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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000435-ME

VAN ROBISON AND VERIA ROBISON APPELLANTS

v.

APPEAL FROM PULASKI CIRCUIT COURT
HON. JUDGE DAVID TAPP
ACTION NO. 07-CI-00501

JUSTIN PINTO; WILLIAM BROWN;
AND ANDY BESHEAR, ATTORNEY GENERAL
OF KENTUCKY APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

SPALDING, JUDGE: Lisa and Justin Pinto, the mother and father of I.P. and R.P., respectively, were divorced in 2006. As part of the divorce, Lisa and Justin executed a property settlement agreement, wherein it was agreed that Lisa would enjoy sole custody of their children. The property settlement agreement further

provided that, in the event of either Lisa or Justin's death, the survivor would assume sole custody of the couple's children. Eventually, Lisa moved to North Carolina.

In 2007, Lisa married William Brown. In 2016, Justin filed a motion to modify custody, essentially seeking to be awarded sole custody of the children. Lisa opposed any modification of custody. However, in July of 2016, Lisa died as a result of long-standing health complications.

On June 10, 2016, Lisa's parents (the "Robisons"), along with Lisa's husband, appellee William Brown, filed a motion to intervene in the action. Subsequently, on May 24, 2018, William filed a motion for sole custody of the children. On August 1, 2018, the circuit court entered a final judgment. Justin's motion to modify was granted, but William's motion for sole custody was denied. Therefore, Justin was awarded sole custody of the children.

On August 10, 2018, the Robisons filed a motion to amend the prior judgment to include grandparent visitation pursuant to KRS[1] 405.021(1). In their motion, the appellants did not specifically mention the revisions to the grandparent visitation statute, effective July 14, 2018. The circuit court[2] held a hearing on the

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[1] Kentucky Revised Statutes.

[2] This matter began as a family court action. However, in the record the title of the trial court as a family court or a circuit court are used interchangeably. The eventual presiding judge was a circuit judge specially assigned. Hence, for purposes of this appeal, we will refer to the court below as the circuit court.

matter on October 17, 2018. Although the circuit court found that the testimony had established, among other things, that the Robisons had kept in regular contact with the children, had maintained a relationship with them throughout their life, and had regularly assisted their daughter with the children, the court nonetheless dismissed the Robisons' motion for grandparent visitation. The court's dismissal was based upon its reading of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), and *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), which led to its determination that KRS 405.021(1)(b) and (c) are unconstitutional. We disagree that *Troxel* and *Walker* mandate that result and, therefore, reverse the judgment.

This case has a rather convoluted procedural history. After appellee Brown[3] lost in his quest to be granted sole custody of the children, the appellants herein filed a last-second motion for grandparents' visitation, citing KRS 405.021(1). Essentially, the court below allowed the motion to be heard because it was within the ten-day time period upon which judgments can be modified by the issuing court. It then held an evidentiary hearing.

After holding an evidentiary hearing, the circuit court issued an order requiring that a notice of this motion be served pursuant to KRS 418.075 on the

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[3] William Brown is a named appellee in this matter. While never being dismissed from this case, he did not appeal the decision denying him custody and did not take part in this appeal.

Attorney General's office because the appellee was contending that a statute was unconstitutional. That notice was filed by appellee. The Attorney General's office made no response to that notice. The trial court then entered an order denying the motion for grandparents' visitation on the grounds that a portion of the Kentucky grandparent visitation statute, KRS 405.021(1)(b) and (c), was unconstitutional. This appeal followed.

Problematic in that decision is the fact the circuit court did not analyze the claims of the appellants pursuant to the provisions of KRS 405.021(1)(a). *Walker* did not hold grandparent visitation to be unconstitutional, *per se*, but provided an evidentiary process by which the statute was constitutional. The court's order did not evaluate the evidence under *Walker*'s interpretation of that portion of statute. It assumed its denial of the claims of the appellants in the constitutional arguments made therein resolved the case in total and dismissed the claim.

