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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001305-ME

DAVID MORTON AND
DARLENE MORTON

APPELLANTS

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 12-CI-00170

BRUCE TIPTON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DIXON, NICKELL AND THOMPSON, JUDGES.

THOMPSON, JUDGE: David and Darlene Morton, the maternal grandparents of C.T. and K.T., appeal from the Montgomery Circuit Court's findings of fact, conclusions of law and decree awarding grandparent visitation to Bruce Tipton, the children's paternal grandparent. The issues on appeal are whether the trial court properly applied the preponderance of the evidence standard when deciding to

grant Bruce visitation and, if so, whether it abused its discretion. We conclude that the preponderance of the evidence standard is proper when grandparent visitation is sought with a child in the custody of a nonparent and the trial court did not abuse its discretion.

C.T. was born in 2007 and K.T. was born in 2009. The Mortons were awarded permanent custody of the children on March 7, 2011, in a neglect proceeding initiated by the Cabinet for Health and Family Services against the children's biological parents, Brian Tipton and Roxanna (then Combs) Swartz. Bruce was granted supervised visitation at the Mortons's discretion. After the Mortons moved to Montgomery County, the Powell Circuit Family Court transferred the juvenile actions to the Montgomery District Court. Bruce visited with children one hour per week at a McDonald's in Montgomery County, a park or at the Mortons's home.

At some point, Bruce asked the Mortons for increased visitation. Animosity had grown between Bruce and the Mortons and the request was denied. On October 23, 2012, Tipton filed a grandparent visitation petition in the Montgomery Circuit Court.

Following the initial pleadings, Bruce sought a temporary specific timesharing schedule. The Mortons objected noting an incident where Bruce showed the children a slaughtered hog carcass in the back of his truck, which they

alleged caused the children trauma and to fear Bruce. The trial court ordered a home evaluation be performed on Bruce's home and that Bruce continue to have visitation every other Thursday for one hour at a McDonald's in Stanton, Kentucky, supervised by Darlene Morton.

On May 14, 2013, the trial court received the home evaluation conducted by the Cabinet on Bruce's home. The evaluation revealed that the children's father, Brian, who had an extensive criminal history, resided in the home. In addition to its concern about Brian's presence in the home, the Cabinet listed additional concerns about exposed wiring in the home and that its registry contained three incidences of substantiated physical abuse against Bruce, one in 1990 and two in 1995, against children belonging to his then girlfriend. The evaluation also disclosed that Bruce takes multiple medications for health conditions including hydrocodone, lorazepam, and hydroxyzine. The Cabinet reported that Bruce appears to love C.T. and K.T. and had ongoing contact with them.

The guardian ad litem (GAL) filed a report stating that she met with Bruce, Brian and Darlene Morton and observed Bruce with the children during a scheduled visitation. The GAL stated that she received a phone call from Darlene, who told her that the children did not want to visit with Bruce. The GAL stated that the visitation she observed was not productive and dysfunctional and that the

children attempted to avoid contact with Bruce. Although the GAL believed Bruce wanted a relationship with the children, he is unable to communicate with them in a manner that is nonthreatening and age appropriate. However, the GAL also believed that the uneasiness the children have with Bruce is due, in part, to the tension between Bruce and Darlene. The GAL recommended that Bruce not have unsupervised visitation and that the children undergo counseling.

In November 2014, C.T. disclosed to her therapist, Amy Smith, that when she was approximately four years old, Bruce touched her vaginal area inappropriately while wiping her after she used the bathroom. Based on this disclosure, Darlene filed for and received an emergency protective order (EPO).

The trial court ordered that the children undergo a trauma assessment with the University of Kentucky Child and Adolescent Trauma Treatment and Training Institute (CATTI). The report, submitted to the trial court on December 22, 2014, noted that K.T. experiences high levels of fear and anxiety connected to domestic violence between her parents and her parents' drug use. The evaluator concluded that C.T. has clinically elevated trauma-related symptoms, particularly anxiety, depression, intrusive thoughts and behavior difficulties. The evaluator diagnosed post-traumatic stress syndrome connected to C.T. having witnessed domestic violence. Also noted was C.T.'s report of inappropriate sexual contact by

Bruce. The evaluator recommended that there be no contact between C.T. and Bruce until that sexual abuse investigation is resolved.

As the trial court noted, Montgomery Circuit Court does not have a family court division. Because other matters were scheduled and other reasons for continuing the case occurred, the hearing was not held until November 30, 2015.

At the hearing, Bruce testified that Brian, Roxanna and the children lived in his home on and off from the time of the children's birth until the children were removed from their parents' custody and he saw the children almost daily. Bruce testified there was domestic violence between Brian and Roxanna but that he tried to stop the violence. He further testified that when Brian was living in his home, he had his son arrested for using drugs.

Bruce believed the children's fear of him was caused by Darlene. Although he admitted he spanked his girlfriend's children in 1990 and 1995, he testified he no longer uses physical discipline. He denied that he sexually abused C.T. and that he simply wiped her after she used the bathroom. Bruce testified that he spends time with his other two grandchildren.

