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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001003-ME

BRITTANY WILSON HARTLAGE — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE KENNETH H. GOFF, II, JUDGE
ACTION NO. 17-CI-00032

TINA LYNN HARTLAGE AND
DANIEL WADE HARTLAGE, SR. — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, TAYLOR, AND K. THOMPSON, JUDGES.

TAYLOR, JUDGE: Brittany Wilson Hartlage brings this appeal from a June 12, 2019, Order of the Grayson Circuit Court granting expanded grandparent visitation to appellees, Daniel Wade Hartlage, Sr., and Tina Lynn Hartlage. For the reasons stated, we reverse and remand.

Brittany Wilson Hartlage and Jason Hartlage were married and had one child, B.M.H., in March of 2015. When B.M.H. was fourteen months old, Jason passed away from cancer on May 19, 2016.

On February 1, 2017, Jason's parents, Daniel and Tina Hartlage, filed a Petition for Grandparent Visitation. Brittany filed a response objecting to Daniel and Tina exercising grandparent visitation. Brittany asserted that Daniel and Tina were not involved in B.M.H.'s life before Jason died, had limited contact with the child since Jason's death, and had never provided care for the child. Brittany also pointed out there was a great deal of animosity between the parties.

Despite their differences, the parties reached a Temporary Agreed Order (Agreed Order) in late 2017.[1] The Agreed Order essentially provided that Daniel and Tina would visit B.M.H. every other Sunday afternoon for two hours. The visits would begin on December 3, 2017, and would continue through March 18, 2018. The two-hour visits would be supervised by Brittany and would occur at Brittany's home. The Agreed Order required the parties to "immediately enroll in individual counseling with the goal of addressing lingering issues from the death of Jason Hartlage as well as their relationships with each other." Temporary Agreed

[1] It appears the parties entered into the Temporary Agreed Order in late 2017 as its terms provided for visitation beginning in December 2017. However, the Agreed Order was not tendered to the circuit court until January 10, 2018, and was entered on February 7, 2018.

Order at 1. The Agreed Order, likewise, provided that if the visits went smoothly, Daniel and Tina could move for expanded grandparent visitation.

On April 10, 2018, Daniel and Tina filed a Motion to Expand Grandparent Visitation. The matter subsequently came before the Domestic Relations Commissioner (DRC) for a hearing on November 13, 2018. The DRC's Proposed Findings of Fact and Conclusions of Law (Recommendations) were entered on December 13, 2018. Therein, the DRC recommended that the motion for expanded grandparent visitation be denied and that the parties continue under the terms of the Agreed Order.

Daniel and Tina filed exceptions to the DRC's Recommendations. Following a hearing, by Order entered June 12, 2019, the circuit court granted Daniel and Tina's exceptions and expanded their grandparent visitation. The visits were ordered to continue every other Sunday, but the time was expanded from two hours to three hours. On the weeks that no Sunday visits occurred, Daniel and Tina would have four hours of supervised visits at Brittany's home. This appeal follows.

Brittany initially contends that Daniel and Tina's exceptions to the DRC's Recommendations of December 13, 2018, were untimely filed and, thus, improperly considered. Pursuant to Family Court Rules of Procedure and Practice (FCRPP) 4(4)(a), a party has ten days after being served with a copy of the DRC's

recommendations to file written exceptions thereto. The DRC's Recommendations were filed on December 13, 2018, so the tenth day for filing exceptions fell on Sunday, December 23, 2018. The next two days, Monday, December 24th and Tuesday, December 25th, were state holidays in 2018. Therefore, the actual deadline for filing exceptions fell on Wednesday, December 26, 2018. *See* Kentucky Rules of Civil Procedure 6.01. Daniel and Tina timely filed their exceptions on December 26, 2018. Consequently, the circuit court properly considered the timely filed exceptions to the DRC's Recommendations.

Brittany next contends the circuit court improperly scheduled a hearing after taking the matter under submission based upon an *ex parte* communication with Daniel and Tina's attorney. Specifically, Brittany asserts that an *ex parte* communication occurred when opposing counsel's office faxed a letter to the court on March 5, 2018, requesting a continuance of the hearing on the exceptions to the Recommendations of the DRC.

The Kentucky Code of Judicial Conduct, Supreme Court Rule 4.300 Canon 2, Rule 2.9, generally forbids *ex parte* communications between the court and a party or a party's counsel.[2] Under the plain terms of Rule 2.9(A), a "judge shall not initiate, permit, or consider ex parte communications" with a party or

[2] Formerly Canon 3B(7). The Code of Judicial Conduct was amended by Supreme Court Order 2018-04, effective January 31, 2018. The alleged *ex parte* contact occurred in March of 2019, thus subject to the 2018 amendments.

attorney that has a legal interest in a proceeding. However, there is a narrow exception found in Rule 2.9(A)(1) relating to communications for scheduling, administrative, or other emergency purposes, that do not address substantive issues. If an *ex parte* communication falls under the exception found in Rule 2.9(A)(1), the judge must reasonably believe no party will gain a procedural or tactical advantage and the judge must promptly notify the other parties of such communication.