However, in their appeal, the appellants do not raise the issue of whether the Pulaski Circuit Court erred in not reviewing the evidence for this petition under the standards of *Walker*. Questions "not argued in the briefs, will not be considered by the Court of Appeals." *Service Financial Company v. Ware*, 473 S.W.3d 98, 103 (Ky. App. 2015). Because the appellants have not asserted that the trial court was in error for the above-stated reason, we will not address that

issue on this appeal. The appellants have in their brief argued that KRS 403.021(b) and (c) are constitutional. We will address that issue on this appeal.

The Kentucky grandparent visitation statute, KRS 405.021, now provides what are essentially three avenues for a grandparent to seek visitation. First, subsection (1)(a) provides that the "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." Second, subsection (1)(b) states that a "rebuttable presumption [arises] that visitation with the grandparent is in the best interest of the child" if "the parent of the child who is the son or daughter of the grandparent is deceased" and the grandparent can show a "pre-existing significant and viable relationship with the child."[4] Finally, subsection (3) provides that a "Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent . . . ."

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[4] Subsection (c) sets forth the four criteria by which grandparents may prove a significant and viable relationship pursuant to subsection (b). KRS 405.021(2) provides that venue for a grandparent's visitation action is in the "Circuit Court in the county in which the child resides."

The preeminent Kentucky case involving grandparental visitation is *Walker v. Blair*.[5] There, this Commonwealth's highest Court reviewed the then-existing statute governing grandparent visitation, which was essentially the current version of subsection (1)(a). The *Walker* Court held that there is a "constitutional presumption that a fit parent acts in the child's best interest[,]" and that this presumption is a "starting point for a trial court's analysis under KRS 405.021(1)." 382 S.W.3d at 870-71. The Court further held that a grandparent petitioning the circuit court for visitation may rebut this presumption with "clear and convincing evidence that visitation with the grandparent is in the child's best interest." *Id.* at 871. If the grandparent fails to satisfy this burden, then parental opposition alone is sufficient to deny the grandparental visitation. *Id.* As noted earlier, the trial court did not analyze the facts of this case upon that standard.

On July 14, 2018, the statute was amended by the General Assembly to include subsections (1)(b) and (1)(c). Thus, the question before us is whether that revision is constitutional. The statute requires as a prerequisite that the grandparent seeking visitation must prove he or she has a "pre-existing significant and viable relationship with the child." Hence, the natural parents have already allowed a relationship to exist. Now, that relationship is in question after one of the parents has died.

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[5] 382 S.W.3d 862.

We begin our analysis by noting that statutes have a presumption of constitutionality. *Martinez v. Commonwealth*, 72 S.W.3d 581, 584 (Ky. 2002) (citing *Commonwealth v. Halsell*, 934 S.W.2d 552 (Ky. 1996)). "[A]ll presumptions and all reasonable doubts are to be resolved in favor of constitutionality of any act of the General Assembly." *Gaines v. O'Connell*, 305 Ky. 397, 204 S.W.2d 425, 427 (1947) (citing *Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, 237 Ky. 674, 117 S.W.2d 918 (1938); *Bowman v. Frost*, 289 Ky. 826, 158 S.W.2d 945 (1942)). With these principles in mind, we turn to the matter at hand.

As discussed earlier, the Kentucky Supreme Court had occasion to review KRS 405.021 in the *Walker* opinion. However, it reviewed the statute prior to the addition of the 2018 amendments, and limited its review to what is now KRS 405.021(1)(a).[6] That subsection provides, in pertinent part, as follows: "[t]he 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." Thus, under the language utilized in subsection (1)(a), any grandparent could bring a visitation action and be granted visitation with the child, so long as the circuit court

[6] Today's KRS 405.021(1)(a) is a verbatim copy of 405.021(1) prior to the addition of the 2018 amendments.

has found grandparental visitation to be in the best interest of the child. This would include individuals who potentially have never met the child subject to the action. Therefore, the Supreme Court found it necessary to apply the statute in a narrower manner in order to comport with the constitutional rights of the parents. Therefore, a petitioning grandparent is required to show, by clear and convincing evidence, that visitation is in the child's best interest, and that without doing so, parental opposition is sufficient to deny visitation.

