

RENDERED: JUNE 22, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001285-ME

JANET MILLER

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 10-CI-503178

DONALD NORRIS AND
ROXANNE NORRIS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: Janet Miller appeals from Findings of Fact, Conclusions of

Law and Order Granting Summary Judgment and Dismissing Action of the

Jefferson Circuit Court, Family Division. She contends that the trial court erred in

¹ Senior Judge Joseph E. Lambert 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.

dismissing her action seeking grandparent visitation. We find no error, and accordingly affirm the Order on appeal.

In 2007, the Commonwealth removed two minor children from the custody of their biological parents and instituted a termination of parental rights action. After the biological parents' rights were terminated, the children were placed in foster care with Appellees Roxanne and Donald Norris. On December 18, 2008, the Norrises adopted the children.

The children's biological maternal grandmother is Appellant Janet Miller. From the outset, the Norrises allowed Miller to visit the children. Miller had visitation with the children every Saturday until February, 2010. Testimony was adduced below that due to the nature of the strained relationship between the biological mother and the two children, and the events which resulted in the biological mother's loss of parental rights, the Norrises told Miller that the children were to have no contact with the biological mother. Miller agreed.

After returning from a visit with Miller in February, 2010, the older of the children told the Norrises that he had spoken with a woman on the telephone while visiting with Miller. Based on what the child told the Norrises, including his statement that it was the same woman who used to visit when he was in the care of the Commonwealth, it was apparent to the Norrises that the woman on the phone was the child's biological mother. According to the record, while the Norrises

understood that Miller had certain loyalties to the biological mother, they determined that it was nevertheless in the children's best interest that they stop visiting with Miller so as to avoid any contact with the biological mother.

Some years earlier, shortly after the biological mother's parental rights were terminated and the children were placed in foster care, and after friends and family members told Miller that she should obtain grandparent visitation rights, Miller engaged the services of an attorney for the purpose of obtaining grandparent visitation rights. Miller would later testify that after talking to the Norrises about the children, the Norrises told her that they would never keep her from seeing the children and that she should save her money by not going forward with the proceeding to secure grandparent visitation rights. Mr. Norris, however, testified as to a different version of the events. He stated that during the period when Miller and her attorney were sending him legal notices and paperwork relating to grandparent visitation rights, the children were still in the custody of the Commonwealth and the Norrises had no legal standing to make any agreements regarding the children. He also would testify that he told Miller she could continue to see the children, but never told her that her access to the children was unconditional.

On August 30, 2010, Miller filed a Petition for Grandparent Visitation in Jefferson Family Court. After filing an answer, the Norrises moved to dismiss the action under CR 12.02 upon alleging that the complaint failed to state a claim upon

which relief could be granted.² After considering the motion and taking proof, the court utilized CR 56 and treated the motion as one seeking summary judgment. On June 22, 2011, it rendered Findings of Fact and Order Granting Summary Judgment and Dismissing Action in favor of the Norrises. As a basis for the Order, the court determined in relevant part that the termination of the biological mother's parental rights also terminated Miller's statutory right to seek grandparent visitation. Based on the undisputed facts and evidence of record, the court ruled that KRS Chapter 405 availed Miller the right to pursue grandparent visitation rights, if at all, only during such time as Miller's daughter had parental rights as to the children. The court went on to reject Miller's argument that the doctrine of equitable estoppel should preclude the Norrises from asserting the defense that Miller had not complied with KRS Chapter 405. The court sustained the Norrises' CR 12.02 motion, and this appeal followed.

Miller now argues that the Jefferson Family Court erred in sustaining the Norrises' motion for CR 12.02 relief. In support of this argument, Miller claims that the trial court improperly rejected her contention that the doctrine of equitable estoppel should bar the Norrises from arguing that she failed to assert a claim for grandparent visitation in conformity with KRS Chapter 405. Her apparent claim, though not expressly stated in her written argument, is that she should have been entitled to assert the doctrine of equitable estoppel because the Norrises told her

² The Norrises argued that the right to grandparent visitation is a purely statutory creation requiring strict statutory compliance. They maintained that a grandparent may assert such a right, if at all, only prior to the termination of parental rights. Miller does not contest this assertion.

they would always allow her to see the children, and that she relied to her detriment on that statement. After directing our attention to CR 56.03 (summary judgment) and the elements of equitable estoppel, Miller's entire written argument on her claim of error is stated thus:

Appellant argues that there is [sic] clearly issues of fact and that if the Court had determined the statement of facts as presented by the Appellant were true, the Court would have been required to grant Appellant's Motion based on the principle of equitable estoppel.

Miller's argument, then, centers on her claim that the trial court - when considering the Norrises' motion to dismiss - improperly failed to accept as true her claim that the Norrises told her they would always allow her to visit with the children. She appears to maintain that had the court properly accepted this assertion as true for purposes of considering the motion to dismiss, it would have also entitled her to assert a claim of equitable estoppel.

We have closely examined the record and the law, and find no error. We must first note that the Jefferson Family Court properly resolved the Norrises' CR 12.02 motion as a CR 56.03 motion for summary judgment. See generally, CR 12. In so doing, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment 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). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.*

On the issue of whether Miller was entitled to assert a claim of equitable estoppel, the party seeking to advance a claim of equitable estoppel has the burden of showing:

(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government, 265 S.W.3d 190, 194-95 (Ky. 2008).

We are not persuaded by Miller’s contention that the trial court did not accept as true - for the purpose of the motion to dismiss - her claim that the Norrises told her they would never stop her from visiting the children. Rather, in rejecting Miller’s claim of equitable estoppel, the Jefferson Family Court made a factual determination that during the period at issue, when Miller was still availed of the right to assert a claim for grandparent visitation rights under KRS Chapter 405, Miller was advised by several friends and family that she should seek

grandparent visitation. More important, it is uncontroverted that Miller retained the services of legal counsel for this purpose. Based on this finding, and the court's determination that Miller was aware of both the necessity to seek grandparent visitation and the means of doing so through retained counsel and the legal process, the court determined that Miller could not meet the elements of equitable estoppel. This conclusion is supported by the record; therefore, we find no error in the Jefferson Family Court's determination that the doctrine of equitable estoppel did not bar the Norrises from asserting the defense that Miller failed to comply with KRS Chapter 405.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). We conclude that the Jefferson Family Court correctly found that there were no genuine issues as to any material fact, and that the Norrises were entitled to a judgment as a matter of law. Accordingly, we affirm the Summary Judgment of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John T. Fowler, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

Christopher Harrell
Louisville, Kentucky