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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001760-ME

ALANA BOWE — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 13-CI-00493

BARBARA BLEDSOE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: R.L. was born February 12, 2009, to Alana Bowe and Joshua Litteral. Bowe and Litteral do not live together; they share joint legal custody of their daughter with Bowe serving as the child's primary caregiver and residential custodian. Barbara Bledsoe is the child's maternal grandmother.

When R.L. was four years old, Bledsoe petitioned the Greenup Circuit Court to award her visitation with her granddaughter. Bledsoe had routinely kept the child since birth while Bowe worked, but occasionally Bowe would not allow Bledsoe to see her granddaughter. The matter was to be heard on October 23, 2013, but no hearing occurred that day. Instead, the court noted on the docket sheet the parties had reached an agreement and would submit an agreed order. However, no agreed order was ever submitted.

On May 19, 2015, the Greenup Circuit Court Clerk issued a notice to dismiss for lack of prosecution since there had been no movement in the case in two years. The matter was to be dismissed on August 12, 2015, but on that day, Bledsoe appeared and requested thirty days in which to file a pleading to avoid dismissal. Her request was granted. Also that day, Bledsoe moved for a final hearing, admitting no formal agreement had been entered, and she and Bowe had been adhering to an oral agreement that had now "fallen apart."

The matter was set for a final hearing on October 13, 2015. Bowe and Litteral both appeared—without counsel—and opposed grandparent visitation. Bledsoe appeared—with counsel—and requested visitation. Bledsoe maintained Bowe and Litteral were denying her visitation with the child due to a "squabble."

Bledsoe testified she witnessed several firsts in R.L.'s life because she kept her so much of the time. For example, when R.L. was between four and eighteen months old,

> [s]he learned how to walk. She learned how to talk. We went places together. We watched TV together. We played together. We went to visit people together. We went grocery shopping together. We went just, generally, shopping. Just whatever the day brought, that's what we did.

Bledsoe went on to identify other milestones she witnessed.

> Clipping her fingernails for the first time, taking care of her when she was first brought home, first bathing. Just, there was a lot of firsts.

In contrast, Bowe testified she had learned from R.L. that Bledsoe was telling the child Bowe did not love her and was encouraging R.L. to move in with Bledsoe. According to Bowe, Bledsoe was trying to replace her as R.L.'s mother, as evidenced by Bledsoe monopolizing milestones in the girl's life such as teaching her to ride a bicycle.

The next day, the trial court entered an order giving Bledsoe grandparent visitation the third weekend of each month and on Tuesday evenings. The trial court made the award because Bledsoe "has been an integral part of [R.L.'s] life since birth" and halting visitation now would not be in the child's best interest. The trial court elaborated on the family dynamics in its order:

> [for] the first four years of the child's life, [Bledsoe] took care of the child at least five days per week, most of the time being overnight. She was present when the child learned to walk, talk, ride a bicycle. She provided financial support, as well as food, clothing, etc.
>
> The Respondent's (sic) interrupted [Bledsoe's] ability to see the child after [Bledsoe] and Respondent, Alana Bowe, had an argument. Once that situation cooled down, [Bledsoe] was once again able to see the child

> from August 2014 through April 2015 when another argument ensued.
>
> It is obvious to this Court that the only reason that [Bledsoe] is not being allowed to see the child is because of the argument between [Bowe] and [Bledsoe]. *The standard to be utilized by this Court is whether or not [Bledsoe] has been an integral part of [R.L.'s] life that to discontinue the visitation would not be in the best interest of the child.* The Respondent, Mr. Litteral, testified that the child wanted to know why she could no longer see her grandmother. In this particular situation, the Court finds that the reasons that visitation was stopped was because of hurt feelings by the mother toward her mother (i.e. the grandmother of the child). Therefore, the COURT FINDS that it is in the best interest of the child to allow the visitation to occur and in fact would be detrimental to the child if visitation did not occur.

(Emphasis added).

On October 19, 2015, Litteral filed a letter with the Greenup Circuit Court asking that Bledsoe's visitation be modified so it did not conflict with his own time-sharing schedule as ordered by the Boyd Circuit Court on August 28, 2009—a fact not revealed during the hearing on October 13, 2015. According to the letter, Litteral has his daughter:

> [e]very Tuesday night for an all-night visit beginning at 6:00 PM. I have her the 1st, 3rd and 5th weekend of each month from 6:00 PM on Friday evening to 6:00 PM on Sunday evening. I also have [her] on alternating Thursdays from 5:00 PM to 8:00 PM (in the weeks that I do not have a weekend visit).

On October 23, 2015—as an accommodation to Litteral—Bledsoe moved the Greenup Circuit Court to alter, amend or vacate its order to allow her to visit with R.L. the second weekend of each month and on Wednesday evenings.

Bowe responded to Bledsoe's motion to alter, amend or vacate in writing, noting her parenting time with her daughter had been greatly reduced due to previously ordered visitation with the child's father, and now visitation with her grandmother. According to Bowe, she now has the child less than half the time specified in the governing custody order. She also generally argued—without any specifics—the statutory requirements for grandparent visitation had not been met and asked that the award of visitation to Bledsoe be rescinded. Additionally, Bowe asked for the opportunity to brief the legal issues in the case since she had originally appeared in a *pro se* capacity but had since retained counsel.

