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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002228-ME

MICHELLE WALKER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY W. BERRY, JUDGE
ACTION NO. 09-CI-503800

DONNA BLAIR

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, COMBS, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Michelle Walker (“Michelle”) appeals from the September 10, 2010, order of the Jefferson Family Court which granted grandparent visitation to Donna Blair (“Donna”). Michelle also appeals from the August 16, 2010, order denying her motion to dismiss and the November 8, 2010, order denying her

motion to alter, amend, or vacate. Having concluded that the trial court did not err in its grant of visitation, we affirm.

Michelle and Steve Blair (“Steve”) had one child in common, B.B. At the time of the trial court’s September 2010 order, B.B. was six years old. Donna is the paternal grandmother of B.B. In August of 2009, Steve Blair committed suicide. On October 26, 2009, Donna filed a petition pursuant to Kentucky Revised Statutes (KRS) 405.021(1) to establish grandparent visitation with B.B. Michelle filed a motion to dismiss and argued that it was not in B.B.’s best interest to have visitation with Donna. Michelle also argued that KRS 405.021(3) was applicable and Donna had failed to state a claim pursuant to that statute and subsection. The trial court issued an order which maintained that KRS 405.021(1) was applicable and denied Michelle’s motion to dismiss.

A hearing was held on August 18, 2010, at which time the trial court heard testimony from Michelle, Donna, and Martin Blair (“Martin”), Donna’s ex-husband and Steve’s father. On September 10, 2010, an order was entered in which the trial court found that it was in B.B.’s best interest that he have visitation with Donna. The order gave instructions for B.B.’s therapist to reinitiate contact between Donna and B.B. The order indicated that the goal of the court was for Donna to eventually have at least one biweekly full-day visit or one overnight visit per month. Further, the order provided that Donna should be given “reasonable visitation during holidays.”

Michelle filed a motion to alter, amend, or vacate the September 10, 2010, order, or, in the alternative, to amend the trial court's findings or grant a new trial. In an order entered on November 8, 2010, the trial court denied all of Michelle's motions. This appeal followed.

Our standard of review is well established. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01. Therefore, it is the function of this Court to determine whether the family court made clearly erroneous findings, applied the correct law, or abused its discretion. *See B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky.App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974).

Michelle first argues on appeal that the trial court erred when it denied her motion to dismiss. In support of this argument, Michelle maintains that Donna sought noncustodial parental visitation rights under KRS 405.021(3), that she is, therefore, required to pay child support, and that she lacks standing to file an action for grandparent's rights because she has failed to assume the financial support of B.B. We do not agree.

Our analysis begins with a look at the statute in question. KRS 405.021, which provides for grandparent visitation, reads as follows:

(1) 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. Once a grandparent has been granted visitation

rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so

(2) The action shall be brought in Circuit Court in the county in which the child resides.

(3) The 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, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support.

KRS 405.021 (emphasis added).

Michelle argues that Donna is seeking substantial and liberal visitation rights and, therefore, KRS 405.021(3) is applicable. We disagree. Donna's petition is clear that she is seeking *grandparent visitation* with B.B. At no time does Donna indicate to the trial court that she is seeking *noncustodial parental visitation* as governed by KRS 405.021(3). It is neither Michelle's right nor her duty to invoke KRS 405.021(3) upon Donna simply in hopes of receiving child support.

Visitation pursuant to KRS 405.021(3) is available to a grandparent when a parent is deceased and the grandparent desires to substantially assume the breadth of visitation normally given to a noncustodial parent. In contrast, grandparent visitation pursuant to KRS 405.021(1) is available to a grandparent regardless of the status of the child's parents but where the grandparent desires a lesser amount

of visitation. Thus, it is not the death of a parent that functions to trigger the imposition of visitation and child support pursuant to KRS 405.021(3) but the breadth of visitation sought by the grandparent. A grandparent is still a grandparent whether or not her child, as the parent of the grandchild, is deceased. A party must actually be pursuing and receive that visitation normally awarded to a noncustodial parent before it is ordered to pay child support. The trial court's order awarded visitation to Donna and stated the goal would be to eventually establish one biweekly full-day visit or one overnight visit per month. This visitation falls short of the more generous visitation expected to be granted to a noncustodial parent

Michelle next argues that the trial court erred by granting visitation rights to Donna because Donna failed to show by clear and convincing evidence that visitation is in B.B.'s best interest. Again, we disagree. As we have already indicated, the trial court has the discretion to judge the credibility of witnesses and may choose to believe or disbelieve any part of the evidence. *See K.R.L. v. P.A.C.*, 210 S.W.3d 183, 187 (Ky.App. 2006). In support of its decision to grant visitation to Donna, the trial court stated:

This court finds by clear and convincing evidence that Donna and B[B.] had an established, loving relationship prior to Steve's death. The child knew she was his grandmother and spent lots of time with her. Donna saw the child as often as many grandparents do and was present at most of the child's "milestone events," such as baptism, birthdays, etc.

The benefits to B[B.] and Donna in allowing continued contact are obvious. The Kentucky Courts have recognized the benefits of a child's contact with extended family, specifically grandparents. "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, gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life."¹ Since Steve is gone, contact with Donna will also enable B[B.] to learn about his father and paternal relatives and develop a relationship with his half-brother.

¹*Dotson v. [Rowe]*, 957 S.W.2d 269, 271 (Ky. App. 1997), citing [*King v. King*, 828 S.W.2d 630, 632 (Ky. 1992)].

The trial court found that it is in the best interest of B.B. that he have visitation with Donna, and we find no error with this conclusion. The testimony of the parties supports this conclusion. Donna testified that she had maintained a relationship with B.B. since birth. Donna babysat B.B., kept him overnight, took him to the zoo and park, and spent time with him during holidays. Donna presented photographs taken during her visits with B.B., as well as handmade drawings given to her by B.B. Overall, the evidence provided by Donna during the hearing was sufficient for the trial court to conclude that B.B. had and would continue to benefit from a relationship with Donna. Although Michelle expresses concern with B.B.'s having contact with Donna's ex-husband, Martin Blair, there is no order of visitation pertaining to him. Furthermore, the trial court specifically stated that B.B. was not to have contact with Mr. Blair. Any argument that

visitation between B.B. and Donna is not in B.B.'s best interest because of Mr. Blair is placed solely on speculation that the two will have contact. Such conjecture is insufficient to prove trial court error.

Michelle argues that the trial court's quotation of *Dotson* was inappropriate because it is no longer the current law in Kentucky. We disagree. Although there have been subsequent cases which function to further develop *Dotson*, it has not been overturned and, thus, remains the law of this Commonwealth. Accordingly, we find no error in the trial court's quotation.

For the foregoing reasons the August 16, 2010, September 10, 2010, and November 8, 2010, orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

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