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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001052-ME

DEBORAH NAVY — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 13-CI-00736

LARRY MASSIE AND CHRISTINA MASSIE — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, THOMPSON, AND VANMETER, JUDGES.

LAMBERT, D., JUDGE: Deborah Navy (hereafter Deborah) appeals from the Greenup Circuit Court's order denying her grandparent visitation. After a thorough review of the record and applicable law, we vacate the trial court's order and remand for further proceedings.

Deborah is the mother of Sarah Griffith, the mother of Deborah's minor grandchild, F.I.M.(hereinafter F.I.M.). Deborah filed a petition and motion,

pursuant to KRS[1] 405.021(1), seeking grandparent's visitation rights with F.I.M., who was then twelve years of age. In a separate dependency, abuse and neglect proceeding, the court had granted custody of F.I.M. to his paternal uncle and aunt, Larry Massie and Christina Massie. However, Deborah, though the grandmother, was unaware of that action and was never contacted by social services as a possible relative placement for F.I.M..

After losing contact with F.I.M. during the first couple of years that the Massies were his custodians, Deborah located him and reestablished contact. The Massies subsequently permitted Deborah to visit F.I.M. several times over the two-year period leading up to her filing a motion for grandparent visitation.[2] The court held a hearing and found that Deborah had a limited relationship with F.I.M., having only visited him occasionally after his birth before reconnecting with him while he lived with the Massies. The court then denied Deborah visitation based on this limited relationship, concluding that Deborah's absence would not detrimentally affect her grandson. This appeal followed.

On appeal, Deborah first argues that the trial court used the wrong standard in its decision to deny her petition for visitation. She further argues that the court did not properly consider all of the required factors in determining whether grandparent visitation is in F.I.M.'s best interest, including motivation of the adults involved and the wishes of F.I.M. himself.

[1] Kentucky Revised Statutes.

[2] Deborah's visitation ceased roughly a year and a half before she filed her petition.

We must apply the clearly erroneous standard in reviewing the trial court's findings of fact. CR[3] 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). We must also be mindful of the trial judge's role in assessing the credibility of witnesses under CR 52.01. However, when reviewing the trial court for proper application of the law to the facts at hand, we review *de novo. Drake v. Commonwealth*, 222 S.W.3d 254, 256 (Ky. App. 2007).

The United States Supreme Court addressed grandparent visitation in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and held that the Due Process Clause of the Fourteenth Amendment gives parents a fundamental liberty interest in the care, custody, and control of their children. *Troxel,* 530 U.S at 65-66, 120 S.Ct. at 2059-2060. The Supreme Court also recognized "a presumption that fit **parents** act in the best interests of their children." *Troxel,* 530 U.S. at 68, 120 S.Ct. at 2061 (emphasis added).

Post *Troxel,* this Court has interpreted Kentucky's grandparent visitation statute, KRS 405.021(1), to require a grandparent seeking visitation over a custodial parent's objection to show by clear and convincing evidence that harm to the child would result if the grandparent was denied visitation. *Scott v. Scott*, 80 S.W.3d 447 (Ky. App. 2002). Later, sitting *en banc,* this Court overturned *Scott* in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004), and created a modified best interest standard in grandparent-versus-biological-parent visitation cases. Specifically, *Vibbert* laid out several factors a court could use to determine whether

[3] Kentucky Rules of Civil Procedure.

visitation was in the child's best interest. The Kentucky Supreme Court then considered KRS 405.021(1) and the *Vibbert* factors and provided in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012):

> When considering a petition for grandparent visitation, the court must presume that a fit parent is making decisions that are in the child's best interest. [T]he Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made. So long as a parent is fit, there will normally be no reason for the [s]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. So a fit parent's wishes are not just a factor to consider in determining what is in the child's best interest. The constitutional presumption that a fit parent acts in the child's best interest is the starting point for a trial court's analysis under KRS 405.021(1).
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> The trial court should not attempt to determine whether the parent is actually fit before presuming that the parent is acting in the child's best interest. The trial court must presume that a parent adequately cares for his or her child (*i.e.,* is fit) and acts in the child's best interest. The trial court should then turn to the *Vibbert* factors to decide whether the fit parent is clearly mistaken in the belief that grandparent visitation is not in the child's best interest.
>
> Rather than a threshold determination that governs application of the parental presumption, parental fitness is inherently addressed in the *Vibbert* factors, including the mental and emotional health of the parents and, to some extent, the stability of the child's living and schooling arrangements. The presumption is that a fit parent acts in the child's best interest. To the extent that there is an element lacking in the parent-child relationship, it is possible that the grandparent can fill