However, neither *Walker* – nor *Troxel*, for that matter – addressed a statute that provided a set of criteria that must be satisfied prior to being awarded visitation, as is the case here. Subsection KRS 405.021(1)(b) provides:

> If the parent of the child who is the son or daughter of the grandparent is deceased, there shall be a rebuttable presumption that visitation with the grandparent is in the best interest of the child if the grandparent can prove a pre-existing significant and viable relationship with the child.

Subsection KRS 405.021(1)(c) provides:

> In order to prove a significant and viable relationship under paragraph (b) of this subsection, the grandparent shall prove by a preponderance of the evidence that:
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> 1. The child resided with the grandparent for at least six (6) consecutive months with or without the current custodian present;
> 2. The grandparent was the caregiver of the child on a regular basis for at least six (6) consecutive months;
> 3. The grandparent had frequent or regular contact with the child for at least twelve (21) consecutive months; or

> 4. There exist any other facts that establish that the loss of the relationship between the grandparent and the child is likely to harm the child.

Thus, there are two thresholds that must first be met by a petitioning grandparent before the rebuttable presumption may be attained. First, the grandparent's son or daughter (*i.e.*, the child's parent) must be deceased. Second, the grandparent must prove a pre-existing significant and viable relationship with the child by one of the four avenues defined in KRS 405.021(c). Then, and only then, does the grandparent enjoy a presumption that grandparental visitation is in the best interest of the child – a presumption the surviving parent can rebut. The essential difference between KRS 405.021(1)(a) and subsections (b) and (c) is that the grandparent has a pre-existing relationship with the child prior to the death of the child's parent. That means that prior to the death of the parent one or both of the child's parents had decided either to facilitate or at least allow the grandparent to have a relationship with the child.

In this way, the statute at issue is distinguishable from those presented in *Walker* and *Troxel*. Here, the language utilized by the legislature has provided a narrow avenue for a petitioning grandparent to be granted visitation. It allows for a possibility of court ordered visitation only if a parent of the child is dead and the grandparent proved a factor showing a significant relationship with the child or the child is likely to be harmed due to the *loss* of the relationship. This is a unique

remedy for a rare and tragic set of events which protects an existing relationship of the child.

For illustrative purposes, we turn to the specific categories presented by subsection (1)(c). That subsection sets forth the only criteria by which a grandparent may prove a "significant and viable relationship" as that phrase is utilized in subsection (1)(b). First, such a relationship may be shown by demonstrating that the child resided with the grandparent for "at least six (6) consecutive months[.]" KRS 405.021(1)(c)1. Second, a "significant and viable relationship" may be proven by showing that the petitioning grandparent "was the caregiver of the child on a regular basis" for six (6) consecutive months. KRS 405.021(1)(c)2. Third, a grandparent may prove the requisite relationship by showing that they had "frequent or regular contact with the child" for twelve (12) consecutive months or more. KRS 405.021(1)(c)3. Finally, a grandparent may prevail by establishing that "the loss of the relationship between the grandparent and the child is likely to harm the child." KRS 405.021(1)(c)4. All of these requirements note a preexisting relationship between the child in question and the grandparents.

In contrast to having to prove by a preponderance of the evidence one of these four criteria – not to mention the fact the petitioning grandparent must first have a child that is deceased – the language reviewed by the *Walker* Court required

only that the circuit court find it to be in the best interest of the child to have grandparental visitation. The requirements imposed by KRS 405.021(1)(b) and (c) present thresholds that must be overcome before visitation may be granted. All four prerequisite provisions require the petitioner to prove a relationship the child has had with the grandparent. It is not the same type of statute that was reviewed by the *Troxel* and *Walker* courts. Rather, it is a narrowly tailored statute for a very specific set of circumstances, as opposed to a broad statute applicable to the populous at large. It protects relationships a child has established prior to the death of a parent. Therefore, contrary to the conclusion of the circuit court, the holdings of *Troxel* and *Walker* do not necessitate a finding that the current statute be declared unconstitutional. Thus, pursuant to the long line of precedent holding that statutes are presumed to be constitutional, we hold here that KRS 405.021(1)(b) and (c) are not unconstitutional.

The judgment of the circuit court is vacated, and this matter is reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bruce W. Singleton Somerset, Kentucky	Ralph D. Gibson Somerset, Kentucky