

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001447-MR

RAY BARTON CHESNEY and
KRYSTAL DAWN CHESNEY

APPELLANTS

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
ACTION NO. 97-CI-00141

PATRICIA GIBSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, DYCHE, and GARDNER, Judges.

COMBS, JUDGE: The appellants, Ray Barton Chesney and Krystal Dawn Chesney (the Chesneys), appeal from the judgment of the Wayne Circuit Court involving the issue of grandparent visitation governed by KRS 405.021. The Chesneys argue that the court erred in denying their motion for change of venue and that the visitation awarded to the appellee, Patricia Gibson (Gibson), was unreasonable. Having reviewed the record, we affirm the order of the circuit court.

On May 31, 1997, Gibson filed a petition pursuant to KRS 405.021 for visitation with K.C., her minor granddaughter.

K.C. was born of the marriage between Gibson's daughter, Peggy Ann Frost, and Barton Chesney. In March 1995, Peggy Ann was tragically killed in an automobile accident; K.C. was three years of age at the time of her mother's death. Barton assumed sole responsibility for raising K.C., who was also born with Down's Syndrome. However, his mother and Gibson helped to care for K.C. while Barton obtained training to become a paramedic. In April 1997, Barton married Krystal, who ultimately adopted K.C. Shortly after Barton's remarriage, Gibson petitioned the Wayne Circuit Court for visitation with K.C. All of the parties were residing in Wayne County at the time Gibson filed her petition.

On July 30, 1997, the Domestic Relations Commissioner (DRC) filed a report with the court finding that it was in the best interest of K.C. to grant Gibson visitation with her. On September 10, 1997, the court entered an order adopting the report of the DRC and granted Gibson extensive visitation with K.C. The court ordered that Gibson be allowed the following visitation with K.C.: the first weekend of each month from 5:00 p.m. Friday until 5:00 p.m. Sunday; overnight visitation on the second and fourth Wednesday of each month beginning after school; one week each summer (in the month of July); four hours on Memorial Day weekend; four hours on the day before the child's birthday; on Grandparents Day from 9:00 a.m. until 5:00 p.m.; one day during Thanksgiving weekend from 12:00 p.m. until 7:00 p.m.; and on Christmas Eve from 12:00 p.m. until 8:00 p.m. Additionally, Gibson was ordered to provide all transportation

necessary to carry out the visitation schedule. None of the parties appealed the court's order.

Subsequently, on January 21, 1998, Gibson filed a motion concerning various issues (unrelated to this appeal) as to her visitation with K.C. In response, the Chesneys filed a motion to transfer the case to Pulaski Circuit Court on the ground that they had moved to Pulaski County in July 1997. They also filed a motion on February 9, 1998, to reduce Gibson's visitation. The Chesneys argued that the extensive visitation interfered with K.C.'s ability to spend holidays with her parents and sibling - as well as limiting visitation opportunities with her other grandparents (she has five sets of grandparents) and extended family. Additionally, they were no longer living in the same county as Gibson, and they argued that the midweek visitation had an adverse affect on K.C.'s performance and behavior at school.

On April 7, 1998, the DRC filed his report with the court recommending the following modified visitation schedule for Gibson: one weekend per month on the first Friday of each month beginning at 6:00 p.m. on Friday to 6:00 p.m. on Sunday; two hours on the second and fourth Wednesday of each month from 4:00 p.m. to 6:00 p.m.; one week of summer visitation in July; four hours during Memorial Day weekend; four hours on K.C.'s birthday; visitation from 12:00 p.m. to 5:00 p.m. on grandparents day; one day during the Thanksgiving holiday from 12:00 p.m. to 7:00 p.m.; and visitation on Christmas Eve from 12:00 p.m. to 8:00 p.m.. The Chesneys filed exceptions to the DRC's report. On May 11.

1998, the court entered an order overruling the Chesneys' exceptions and adopting in its entirety the DRC's report. The court entered an amended order on June 2, 1998, adopting the DRC's report and making its order final and appealable. This appeal followed.

