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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000688-ME

GREGORY ALAN FUGATE — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 07-CI-00413

PATRICIA PARR — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND WINE, JUDGES; HARRIS,[1] SENIOR JUDGE.

NICKELL, JUDGE: Gregory Alan Fugate (Alan) has appealed from the March 24, 2009, judgment of the Breathitt Family Court which granted overnight visitation with his three-year-old daughter, Abigail, to Patricia Parr (Pat), the child's maternal grandmother. For the following reasons, we affirm.

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Abigail was born on April 26, 2006, to Alan and his future wife, Cassaundra Warren Fugate. Alan and Cassaundra were married on October 8, 2006, but by March of 2007 had separated and Cassaundra filed for divorce shortly thereafter. Before the divorce could be finalized, Cassaundra was killed in a motor vehicle accident in late July 2007. During the marriage, Alan provided a majority of Abigail's caregiving to accommodate Cassaundra's work schedule. Although Abigail lived with her mother, Alan continued to provide the majority of her care after the separation until Cassaundra obtained an Emergency Protective Order (EPO) against him on June 4, 2007.[2] Following Cassaundra's death, Abigail returned to live with her father.

Alan and Pat had known each other for many years and enjoyed a good relationship. On the day of Cassaundra's death, Alan voluntarily took Abigail to Pat's home to spend the night so that they might comfort one another. Shortly thereafter, Alan and Pat devised a visitation schedule that would accommodate Pat's work schedule. Abigail subsequently visited her grandmother every Tuesday and Thursday from 10:00 a.m. to 5:00 p.m. However, Alan refused to allow overnight visits with Pat, asserting he wanted his daughter home with him at night, he did not want Abigail exposed to the use of alcohol which occurred at the Parr residence, he was fearful of Abigail's safety around the Parr's dogs, and was concerned about Pat's husband's anger issues. Prior to Cassaundra's death, Abigail visited with her grandparents on a near-daily basis without complaint.

[2] The EPO was subsequently dismissed following a hearing before the Breathitt District Court.

On October 18, 2007, Pat and her husband, Thomas Parr (Tom),[3] filed a Petition for Grandparent Visitation pursuant to KRS 405.021(3). Alan objected to the petition, contending that he, as the sole living parent, had a fundamental right to make all decisions concerning the care, custody and control of his daughter. A hearing was held on August 1, 2007, following which a directed verdict was granted against Tom for lack of standing to prosecute the action. The trial court further ordered Alan and Pat to attempt to negotiate a settlement of the issues if possible, and if no settlement could be reached, the parties were ordered to submit post-trial memoranda upon which the trial court would base its decision. An amicable resolution could not be had, and on March 24, 2009, the trial court rendered a thirty-five page judgment granting Pat limited visitation including overnight stays, finding that such visitation was in Abigail's best interest after analyzing the factors set forth in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004). This appeal followed.

Alan contends the factors set forth in *Vibbert* and relied upon by the trial court are too broad and do not give adequate deference to his rights as a fit parent to determine the whereabouts of his child. He claims that under *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), his wishes as a fit parent should be controlling as to the care, custody and control of his minor daughter and since the trial court failed to give any deference or special weight to

[3] Tom and Pat married sometime in 2003. Tom is Cassaundra's step-father and Abbie's step-grandfather.

his decisions, the judgment must therefore be reversed.[4] Pat argues the trial court correctly considered all of the required factors including Alan's wishes in reaching its decision and that she proved visitation was in Abigail's best interest. Finally, she contends that even a fit parent's decision is not binding on a trial court but is merely one of the factors to be considered in making a determination. We agree with Pat.

In *Vibbert*, this Court, *en banc*, overruled the previous standard set forth in *Scott v. Scott*, 80 S.W.3d 447 (Ky. App. 2002), insofar as the previous standard required a grandparent to prove harm would come to the child if the requested visitation were denied. The Court then offered the following guidance for trial courts in grandparent visitation cases:

> We now hold that the appropriate test under KRS 405.021 is that the courts must consider a broad array of factors in determining whether the visitation is in the child's best interest, including but not limited to: the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; the wishes and preferences of the child. The grandparent seeking visitation must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child. We retain this standard of proof from *Scott,* noting that the Supreme Court has mandated its use when "the individual interests at stake in a state

[4] Although there are constitutional undertones to Alan's argument, no such challenge was leveled in the trial court nor is such an argument properly before this Court.

> proceeding are both particularly important and more substantial than mere loss of money." *Santosky v. Kramer,* 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (citation omitted). Given 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 this heightened standard of proof is required.

Vibbert, at 295.

In its well-reasoned and lengthy judgment, the trial court clearly considered all of these factors and properly concluded visitation was in Abigail's best interest. The trial court also took into consideration Alan's desires and concerns as expressed in his objection to the overnight visits. This is especially evident in light of the trial court's numerous restrictions on the visitation—that there be no alcohol consumption or use of illegal drugs, no out-of-county trips without Alan's prior consent, that Tom not be left unsupervised with Abigail nor be allowed to discipline her, Abigail was not to be taken to any church or religious services without Alan's consent, the Parr's dogs be kept fenced and not allowed to roam or have contact with Abigail without Alan's consent, and that no derogatory remarks be made about Alan during the visits. These rulings indicate the trial court's grasp of Alan's concerns and its clear intention to give deference to Alan's desires while still acting in Abigail's best interest. On appeal, this Court is not authorized "to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999) (citation omitted).

"We will not reverse a trial court's award of visitation unless it constitutes a 'manifest abuse of discretion, or [was] clearly erroneous in light of the facts and circumstances of the case.'" *Grant v. Lynn*, 268 S.W.3d 382, 390 (Ky. App. 2008) (quoting *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000)). The testimony adduced at trial was clearly sufficient to support the trial court's findings. Thus, we conclude there was no clear error or abuse of discretion and the judgment will therefore not be disturbed.

Finally, our review of the applicable statutes and precedential caselaw does not support Alan's contention that a fit parent's desires are controlling and binding on a trial court's decision whether to award grandparent visitation. Rather, such wishes and desires are but one factor to be considered under *Vibbert's* modified best interest test. *Grant*, 268 S.W.3d at 384. As we have previously held, the trial court weighed all of the required factors in making its decision and gave due deference to Alan's wishes as a fit parent. Despite Alan's argument to the contrary, his reliance on *Troxel* is misplaced. *Troxel* requires a fit parent's decision to be considered, given deference and presumed to be in the child's best interest. However, *Troxel* and *Vibbert* also set forth the proper methods for challenging a fit parent's decision in the context of grandparent visitation. Were we to adopt Alan's theory, the need for such procedures would be obviated and the purpose of KRS 405.021 would necessarily be negated. We are unwilling to make such a sweeping change in the law.

For the foregoing reasons, the judgment of the Breathitt Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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