

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000451-ME

SARA PEYTON

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 14-CI-00231

TAMELA PAINTER AND
LARRY DEWAYNE MURRAY

APPELLEES

OPINION
REVERSING & REMANDING

** ** * * * **

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: On May 6, 2015, the Simpson Family Court entered an order granting grandparent visitation to Tamela Painter. The child's mother, Painter's daughter Sara Peyton, brought an appeal to this Court, which vacated the order and remanded the case for additional findings. *Peyton v. Painter*, No. 2015-CA-001210-ME, 2016 WL 4410085 (Ky. App. Aug. 19, 2016). On remand, the

family court entered additional findings of fact in support of the order granting grandparent visitation. Peyton now brings this appeal.

The background facts of the case are set forth in this Court's first opinion:

Sara Peyton and Larry Dewayne Murray are the mother and father, respectively, of L.D.M., born January 2008. Tamela Painter is Peyton's mother and the maternal grandmother of L.D.M. Peyton and Murray separated in February 2009, at which time she and L.D.M. moved in with Painter. In the dissolution proceeding, Peyton received sole custody of L.D.M. Murray received supervised visitation at first, and then unsupervised visitation.

While they were living with Painter, Peyton would get L.D.M. dressed and dropped off at daycare. Painter would pick up the child in the afternoon and care for him until Peyton got off work. Painter also assisted transporting the child to visits with his father. Peyton voiced concerns about Painter's enforcement of rules, and Painter often commented that Peyton was being overprotective.

Peyton remarried in May 2011 and moved out of Painter's house at that time. Painter saw L.D.M. less frequently after that time, but still had occasional visits. However, Peyton and Painter continued to have disagreements regarding the child. Peyton objected to several emotional outbursts by Painter in the presence of L.D.M. and felt that Painter was undermining her authority with the child.

The disagreements culminated in several heated arguments between Peyton and Painter in December of 2011. Peyton and Painter entered into counseling over visitation in January of 2012. However, Peyton

discovered that Painter was secretly seeing L.D.M. during the child's visits with his father. In early April of 2012, Peyton cut off all communication with Painter. Painter continued to see L.D.M. during the child's visits with Murray.

On August 13, 2014, Painter brought a verified petition seeking grandparent visitation pursuant to [Kentucky Revised Statutes] KRS 405.021. Peyton filed an answer opposing the petition. The trial court conducted an evidentiary hearing on March 23, 2015. Thereafter, on May 6, 2015, the trial court entered findings of fact, conclusions of law and an order granting Painter's petition for grandparent visitation.

Id. at *1.

As grounds for vacating the order, the Court of Appeals held that the trial court did not provide sufficient findings that visitation was in the child's best interest, and directed the court to make additional findings in accordance with the standard set out in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012) and *Waddle v. Waddle*, 447 S.W.3d 653 (Ky. App. 2014). *Id.* at *4.

On remand, the trial court entered an order allowing the parties to file briefs, which they did. The trial court then entered additional findings of fact in support of the order granting grandparent visitation. Peyton filed a motion to alter, amend or vacate the additional findings or in the alternative a motion to stay pending appeal. Painter filed a response, and a motion to establish a grandparent visitation schedule. Peyton filed a response contesting the establishment of a visitation schedule. On February 15, 2017, the trial court entered an order

incorporating all previous findings of fact and amended facts and awarding grandparent visitation, although the visitation was stayed pending appeal. This appeal by Peyton followed.

In deciding whether to award grandparent visitation under KRS 405.021, the starting point for a trial court's analysis is "[t]he constitutional presumption that a fit parent acts in the child's best interest" *Walker*, 382 S.W.3d at 870-71. "The grandparent petitioning for visitation must rebut this presumption with clear and convincing evidence that visitation with the grandparent is in the child's best interest." *Id.*

The Kentucky Supreme Court has provided the trial court with several factors to consider in assessing whether visitation is in the child's best interest:

- 1) the nature and stability of the relationship between the child and the grandparent seeking visitation;
- 2) the amount of time the grandparent and child spent together;
- 3) the potential detriments and benefits to the child from granting visitation;
- 4) the effect granting visitation would have on the child's relationship with the parents;
- 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;

- 7) the wishes and preferences of the child;
- 8) the motivation of the adults participating in the grandparent visitation proceedings.

Id. at 871.

In its initial order granting visitation, the trial court found that Peyton's concerns about Painter undermining her authority and continuing to see L.D.M. during his visitation with Murray were outweighed by the close relationship which developed between Painter and the child while he and his mother were living in Painter's home. The court also found that limited visitation by Painter would not have a negative impact on the child's relationship with his parents, nor would it affect the stability of the child's living and schooling arrangements.

In vacating the order and remanding for further findings, this Court stressed that "[t]he mere existence of a close relationship between the child and the grandparent, standing alone, is insufficient to overcome the presumption that the parent is acting in the child's best interest." *Peyton* at *4. It explained that Painter had to "show something more – that the grandparent and child shared such a close bond that to sever contact would cause distress to the child." As further grounds for vacating the order, the opinion cited the trial court's failure to provide any specific evidence to support its findings that limited visitation would not have a

negative impact on the child's relationship with his parents and its findings regarding the motivations of the parties. The Court also alluded to the trial court's failure to give special weight to Peyton's objection to visitation as a mother.