> that child's need. This is a fact-intensive inquiry, not a general assumption of all grandparent-grandchild relationships, which also depends on the grandparent's mental and emotional health and overall stability.
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> But the inquiry is not whether the parent is actually unfit and, therefore, no longer receives the benefit of the parental presumption. Nor is a grandparent required to show that a parent is unfit in order to overcome the parental presumption. Rather, through the *Vibbert* factors, which inherently address parental fitness, a grandparent can show that the parent is mistaken in the belief that visitation is not in the child's best interest.
>
> Also implicit in the factors is the prior *Scott* harm standard. If the grandparent demonstrates that harm to the child will result from a deprivation of visitation with the grandparent, this is very strong evidence that visitation is in the child's best interest. But showing harm to the child is not the only way that a grandparent can rebut the presumption in favor of the child's parents.

Walker, 382 S.W.3d at 870-72 (citations and internal quotation marks omitted).

The Court also listed the *Vibbert* factors and added another. This modified list is as follows:

> 1) the nature and stability of the relationship between the child and the grandparent seeking visitation;
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> 2) the amount of time the grandparent and child spent together;
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> 3) the potential detriments and benefits to the child from granting visitation;
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> 4) the effect granting visitation would have on the child's relationship with the parents;
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> 5) the physical and emotional health of all the adults involved, parents and grandparents alike;

> 6) the stability of the child's living and schooling arrangements; and
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> 7) the wishes and preferences of the child.
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> ****
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> 8) the motivation of the adults participating in the grandparent visitation proceedings.

Id. at 871.

Walker is a case involving a paternal grandmother seeking visitation over the objection of a biological mother. However, in this case, the Massies are the ones trying to prevent Deborah's visitation. This is an important distinction because KRS 405.021 has not been interpreted to require a grandparent to clearly show that visitation is in a child's best interest against anyone besides a parent. The text of the statute does not contain an express requirement that the clear and convincing standard always applies when a grandparent petitions for custody. Moreover, a "lesser preponderance of the evidence standard," leftover from the overruled decision of *King v. King*, 828 S.W.2d 630 (Ky. 1992), has been acknowledged. *Walker*, 382 S.W.3d at 873.

In addition to overlooking the biological relationship of grandparent and grandchild compared to that of uncle and nephew, applying the heightened standard in this situation effectively elevates the party with custody to that of a parent.[4] And because we find that an uncle and an aunt by marriage do not

[4] The record is unclear and the court made no finding as to the exact legal status of the Massies' custody. Mr. Massie testified that the biological father, his brother Frank Massie, has court-ordered visitation; however, we do not know the full extent of this custody arrangement.

automatically acquire the same fundamental liberty interest as parents simply by receiving custody of a child, the same Due Process Clause protections are not required. As such, the trial court erred in applying the heightened clear and convincing evidence standard of *Walker*.

Although the trial court's findings were limited, we note that the Massies terminated contact between Deborah and F.I.M.. The Massies each testified that they did not wish for Deborah to have any further contact with F.I.M. However, of great concern to this Court is that the trial court did not address F.I.M.'s apparent restriction from visiting his half-sister, D.L., who is a couple of years older and has lived with Deborah and her husband for some years. The court also did not address Deborah's oral motion requesting an interview with F.I.M. Finally, the court did not consider mental health evaluations or expert testimony, nor was a guardian *ad litem* appointed for F.I.M. In fact, at the termination of Deborah's testimony and that of her witnesses in chief, the hearing ended with the judge announcing he would get them a written decision. The Massies were present and did not present any evidence in rebuttal, though they had been called by Deborah.