Kristy Smith, Bruce's daughter, testified that Bruce is a wonderful grandfather to her twin daughters and she allows him to visit with them when Bruce chooses. She testified Bruce never abused her.

Pastor Scott Rogers testified that he had known Bruce for seven years and Bruce is very involved in his church. He has no concern about Bruce being around children and Bruce tries to be a positive influence on the church youth.

Michelle Felty, a social worker for the Cabinet, testified and her report was admitted into evidence. She testified she investigated the sexual abuse allegation against Bruce who denied the allegation. She spoke with C.T. who stated Bruce touched her in her vaginal area. She also testified that the Kentucky State Police investigated the charge but did not seek an indictment and closed the case. Based on her knowledge of the case and as a social worker, Felty testified that the children should have no contact with Bruce.

Amy Smith, the children's therapist, testified that she began seeing C.T. in September 2013. C.T. demonstrated significant anxiety, tantrums, defiant behavior, and an inability to focus and maintain attention. During a session, C.T. disclosed that Bruce had touched her inappropriately. Her diagnosis of C.T. was post-traumatic stress disorder. Smith recommended that C.T. have no contact with Bruce.

Darlene testified that the children were bonded with Bruce when the children first entered her care but that after the children viewed the hog in Bruce's truck, they were fearful of him and did not want to go to visitation. She also

testified that after Brian attended visitations with Bruce, the children had behavioral issues.

At the end of the hearing, the trial court took the matter under advisement and ordered that the children visit Kristy's home with Kristy, her daughters and Darlene present. Although Bruce was not to be present, the trial court ordered visitation with his family members in anticipation of Bruce being incorporated into future visits. The court set the matter for review on February 19, 2016.

Numerous reviews were held between August 2016 and the trial court's final order on July 6, 2017. While the matter was pending, on February 25, 2016, the EPO against Bruce was dismissed.

On June 23, 2016, Bruce filed a motion for a review of visitation reporting that the children's visits at his daughter's home had gone well and requested that he be incorporated into those visits. The Mortons objected stating the children's behavior had improved since visitation with Bruce ceased and visitation was not in their best interests.

On July 15, 2016, the trial court ordered Bruce meet with the children, Kristy's daughter and Darlene before the next review date of August 11, 2016. After two visits with Bruce, the Mortons filed a motion for a final order stating that

Bruce's visits with the children had not gone well and the children mostly ignored Bruce.

The trial court held a status hearing on October 21, 2016. It heard testimony from Darlene's sister that Bruce's visits with the children at Kristy's home did not go badly but that the children mostly played with Kristy's daughters. Kristy was not present, so the trial court continued the matter until December 16, 2016.

Kristy testified that the visits with Bruce had gone well. The trial court noted there were no reports that the children were traumatized by the visitations.

The trial court's final order was on July 7, 2017. In addition to reciting the procedural history, the trial court made extensive findings of facts. The trial court found that Bruce established relationships with the children after their births that was disrupted only because of their removal from their parents' custody and placement with the Mortons. The trial court found it is in the children's best interest that they continue their relationships with Bruce and maintain contact with the paternal side of the family. However, the trial court awarded limited visitation, ordering that Bruce have visitation with the children three times per year, the first visit to occur between January and April, the second visit to occur between May and August, and third visit to occur between September

and December. The visits were to be arranged and supervised by Kristy in her home with her two children present.

The Mortons appealed and filed their appellate brief. However, Bruce did not file an appellee brief. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) “provides the range of penalties that may be levied against an appellee for failing to file a timely brief.” *St. Joseph Catholic Orphan Society v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may “(i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” CR 76.12(8)(c). While a party’s failure to file a brief may be taken as a confession of error, this Court has been reluctant to impose such a sanction in appeals involving child custody, support or visitation. *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky.App. 2014). Because this matter involves visitation with children, we decline to impose any of the available sanctions and address whether the trial court erred in granting Bruce grandparent visitation against the wishes of the Mortons.

“In civil actions, proof by a preponderance of the evidence normally determines the rights of the parties.” *Woods v. Commonwealth*, 142 S.W.3d 24, 43 (Ky. 2004) (quoting *Aetna Ins. Co. v. Johnson*, 74 Ky. (11 Bush) 587, 593 (1874)).

However, in certain cases the heightened clear and convincing standard is applied. That standard “requires the party with the burden of proof to produce evidence substantially more persuasive than a preponderance of evidence, but not beyond a reasonable doubt.” *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989). The Mortons argue that the trial court erred when it applied the preponderance standard in considering whether to award grandparent visitation to Bruce. We disagree.

There is no right to grandparent visitation at common law. However, in Kentucky, a grandparent may be awarded visitation pursuant to KRS 405.021(1), which provides that a circuit court “may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.”

