

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002780-MR

PHOEBE STONE

APPELLANT

v.

APPEAL FROM WOLFE CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 97-CI-00014

BETHEL GENE STONE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, EMBERTON AND GARDNER, JUDGES.

EMBERTON, JUDGE: Phoebe Stone appeals from a judgment of the Wolfe Circuit Court awarding grandparental visitation rights to appellee, Bethel Gene Stone. Phoebe alleges that appellee failed to meet his burden of establishing that allowing such visitation is in the best interest of the child and that the trial judge erred in setting aside the recommendation of the domestic relations commissioner who had "tried" the case. We disagree and affirm.

Appellee is the paternal grandfather of Shana DeAnna Olene Stone, born October 9, 1995. The child's mother, appellant Phoebe Stone, and appellee's son, Shane Stone, were divorced by

decree entered on October 24, 1996. Phoebe was awarded custody of the child, and Shane, for reasons not apparent in the record, was granted visitation only with Phoebe's permission at her mother's home. Subsequently, on February 7, 1997, appellee filed a motion seeking visitation rights with his granddaughter. The matter was referred to a domestic relations commissioner who conducted a hearing which apparently was not transcribed because it does not appear in the record filed with this court. However, based upon the evidence adduced at that hearing, the commissioner submitted a report recommending that appellee's petition be denied.

After appellee filed exceptions to the commissioner's report, the trial judge entered detailed findings to support his conclusion that the granting of grandparental visitation was in the best interest of the child. He specifically addressed Phoebe's contention that appellee's smoking irritated the child's allergies, as well as her similar allegation of irritation caused by the spraying of perfume on her dress by appellee's mother, the child's great-grandmother. The trial judge found that the allegations of irritation of the child's allergies were not supported by medical evidence and that it was "reasonable to assume that everyone involved in Shana's caretaking would be willing to refrain from any activity that could jeopardize Shana's physical health and well-being."

Next, the trial judge explained his conclusion that evidence introduced at the hearing before the commissioner to the effect that appellee had been abusive with his first wife in 1984

did not preclude the granting of his petition. The trial judge noted that there was no evidence that appellee had been violent with his second wife or his present spouse nor was there evidence that he had ever been abusive to any of his children. Finally, emphasizing the fact that appellee did not have a close relationship with his son who had not been exercising the limited visitation rights granted him in the divorce decree, the trial judge concluded that it was in the child's best interest to maintain contact with her paternal family through visitation with her grandfather.

We commence our discussion of Phoebe's argument that appellee failed to establish that grandparental visitation was in Shana's best interest by acknowledging the general rule, that in the absence of a transcript of proceedings, a reviewing court must assume that the record supports the factual determinations of the trial judge. Dillard v. Dillard, Ky. App., 859 S.W.2d 134 (1993). We would also emphasize the fact that our General Assembly, by enactment of Kentucky Revised Statute (KRS) 405.021, has determined that grandparental visitation is an established right which will be recognized and enforced by the courts if it is in the child's best interest to do so. Mustaine v. Kennedy, Ky. App., 971 S.W.2d 830 (1998). In a carefully detailed ten-page opinion, the trial judge provided the findings and conclusions supporting his decision that our Supreme Court found essential in King v. King, Ky., 828 S.W.2d 630 (1992), and which this court reaffirmed in Mustaine.

Despite Phoebe's contention that evidence of the child's best interest falls far short of that supporting the award of grandparental visitation rights in King, we are nevertheless convinced that the trial judge's ruling in this case adheres to the King court's view of the factors to be considered in resolving such matters:

If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents. . . .

828 S.W.2d at 632. Here, the trial judge addressed each of Phoebe's concerns and found no evidence that appellee was physically, mentally, or morally unfit for the responsibility of caring for his grandchild. These findings, coupled with the fact that the trial judge utilized the proper legal standard, are sufficient to dispel Phoebe's contention that appellee failed to satisfy the requirements of the statutory "best interest" test.

Neither do we find persuasive Phoebe's contention that because the trial judge did not personally "try" the case or directly observe the demeanor of the witnesses, he acted arbitrarily and capriciously in failing to follow the commissioner's recommendations. Ky. R. Civ. P. (CR) 53.06(2)

explicitly grants the trial judge complete discretion as to the use of the commissioner's report:

The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

The extent of the trial judge's authority in this regard was recently considered by the Supreme Court in Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997), in which it removed any doubt as to the intent of the rule:

A great many circuit courts in Kentucky make use of domestic relations commissioners. The rules relating to such commissioners are found in CR 53.03-53.06. . . . With respect to the report, the court may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it with instructions. In sum, the trial court has the broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners. Haley v. Haley, Ky.App., 573 S.W.2d 354 (1978). See also Basham v. Wilkins, Ky.App., 851 S.W.2d 491 (1993), which confirmed the right of the trial court to re-evaluate the evidence and reach a different conclusion than the commissioner. . . . (Emphasis added).

Furthermore, due process does not require that the person who actually receives the evidence make the final determination; rather, it focuses upon the appraisal and evaluation of evidence supplied to the decision maker. There is no requirement that the decision maker have an opportunity to personally observe the demeanor of the witnesses. Bentley v. Aero Energy, Inc., Ky. App., 903 S.W.2d 912 (1995).

Thus, because the trial judge's detailed findings and conclusions make clear he evaluated the evidence before the

commissioner, we cannot say he abused his discretion merely because he reached a different result.

The judgment of the Wolfe Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tonya L. Mounts
Lexington, Kentucky

BRIEF FOR APPELLEE:

Billy L. Oliver
Campton, Kentucky