On October 30, 2015, the trial court granted Bledsoe's requested modifications—she would now have visitation with R.L. the second weekend of each month and every Wednesday. No briefing schedule was specified, apparently denying Bowe's request for more time to respond. Bowe now has her daughter only one weekend each month, and argues she enjoys less actual parenting time than a fit residential parent and primary caregiver would expect. Bowe has appealed.

ANALYSIS

Bowe contends the trial court applied the wrong legal standard in awarding visitation to Bledsoe and did not comment on all factors to be considered

before awarding visitation to Bledsoe. Specifically, she claims "whether or not [Bledsoe] has been an 'integral part of the child's life' is not the proper legal standard" to use. From our review of both statutory and case law, the applicable standard is stated in KRS 405.021(1) which reads in pertinent part:

> [t]he 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.

In *Vibbert v. Vibbert*, 144 S.W.3d 292, 295 (Ky. App. 2004), our Supreme Court clarified the determination of a child's "best interest" in this way:

> 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.

The above-mentioned factors still apply today. *Walker v. Blair*, 382 S.W.3d 862, 869 (Ky. 2012). In a succinct order, the trial court found grandparent visitation was in R.L.'s best interest and denying the request would be detrimental to the child, in part because her father had "testified that the child wanted to know why she could no longer see her grandmother."

Due to lack of preservation, we will not reach the purported merit of Bowe's claim. Bowe maintains her response to Bledsoe's motion to alter, amend or vacate the order entered on October 14, 2015, preserved the issue for our review. We have read the response she filed on October 29, 2015, and disagree. The gist of her argument on appeal is the court used the wrong standard in granting visitation and failed to consider all relevant statutory factors. Bowe's short, three-paragraph response to her mother's motion—excluding the introduction and conclusion—reads in its entirety:

> [Bowe] requests that the Court set aside the Order entered on October 14, 2015 with respect to grandparent visitation awarded to the Petitioner, Barbara Bledsoe; or in the alternative, that the Order be stayed and [Bowe] be given the opportunity to file a legal brief on the issue of grandparent visitation.
>
> In support thereof, [Bowe] states that she is the primary residential custodian of the minor child herein pursuant to an Agreed Order entered on or about July 2, 2010 in Boyd Circuit Court, Division I, Case No. 09-CI-00834. Both Respondents herein have joint legal custody of the minor child. The parties' Agreed Order entered on or about July 2, 2010 sets forth Joshua Litteral's timesharing with the parties' daughter. Under the October 14, 2015 Order of this Court, [Bledsoe] has been awarded one weekend per month plus one evening per week. The Respondent, Alana Bowe, who is the primary residential custodian of the child, will have the child less than one-half of the time under the terms of the custody and visitation Order held between the Respondents herein and the grandparent visitation Order entered by this Court.
>
> The Respondent, Alana Bowe, was not represented by counsel at the time of the hearing held on October 13, 2015 and she does not believe that the Petitioner, Barbara

> Bledsoe, met the statutory requirements for grandparent visitation. [Bowe] disputes that it is in the minor child's' (sic) best interest for Ms. Bledsoe to have grandparent visitation. [Bowe] would request that the Court stay the Order and allow [her] ten (10) days to file a legal brief on the issue for consideration by this Court.

At no point in this response is there a suggestion or even a hint the trial court used the wrong standard. The tenor of the response is *as a fit parent, I now have very little time with my daughter, and I need more time to file a full response*. Bowe cannot "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976), *overruled on other grounds by Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010).

Moreover, no request for a finding on an essential fact was ever filed by Bowe—another missed opportunity to call the alleged flaw to the trial court's attention. Under CR[1] 52.04,

> [a] final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

No request having been filed, we are without authority to give the requested relief.

Furthermore, we are unconvinced relief would be warranted if the matter were properly before us. We do not know what factors the trial court did or did not consider. The court may have considered all eight factors mentioned in *Vibbert,* but simply chose not to comment on all of them in its order. We will

[1] Kentucky Rules of Civil Procedure.

never know the full extent of the trial court's rationale—because Bowe did not move for additional findings.

Additionally, we are unaware of any requirement that the court consider *and comment upon* every relevant factor. *Vibbert* merely requires *consideration* of "a broad array of factors," only eight of which are enumerated in a list our Supreme Court has acknowledged is not exhaustive.

We have read the transcript of the hearing held on October 13, 2015, at which Bledsoe, Bowe and Litteral testified. Based on the testimony the parties chose to put before the trial court, the grant of grandparent visitation is supported by the proof—thus, there was no abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Had Bowe and Litteral introduced other evidence, the result may have been different, but alas, they did not offer contrary proof and we cannot say the trial court abused its discretion based upon the testimony it heard.

Bledsoe has been a constant in R.L.'s young life. According to Litteral, even the child questioned why she could no longer see her grandmother. For the child's benefit, all parties should seek to create a harmonious atmosphere.

For the reasons stated above, the orders entered by the Greenup Circuit Court, Family Division, on October 14, 2015, and on October 30, 2015, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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