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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001396-ME

SACHA N. DEES WRIGHT APPELLANT

v.

APPEAL FROM BOYD FAMILY COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 12-CI-00505

JOYCE BRAMBLETTE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Sacha N. Dees Wright (Wright) appeals from an order of the Boyd Circuit Court giving grandparent visitation to Joyce Bramblette (Bramblette). Wright argues that the Domestic Relations Commissioner (DRC) impermissibly pre-judged the question of Bramblette's entitlement to visitation and pressured her into agreeing to visitation. While we strongly question the substance and tenor of

the DRC's comments, we agree with the trial court that Wright knowingly and voluntarily entered into the visitation agreement. Hence, we affirm.

Wright is the mother of T.E.W., born in April of 2008. The child's father, Todd Wright, died on September 7, 2008. Bramblette was Todd Wright's mother and is the paternal grandmother of T.E.W.

In 2012, the child's maternal uncle, Nathan Dees, filed this action seeking custody of T.E.W. Wright filed a waiver of her superior right to custody, stating that she was undergoing mental health treatment under a criminal diversion agreement and was unable to care for the child. Bramblette filed a separate action also seeking custody of T.E.W., but Bramblette did not allege that she had been a *de facto* custodian of the child. Wright indicated that she wanted T.E.W. to live with Dees and their extended family in Macon, Georgia, and that she intended to re-locate there upon her release from treatment.

Initially, the trial court directed that Dees and Bramblette have alternating timesharing with T.E.W. pending Wright's release from psychiatric treatment. The order further provided that, upon Wright's release from treatment, the court would grant custody to the party nearest to where Wright lived. Thus, if Wright re-located to Georgia, then the child would be placed in Dees's custody. But if Wright remained in the Ashland, Kentucky area, then the child would be placed in Bramblette's custody.

In April 2013, Wright was released from treatment and relocated to Georgia. Consequently, the court granted custody of T.E.W. to Dees. The DRC recommended that Bramblette receive regular visitation with the child. Dees objected to the proposed visitation, pointing to ongoing disputes between him and Bramblette over visitation. Subsequently, the trial court set aside the previous visitation schedule recommended by the DRC.

In February 2014, Dees filed a motion to modify the custody order and grant joint custody of the child to him and Wright. The trial court granted the motion on March 7, 2014. The parties worked out an agreement for visitation with Bramblette through the summer of 2014, but were unable to reach an agreement beyond that time. On September 24, 2014, Bramblette filed a motion asking the trial court to set a specific schedule for visitation for the child's school year.

The trial court set the motion for a hearing before the DRC on November 3, 2014. Wright and Bramblette were each present and represented by counsel. Prior to beginning the hearing, the parties engaged in some off-the record discussion of the issues involved. At the beginning of the hearing, prior to any proof being taken, the DRC addressed the parties, noting that the motion for grandparent visitation was not typical because T.E.W.'s father is deceased. The DRC told Wright that, "the only way that your son will ever know about his father's side of the family is really through his grandparents." The DRC went on to say,

I've looked at everything. I've heard your – your attorneys argue. I think it's important that your son get to know his – or know his grandparents. He had a close relationship with them at one time. And based on what I've heard from them and the attorneys and what I've read in the file – number one, you're Mom. And nothing's ever going to change that. But the grandparents need to be able to spend some time with their grandson.

In a normal situation – and I will tell you this – this has happened before, that the grandparents – of course, it works a lot better if everyone is in the same town. Which – not in the same town, not in the same state.

There have been times where the grandparents have actually stepped into the shoes of a deceased parent. I had one in Greenup County where Mom passed away. And Mom's parents basically stepped into the shoes of the time that Mom might have been able to spend with the child if Mom had been there, which was every other weekend, four weeks in the summer, holidays. That's not possible here. And I'm not so sure that that's really an appropriate situation either.

My gut instinct – I have not heard anything. I haven't heard any testimony. But my gut instinct is – and I've read what the paternal grandparents have requested. And I – and I don't find that unreasonable. I don't really think that it's appropriate to go six or seven months in between seeing – children change way too much during that period of time.

And I – full disclosure, I am a grandparent. I have two children. My husband has three. Together we've got five. And I have three grandchildren and another one on the way. I'm just now announcing that, by the way.