The Chesneys first argue that the court erred in failing to grant their motion to transfer the action to Pulaski County. We disagree. An action brought pursuant to KRS 405.021 must be brought in the circuit court in the county where the child resides. KRS 405.021(2). At the time Gibson initiated proceedings for visitation rights, the Chesneys lived with K.C. in Wayne County. Gibson correctly filed her petition for visitation with the Wayne Circuit Court. After the court granted visitation rights to Gibson, the Chesneys moved to Pulaski County and planned to move to Laurel County at the end of K.C.'s school year. "The granting of change of venue shall be within the sound discretion of the court, and shall be granted by the court when justice so requires." KRS 452.030. In light of the fact that this action originated in Wayne county and that the Chesneys are not planning to reside permanently in Pulaski County, Wayne Circuit Court has the most substantial interest in this case. The court did not abuse its discretion in denying the Chesneys' motion to transfer venue.

The Chesneys next argue that the court erred in not substantially reducing Gibson's visitation with K.C. to a more manageable amount. They do not challenge the award of visitation rights to Gibson; rather, they contend that the amount of

visitation awarded to her was unreasonable. The Chesneys maintain that the extensive visitation awarded to Gibson interferes with their ability to function as a family unit and to raise their children. They contend that it makes it difficult for them to enjoy family holidays and to visit with other extended family members. They also assert that the extensive visitation is disruptive to K.C.'s routine, emphasizing the importance of maintaining a regular routine for a child with K.C.'s handicap. They ask this court to reverse and remand the circuit court's order with directions that it reduce Gibson's visitation with K.C. to a more reasonable amount.

KRS 405.021(1) 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. (Emphasis added).

The constitutionality of KRS 405.021 was upheld by the Supreme Court in King v. King, Ky., 828 S.W.2d 630 (1992). Nonetheless, the right to grandparent visitation is neither unrestricted nor absolute. Mustaine v. Kennedy, Ky. App., 971 S.W.2d 830 (1998). A court may award grandparent visitation only after it has conducted a hearing and entered findings of fact and conclusions of law that the best interest of the child will be served by granting visitation. King 828 S.W.2d at 632. The best interest of the child is solely determinative of whether grandparent visitation should be granted, and parental opposition alone is not a sufficient basis to deny visitation. Baker v. Perkins, Ky. App., 774 S.W.2d 129 (1989).

In the case before us, the DRC conducted a lengthy hearing before filing his report and recommendations with the court. In his report, the DRC reiterated his previous finding that visitation with Gibson was in the best interest of K.C. and stated that the visitation awarded previously to Gibson was reasonable. However, because of the reality of geographic burden created by the Chesneys' move to another county, the DRC found that it was in the best interest of K.C. to eliminate Gibson's overnight visitation on the second and fourth Wednesday of each week and to reduce the length of the visitation on certain holidays. The court adopted and incorporated the DRC's report into its order, modifying Gibson's visitations as set out in the DRC's report.

As an appellate court, we cannot disturb the findings of the trial court unless they are clearly erroneous. CR 52.01. The DRC set forth specific findings upon which he based his recommendations, correctly utilizing the best interest of the child standard. We can find no error. Based upon the facts and circumstances of this case, we do not find that the visitation schedule is unreasonable

For the foregoing reasons, we affirm the order of the Wayne Circuit Court.

GARDNER, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

DYCHE, JUDGE, DISSENTING. Although the General Assembly has enacted a statute providing for grandparent visitation, I doubt its constitutionality. King v. King, Ky.,

828 S.W.2d 630,633-5 (1992) (Lambert, J., dissenting). Even if the statute is constitutional, the present application is excessive, and unduly interferes with the child's nuclear family life. I would vacate and remand for less visitation by appellee.

BRIEF FOR APPELLANTS:

Samuel E. Begley
London, KY

BRIEF FOR APPELLEE:

Robert E. Gillum
Somerset, KY