In the case *sub judice*, Daniel and Tina's attorney faxed a letter directly to the court requesting a continuance. Brittany's attorney was not present nor did he receive a copy of the faxed letter. Hence, the communication by its very essence constitutes an *ex parte* communication. However, as the letter merely requested a brief continuance of a hearing, the judge properly considered this a scheduling matter under Rule 2.9(A)(1). In an order entered March 11, 2019, the court informed all parties it had received the faxed letter from Daniel and Tina's attorney, had granted the continuance, and had set a hearing for March 19, 2019. We do not believe either party received a procedural or tactical advantage as a result of this scheduling communication or the resulting continuance. As a result, we conclude the narrow exception related to *ex parte* communication set forth in Rule 2.9(A)(1) was satisfied and, thus, Brittany's contention of error is without merit.

Brittany additionally argues that the circuit court erred by not adopting the DRC's Recommendations entered on December 13, 2018. It is well-established that a circuit court has "the broadest possible discretion with respect to the use it makes of reports" or recommendations of a DRC. *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997) (citations omitted). In fact, the circuit court may adopt the DRC's report, modify or reject the report, in whole or in part, may receive additional evidence, or may "recommit" the report with instructions. *Id.* at 716. We do not believe the circuit court abused its discretion not adopting the DRC's report, although the recommendation was consistent with applicable law as discussed in this Opinion. In this case, the court, at its discretion, considered additional evidence, as well as argument by the parties.

Brittany also contends the circuit court erred in its application of Kentucky Revised Statutes (KRS) 405.021, the grandparent visitation statute.

KRS 405.021(1) provides, in relevant part:

> (a) 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. . . .
>
> (b) 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.

> (c) 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:
>
> 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 (12) 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.

As to subsection (1)(a) of KRS 405.021, Brittany argues that she "and B.M.H.'s father [Jason] were happily married at the time of his death [and] [t]here were not any cases filed in court that required existing orders to be enforced in any decree that would give the Court standing under this statute." Brittany's Brief at 16. This argument is nonsensical. First, a court does not acquire "standing" in a grandparent visitation case. Jurisdiction is established by KRS 405.021. Second, there is nothing in subsection (1)(a) of KRS 405.021 requiring that the parents of the child be divorced. Therefore, Brittany's argument that KRS 405.021(1)(a) is not applicable to this proceeding is without merit.

However, our review does not end there. The starting point for a trial court's analysis under KRS 405.021(1) looks to the constitutional presumption that a fit parent acts in the child's best interests. *Walker v. Blair*, 382 S.W.3d 862, 870-71 (Ky. 2012). In *Walker*, the Kentucky Supreme Court stated the following:

> 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." [*Troxel v. Granville*, 530 U.S. 57, 72-73 (2000).] 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." [*Id.* at 68-69.] So a fit parent's wishes are not just a factor to consider in determining what is in the child's best interest. . . .

Walker, 382 S.W.3d at 870.

Additionally, the Supreme Court has clearly stated that a "parent's decision regarding grandparent visitation must be given special weight." *Morton v. Tipton*, 569 S.W.3d 388, 394 (Ky. 2019) (citation omitted). And, a grandparent seeking visitation, as in this case, must overcome the constitutional presumption by clear and convincing proof to establish that the grandparent visitation is in the child's best interests. *Id.*

As noted, the parties entered into an Agreed Order entered on February 7, 2018, granting Tina and Daniel limited, supervised visitation with the child. This visitation was agreed to by Brittany. Tina and Daniel then sought to expand visitation, over the objection of Brittany, which the circuit court granted, and is the genesis of this appeal. The circuit court expanded the grandparents' supervised visitation notwithstanding the court's findings that Tina and Daniel did not establish what type of relationship they had with the child before their son passed away and that during most of 2017, they had little or no contact with the child. Effectively, the only relationship they had with the child was the limited, supervised visitation agreed to by Brittany as set out in the Agreed Order. Based on the record below, Tina and Daniel failed to establish a preexisting and viable relationship with the child sufficient to trigger the presumption under KRS 405.021(1)(b).

More troublesome, however, is the lack of clear and convincing evidence in the record below to overcome Brittany's opposition to the expanded visitation. *See Morton*, 569 S.W.3d at 394; *Hamilton v. Duvall*, 563 S.W.3d 697, 706 (Ky. App. 2018). There was absolutely no evidence presented below by Tina and Daniel to overcome Brittany's parental decision to not expand the supervised visitation that she had previously agreed to. To expand the visitation over Brittany's objection, the circuit court must address some or perhaps all of the

factors, depending on the circumstances, set out by the Supreme Court in *Walker*, 382 S.W.3d at 871 and restated in *Morton*, 569 S.W.3d at 395. In this case, the circuit court failed to address any of these factors, nor determine whether there was clear and convincing proof to establish that it was in the child's best interests to expand visitation.

Accordingly, we must reverse the circuit court's order granting Tina and Daniel expanded visitation above what was previously agreed to by Brittany. Any future motions for expanded visitation shall be governed by the *Walker* factors to determine whether such visitation would be in the child's best interests to overcome the constitutional presumption that the parent's decision is in the child's best interests.

For the foregoing reasons, we reverse and remand, with instructions for the circuit court to enter a grandparent visitation order consistent with the terms of the Agreed Order previously entered by the court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
Phillip W. Smith Leitchfield, Kentucky	Lyn Taylor Long Elizabethtown, Kentucky