…

But with that setting aside, I looked at what the grandparents were asking for. And basically, what that does is they get to see their grandson – not their son. Their grandson – about every two to three months. And they get to spend time with him. That's not unreasonable.

> Based on what they have requested, I think it would be appropriate for half of Christmas, alternate spring break or winter break. Get that period of time each February or March, whichever the case may be. Then at least two weeks in the summer. And the fall break or Thanksgiving.
>
> I prefer fall break, because then they're not close together. Thanksgiving and Christmas fall so close together. And again, I'm trying to space out what time – or would like to see them space out the time so that they get to see him every two or three months. So there's not a long period of time in between.

The DRC went on to recognize that the parties lived a considerable distance apart, and suggested that they arrange for visitation exchanges in Knoxville, Tennessee, which is the approximate midway point. The DRC added that, "we'll have a hearing if you all want a hearing." However, the DRC advised the parties to reach some sort of agreement. The DRC went on to say,

> But I don't want you to feel like you did not have a choice in this. You do. You do right now. You can make – you can reach an agreement.
>
> If we have a hearing, I'll issue a report and recommendation. You basically lose control. Now you have one more shot. The judge will make the final determination. I only do reports and recommendations. I do a lot of mediation. And I always tell people when I'm doing mediation, this is your shot at still having control over the outcome.
>
> Once it goes before the judge, you lose control. Someone else is dictating what's going to happen to your child, your grandchildren, you know. And we try to do the best that we can given what we hear. But that doesn't make it always right.

After some further discussion, the DRC adjourned the hearing, without taking any proof, to allow the parties to discuss an agreement. About an hour and ten minutes later, the parties advised the DRC that they had reached an agreement regarding visitation with Bramblette. The agreement mostly tracked with the DRC's prior suggestion. The agreement provided that Bramblette would have visitation over Thanksgiving Break, half of Christmas break, and two weeks over summer break. Bramblette would also have visitation alternating between spring break and winter break. As suggested by the DRC, visitation exchanges would take place in Knoxville, with Bramblette paying up to $240 toward Wright's travel expenses. Bramblette was allowed to call T.E.W. up to three times a week. Finally, the agreement allowed Bramblette to have visitation with the child in Georgia with at least two weeks' notice.

The parties' handwritten agreement was read into the record. Subsequently, however, Wright refused to sign the Agreed Order adopting the agreement. In June 2015, Bramblette moved the court for entry of the order. Wright responded that she had felt pressured to enter into the agreement, and that her attorney advised her that the hearing would be re-scheduled if she did not accept the agreement.

The trial court referred the matter back to the same DRC to address whether Wright was competent to enter into the agreement or whether she was placed under some type of duress to enter the agreement. Following a hearing, the

DRC concluded that Wright entered into the agreement knowingly, voluntarily, and with advice of counsel. Thereafter, the trial court overruled Wright's objections to the DRC's report and entered an order adopting the agreed visitation. Wright now appeals from this order.

As an initial matter, the procedural posture of this case is somewhat confused. As noted above, Dees and Bramblette were initially awarded a form of joint custody, which the trial court referred to as "timesharing." But following Wright's release from treatment, Dees received sole custody, and any further visitation with Bramblette was at his discretion. This situation continued even after the trial court gave joint custody of the child to Dees and Wright. Consequently, Bramblette's September 24, 2014 motion must be considered as seeking an initial grant of grandparent visitation.

Under *Walker v. Blair,* 382 S.W.3d 862 (Ky. 2012), a grandparent seeking visitation over the objections of the parent must present clear and convincing evidence that the parent is mistaken in the belief that visitation would not be in the best interests of the child. *Id.* at 871-72. There has never been a formal determination that Bramblette is entitled to grandparent visitation under this standard. The question on appeal is whether Wright waived her objections to visitation and voluntarily entered into the agreement setting out the visitation schedule.

Wright points to the DRC's comments as evidence that she pre-judged Bramblette's entitlement to grandparent visitation and expressed a clear preference for a particular visitation schedule. Bramblette responds that the DRC specifically stated that she would conduct a hearing if either party requested it. Wright never objected to the comments until after the agreement was read into the record.