On remand, the trial court found that the child would benefit from the continuation of the close and loving relationship he had established with his grandmother, but that Painter should be ordered and required to observe Peyton's wishes as to his care and discipline. Along the same lines, it held that limited visitation should have no adverse effect on the relationship between the two women if Painter complied with Peyton's wishes regarding care and discipline and did not undermine Peyton. The court found that the relationship between the two women began to suffer when Peyton and the child moved out of Painter's home, and noted that Painter's husband (Peyton's father) passed away at that time. Although the court deemed the child too young to have his wishes directly considered, it found there was evidence he expressed happiness and joy when he was able to spend time with his grandmother.

The trial court stressed as the most compelling factor in the case the motivations of Painter and Peyton. The trial court attributed Peyton's opposition to visitation to her personal conflict with Painter and Murray. The trial court concluded that Peyton's "decision to completely sever ties between [Painter] and [the child] was an extreme overreaction and not in the best interests of [the child]

when the child had developed such a close and loving bond with [Painter].” The trial court concluded, in reliance on *Walker*, that “[Peyton] is ‘clearly mistaken’ in her belief that visitation by [Painter] (with appropriate restrictions and limitations) is not in the best interest of the child.” See *Walker*, 382 S.W.3d at 871.

These findings focus purely on the relationship between Peyton and Painter, rather than on any specific facts relating to the best interest of the child. As the first opinion of this Court stated, a conclusory finding that the child and grandparent have a loving relationship is not sufficient to overcome the presumption in favor of the parent.

Like the trial court, we accept that the parties love the child and want what is best for him. Ideally, the parties should be able to work through their differences for the benefit of the child. But where a grandparent seeks the intervention of the courts to compel visitation, the decision of the parent must prevail absent a clear and convincing showing by the grandparent in favor of such visitation. Anything less would elevate the grandparent to equal status with a custodial parent.

Peyton, at *4-5.

Painter never provided clear and convincing evidence to establish, pursuant to the modified best interest standard, that grandparent visitation with her was compelling enough to override Peyton’s objections and that visitation with her, despite Peyton’s objections, served the child’s best interest. *Waddle*, 447 S.W.3d at 657. Ultimately, “a trial court may not override parents’ constitutional

liberty interest in rearing their child simply because the judge believes that a better decision could be made.” *Walker*, 382 S.W.3d at 873.

The facts of this case are significantly distinguishable from those of *Nein v. Columbia*, 517 S.W.3d 492 (Ky. App. 2017), a case cited by Painter in which the grandparents succeeded in rebutting the presumption that the mother was acting in the child’s best interest when she sought to end visitation. The paternal grandparents in *Nein* were the primary daycare providers for the child for most of his life. He had daily contact with them and spent equal time with them as with his mother. The mother acknowledged that the child’s bond with his grandfather was much stronger than the average grandfather-grandson relationship. The grandparents also gave both mother and child significant financial support, paying for the child’s medical treatment, the tuition at his school and his extracurricular activities, as well as helping the mother with her rent. Evidence was presented that the child experienced negative effects when his time with his grandparents was restricted. His fourth-grade teacher testified that when she first met him, he was upbeat and a model student. When he stopped spending time with his grandparents, the teacher noticed that he was not completing his homework, would sleep in class, and complain frequently of headaches. He began performing below his standards in school and, much to his teacher’s surprise, did not qualify for advanced placement classes that year. The child explained that these changes

were due to his trouble adjusting to reduced time with his grandfather, who helped him study and do his homework. The child told the court that he wanted to spend more time with his grandparents and for things to go back to the way they were. Although the trial court noted that mother's alleged motivation for curtailing visitation was the child's poor behavior when he returned home from his grandparents, it also noted that her decision to restrict visitation occurred shortly after the grandmother refused to lend her money.

Id. at 497-98.

By contrast, in this case, the trial court's findings contain few details regarding the impact of visitation on the child. Admittedly, L.D.M. is younger than the child in *Nein*, who was able to express his views about visitation and his relationship with his grandparents. Nonetheless, the only specific facts about L.D.M.'s relationship with his grandmother described in the trial court's order refer to Painter's insistence on spoiling him by not following Peyton's rules regarding care and discipline. In *Nein*, by contrast, evidence was presented that the child's school work and conduct actually suffered when he was away from his grandparents. Although Painter is clearly distressed at the prospect of losing visitation, there is simply no evidence that the child would be harmfully affected. Although the trial court describes their relationship as "close and loving," there are no specific facts or evidence cited by the trial court to suggest that he "shared such

a close bond [with his grandmother] that to sever contact would cause distress to the child.” *Walker*, 382 S.W.3d at 872.

Accordingly, the order of the Simpson Circuit court granting visitation to Painter is reversed and remanded for the trial court to enter an order denying the petition for grandparent visitation.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Joy D. Denton
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BRIEF FOR APPELLEE PAINTER:

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NO BRIEF FILED FOR APPELLEE
MURRAY