons agree that the court requested briefs on that issue. However, they also state that the court obtained "verification that the previously stated facts were true . . . ." The Richardsons do not indicate what facts were verified nor do they say how that verification was obtained. During or immediately after the hearing, the court entered an order that states "20 days to brief issue, 10 days to respond (if g-parents can request visitation if no dissolution)." The order does not schedule any additional proceedings and it does not state what, if any, evidence was presented at the hearing.

On August 3, 2009, Spencer filed a brief outlining his position regarding the court's jurisdiction. On December 16, 2009, Spencer filed a motion for a ruling, noting that briefs had been filed but that the court had yet to rule.

On January 12, 2010, the court entered an order denying Spencer's request for visitation and his request for a guardian *ad litem*. In doing so, the court stated that:

> Petitioner has failed to meet his burden, showing that it is in the children's best interest to have set visitation with him . . . . Petitioner has not visited with the children since 2007 and waited two years to request visitation . . . . Forcing visitation is likely to further strain the familial relationships between the parties and bring unnecessary conflict into the children's lives . . . . Due to the age of the children involved, they are likely to have weekend activities scheduled making scheduled visitation difficult since the parties do not live close to each other . . . . Respondents have legitimate concerns regarding physical

> discipline of the children while in Petitioner's care and Petitioner's domestic violence toward others.

It is from this order that Spencer appeals.

STANDARD OF REVIEW

As a general rule, we review a family court's orders regarding visitation for abuse of discretion. *Wireman v. Perkins,* 229 S.W.3d 919, 920 (Ky. App. 2007). However, entitlement to grandparent visitation must be established by clear and convincing evidence. KRS 405.021. Furthermore, whether Spencer was entitled to an evidentiary hearing prior to entry of the court's order is a matter of law, which we review *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

In *Mustaine v. Kennedy*, 971 S.W.2d 830, 832 (Ky. App. 1998), this Court held that a hearing is required before a trial court can grant or deny grandparent visitation. The parties agree that the court did not hold a hearing specifically addressing whether it would be in the children's best interest to visit with Spencer. However, the Richardsons argue that the proceeding that took place on July 15, 2009, was a hearing sufficient to meet the *Mustaine* requirement. In support of that argument, the Richardsons state that:

> [T]he court allowed the parties to appear. The parties were present with counsel and the Respondents by their statements confirmed the allegations in the Response. The Plaintiff did not deny that he had not seen the children for two years nor did he deny that he did not even know the children's age [sic]. In fact it was

> confirmed that the Plaintiff did not have a relationship with his grandchildren, daughter or son-in-law.

It is not clear from the record how this information was elicited from the parties. Furthermore, it is not clear from record whether the parties had been sworn before providing this information. However, based on the statements by the parties in their briefs, it does not appear that they were examined at any length by counsel or subject to cross-examination. The hearing envisioned by *Mustaine* is a full evidentiary hearing, with the parties subject to cross-examination. From the record, it does not appear that the July 15, 2009, proceeding approached that level. Therefore, we reverse and remand so that the family court can hold an evidentiary hearing.

We note the Richardsons' argument that the family court, based on the pleadings, had sufficient information to determine that Spencer had not met his burden of proof. That argument must fail for at least two reasons. First, the family court made a finding of fact – that the children are likely involved in weekend activities that would make visitation difficult – that is not contained in the record.

Second, a court should only dismiss a complaint based on the pleadings if the plaintiff could not succeed under any set of facts. *See James v. Wilson,* 95 S.W.3d 875, 883 (Ky. App. 2002). The Richardsons argue that they established in their response to Spencer's complaint that Spencer had not seen the children for two years, that there was animosity among the parties, and that Spencer did not know the children's ages. According to the Richardsons, these statements in their

response were sufficient to support the family court's order. However, this argument assumes that the Richardsons' statements in their response to Spencer's complaint are true while Spencer's allegation in his complaint – that visitation would be in the best interest of the children – was false. Absent an evidentiary hearing, there is no basis for the family court to make this assumption. In fact, the family court should assume the opposite, that what Spencer alleged in his complaint is true. Based on that assumption, the family court's dismissal was not appropriate absent an evidentiary hearing.

Third, by relying on "evidence" outside the pleadings, the family court treated the matter as a summary judgment under Kentucky Rule of Civil Procedure 56 rather than as a dismissal on the pleadings. When making a determination regarding summary judgment, the court must construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). As noted above, Spencer alleged that it would be in the best interest of the children to visit him. Therefore, the family court could not reach the conclusion it did unless it not only misconstrued the record, but ignored that portion of the record that favored Spencer.

CONCLUSION

For the foregoing reasons, we vacate, reverse, and remand. On remand, the family court shall, unless it is waived by the parties, hold an evidentiary hearing before making a determination regarding Spencer's entitlement to visitation with

his grandchildren. The family court and the parties should note that we are not commenting on whether such visitation is appropriate. That determination is left to the discretion of the family court following an evidentiary hearing.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John C. Collins
Salyersville, Kentucky

BRIEF FOR APPELLEE:

David E. Higdon
Georgetown, Kentucky