In those counties in which family courts have not been established, the trial court is authorized to refer domestic relations matters to a DRC. See FCRPP[1] 4. The rules relating to such commissioners are found in CR[2] 53.03–53.06, inclusive. The DRC acts only to further judicial economy by assisting the trial court; the commissioner's report is a recommendation and is not binding. *Pennington v. Marcum*, 266 S.W.3d 759, 771 (Ky. 2008). However, a commissioner is subject to applicable provisions of the Code of Judicial Conduct. SCR[3] 4.300. Thus, a commissioner, like any judge, shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. SCR 4.300, Canon 2. Canon 3 provides: "A judge shall perform the duties of judicial office impartially and diligently." The Commentary to Canon 3 B(8) adds:

> A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into

[1] Kentucky Family Rules of Practice and Procedure.

[2] Kentucky Rules of Civil Procedure.

[3] Kentucky Rules of the Supreme Court.

> surrendering the right to have their controversy resolved by the courts.

The DRC's comments in this case demonstrated a clear pre-judgment concerning Bramblette's entitlement to grandparent visitation and the DRC's preferences regarding a specific visitation schedule. Indeed, the DRC expressed a preference for grandparent visitation which is contrary to established Kentucky law on the subject. *See Fairhurst v. Moon*, 416 S.W.3d 788 (Ky. App. 2013). The DRC also overstepped her boundaries by pushing the parties into a negotiated agreement so they could still "have control over the outcome." We must strongly caution any judicial officer from expressing such views prior to hearing all of the evidence in a case.

Having said this, a party must raise a timely objection to the commissioner's report and recommendation or she will be precluded from questioning the circuit court's action confirming the commissioner's report. *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). In this case, Wright raised no objection to the visitation agreement until more than *six* months after the hearing. Nevertheless, the trial court considered her objections and referred them back to the DRC for an additional hearing to determine whether Wright was under duress or was not competent at the time she made the visitation agreement.

Wright contends that her prior counsel failed to advise her of the Kentucky law relating to grandparent visitation. She also alleges that her attorney

told her that no hearing would be held that day, and that if she did not agree on visitation then she would have to incur the additional time and expense of returning to Kentucky for another hearing date. However, Wright's written pleadings to the trial court do not mention the DRC's comments as a factor in pressuring her to accept the agreement. And at the July 2, 2015 hearing before the DRC, Wright only made a general reference to the DRC's earlier comments. Similarly, Wright's objections to the DRC's July 23, 2015 report does not specifically mention the DRC's comments. The only question before the trial court was whether Wright was incompetent or under duress at the time she made the visitation agreement.

The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. CR 52.01. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness. *Id.* Given the evidence presented, the trial court did not clearly err in concluding that Wright knowingly and voluntarily entered into the visitation agreement.

Although we are concerned by the DRC's comments and do not condone them, Wright failed to present any evidence showing that she actually accepted the visitation agreement under duress. At the November 3, 2014 hearing, the DRC correctly informed all parties that they could have a hearing if they wanted it, and that the trial court would be making the ultimate decision regarding visitation. In addition, the DRC had the opportunity to observe her demeanor both

at the November 3, 2014 hearing, and did not observe any sign that Wright was emotional or stressed at that time.

Furthermore, Wright was represented by counsel at the time and could have objected. Wright alleges that her prior counsel failed to properly advise her or to make a timely objection. A unilateral mistake is generally not grounds to set aside a contract unless: (1) the mistake was of so grave a consequence that to enforce the contract would be unconscionable; (2) the mistakes related to a material feature of the contract; (3) the mistaken party exercised ordinary diligence; (4) the court may rescind the contract without serious prejudice to the other party. *Kane v. Hopkins*, 309 Ky. 488, 493, 218 S.W.2d 37, 39-40 (1949). Wright does not allege that the visitation agreement was unconscionable, nor does she make any specific argument that it is not in the best interests of T.E.W. In addition, Wright concedes that she made no effort to raise the issue of duress until Bramblette moved for entry of a visitation order, and she did not make any specific objections to the DRC's comments until this appeal. Under the circumstances, we must agree with the trial court that Wright failed to prove any basis to set aside the visitation agreement.

Accordingly, we affirm the order of the Boyd Circuit Court adopting the visitation agreement.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Mary Hall Sergent
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