When a grandparent visitation petition is filed pursuant to KRS 405.021 after a parent refuses visitation, the “liberty interest of parents to rear their children as they see fit” is implicated. *King v. King*, 828 S.W.2d 630, 631 (Ky. 1992) (overruled on other grounds in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012)). In *King*, the parents argued KRS 405.021 was an unwarranted intrusion into that liberty interest and, therefore, unconstitutional. *Id.*

The *King* Court concluded that the benefits derived from the special bond between grandparent and grandchild are so significant that the statute did not

“go too far in intruding into the fundamental rights of the parents.” *Id.* at 632. As the Supreme Court would later note, “[t]he [*King*] Court neither gave presumptive weight to a fit parent’s decision to deny visitation nor required grandparents to meet a heightened burden of proof of the child’s best interest. The [Supreme] Court left the best interest analysis to the trial court’s determination based on a preponderance of the evidence standard.” *Walker*, 382 S.W.3d at 868.

After *King*, the United States Supreme Court was presented with a challenge to a statute permitting a trial court to grant visitation to a nonparent against the wishes of the parent. In *Troxell v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000), the Supreme Court held that a parent has a fundamental liberty interest in the care, custody and control of their children and that “there is a presumption that fit parents act in the best interests of their children.”

Following *Troxel*, this Court decided *Vibbert v. Vibbert*, 144 S.W.3d 292, (Ky.App. 2004). We held that “[g]iven that these cases involve the fundamental right of parents to raise their children as they see fit without undue interference from the state, the use of the [clear and convincing] heightened standard of proof is required.” *Id.* at 295.

Our Supreme Court would not discuss the issue until it decided *Walker*. The Court pronounced that *Troxel* overturned *King*. *Walker*, 382 S.W.3d

at 870. 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.” *Id.* at 874. That presumption may only be rebutted by “clear and convincing evidence that visitation with the grandparent is in the child’s best interest.” *Id.* at 875.

While the clear and convincing standard is required in grandparent visitation involving a parent, little has been written concerning whether that standard or the preponderance standard is applicable when a grandparent seeks visitation against a nonparent after the removal of the child from the parent’s custody in a dependency proceeding. However, the same constitutional reasons for applying the heightened standard are not present.

Where the parent has lost legal and physical custody of a child in a dependency proceeding, the decision to grant grandparent visitation has “no bearing whatsoever on [the parent’s] rights[.]” *Doane v. Gordan*, 421 S.W.3d 407, 409 (Ky.App. 2014). The custodial nonparent rights arise from a judicial order and not from a fundamental constitutional right to the custody, control and care of the child. Therefore, the liberty interest discussed in *Walker* is not a consideration.

Because the same liberty interest is not involved, there is no presumption that a nonparent will act in the child’s best interest. Absent that

presumption, the appropriate standard is that the grandparent must prove that visitation is in the child's best interest by a preponderance of the evidence.¹

As the trial court properly noted, the constitutional rights of the parents were not implicated by Bruce's grandparent visitation petition where neither Brian nor Roxanne had custody or established visitation. Therefore, the final issue is whether Bruce established by a preponderance of the evidence that grandparent visitation is in the children's best interests.

A trial court has broad discretion in child visitation matters and its decision will be affirmed absent an abuse of that discretion. *Nein v. Columbia*, 517 S.W.3d 492, 496 (Ky.App. 2017). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

While "best interest" is a broad term, in *Walker* our Supreme Court set forth a nonexclusive list of factors for a trial court to consider when grandparent visitation is sought. With some necessary modification, those factors are:

- 1) the nature and stability of the relationship between the child and the grandparent seeking visitation;

¹ In the 2018 legislative session, the General Assembly amended KRS 405.021 and KRS 620.090, which require application of the preponderance of the evidence standard where custody is granted to a grandparent pursuant to KRS 620.090 and the noncustodial grandparent seeks 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 [custodial nonparents];
- 5) the physical and emotional health of all the adults involved, [nonparents] and grandparents alike;
- 6) the stability of the child's living and schooling arrangements; and
- 7) the wishes and preferences of the child.

[and]

- 8) the motivation of the adults participating in the grandparent visitation proceedings.

Walker, 382 S.W.3d at 871.

While not citing *Walker*, the trial court's careful consideration of each factor is reflected in its extensive order. It found Bruce was involved with the children since birth and that relationship had been interrupted by the removal of their custody from Brian and Roxanne and Darlene's subsequent animosity toward Bruce. The trial court found that it was in the children's best interests to have contact not only with Bruce but also the paternal side of the family through occasional contact with Bruce without disrupting the children's daily lives.

Although there was evidence that the children are reluctant to visit with Bruce, the trial court attributed that reluctance to Darlene's negative attitude toward Bruce and the pending court proceedings. While the Cabinet's substantiations of physical abuse by Bruce against other children and the inappropriate sexual touching of C.T. by Bruce caused the trial court to pause in awarding visitation, it found Bruce's and Kristy's testimony that he no longer used physical discipline credible. It further found that the touching of C.T. was incidental to the wiping and not for sexual gratification noting that the Kentucky State Police closed the case without charges.

It is evident from the repeated status conferences in this case and the trial court's gradual reintroduction of visitation with Bruce that the trial court carefully considered this matter. We conclude that the trial court did not abuse its discretion in granting supervised visitation three times per year to Bruce.

For the reasons stated, the Montgomery Circuit Court's findings of fact, conclusions of law and decree granting grandparent visitation is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John M. Hendricks
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BRIEF FOR APPELLEE:

No brief filed