As the trial court erroneously applied the clear and convincing standard, the order of the Greenup Circuit Court is vacated and this matter is remanded for rehearing on a best interest standard alone, with no presumptions or preferences given to the nonparental custodians. The Court shall apply KRS 405.021 in its analysis after rehearing and should rule on the record as to the child's testimony

and any other motions presented by either party, making appropriate findings of fact to support any order entered.

THOMPSON, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. In this case, D.N. ("Grandmother") filed a petition for grandparent visitation with F.I.M. ("Child") expressly based on the standards and factors set forth in *Walker v. Blair*, 382 S.W.3d 630 (Ky. 2012). The case was heard and decided based on the applicability of those factors. The parties did not raise the issue of whether legal custodians such as C.M. and L.M. ("Custodians") assume the role of "parents" for purposes of the *Walker* presumption in grandparent visitation cases, and no case law is directly on point. I note, however, this court recently affirmed a trial court's application of the *Walker* analysis in a case involving a nonparent custodian opposing a grandparent visitation petition. *See Doane v. Gordon*, 421 S.W.3d 407 (Ky. App. 2014).

The majority opinion violates the oft-cited rule that an appellate court may affirm a trial court for any reason appearing in the record, but may reverse only for preserved errors. *Fischer v. Fischer*, 348 S.W.3d 582, 590 (Ky.2011); *see also Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010) (holding that since father failed to raise issue of grandparents' standing "before the trial court, the Court of Appeals erred by injecting standing into the case on its own motion . . . and

resolving the case based upon a standing doctrine that had not been raised in any manner by any party[]"). Since no one raised the issue of whether the heightened grandparent visitation standard of *Walker* applies to nonparent guardians, the majority opinion errs in applying a different standard at this point in the proceedings.

On appeal, Grandmother argues that the trial court erred in its application of the *Walker* factors, not that the *Walker* factors do not apply. My review of the record is that the trial court's order clearly states that the best interest of the child standard was applied in ruling on her petition. The trial court admittedly did not cite *Walker* or list each of the factors involved in determining the best interests of the child, but it clearly considered the factors given its finding that Grandmother had not spent significant time with Child or been sufficiently involved in his life. While trial courts should cite *Walker* and list and consider all of the enumerated best interest factors in their orders concerning grandparent visitation, on balance, I do not believe the trial court's order here was insufficient. The trial court's consideration of the first two factors is obvious given that the trial court's decision was based on the facts that Grandmother has not spent much time with Child and that the two did not have a close relationship. And, as the Kentucky Supreme Court noted, the grandparent must show something more than just a loving relationship – the grandparent must show "that the grandparent and child shared such a close bond that to sever contact would cause distress to the child." *Walker*, 382 S.W.3d at 872. The trial court thoroughly examined the lack

of time Grandmother and Child had spent together and the relationship between the two prior to reaching its conclusion, and since none of the other factors appear to weigh heavily in favor of granting Grandmother visitation, those two factors were dispositive of the issue.

Further, the trial court's language concerning detriment to Child does not indicate the use of case law that is no longer in effect. The Kentucky Supreme Court in *Walker* indicated that "implicit in the factors is the prior *Scott* harm standard[,]" and showing that harm to the child would result from deprivation of visitation with the grandparent would be strong evidence that visitation is in the child's best interest. *Walker*, 382 S.W.3d at 872. Therefore, the trial court's use of language concerning detriment to Child does not render the conclusion erroneous.

Lastly, I disagree with Grandmother's assertion that the trial court failed to analyze the wishes of Child or the motivations of Custodians in making its decision. Evidence of Child's feelings and wishes was presented to the trial court, as was evidence of Custodians' motivation in contesting Grandmother's petition. Custodians were concerned that Grandmother wished to reunite Child with his mother against their wishes. The trial court included these findings in its order, and undoubtedly took Grandmother's motivations into consideration. I sympathize with Grandmother's plight, but given the presumption that Child's Custodians are fit parents, I agree with the trial court that Grandmother failed to rebut that presumption by proving by clear and convincing evidence that visitation is in Child's best interest.

I would affirm the Greenup Circuit Court's order.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Deborah Navy, *Pro se* Huntington, West Virginia	Amy Rollins Craft Greenup, Kentucky