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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180912

K.J.

v.

S.B.

**Appeal from Jefferson Circuit Court
(CV-17-330.80)**

DONALDSON, Judge.

K.J. ("the father") appeals from a judgment of the Jefferson Circuit Court ("the trial court") granting S.B. ("the grandmother") visitation with K.H.J. ("the child"), pursuant to § 30-3-4.2, Ala. Code 1975 ("the Grandparent

2180912

Visitation Act"). The Grandparent Visitation Act requires clear and convincing evidence of certain elements to establish that a grandparent's visitation is in the best interest of a child in rebuttal of the presumption in favor of a fit parent's decision-making regarding visitation. The trial court was not presented with any evidence regarding one of the elements; therefore, the judgment must be reversed and the cause remanded.

Facts and Procedural History

The following is a recitation of the facts and procedural history pertinent to this appeal. The father and A.N.J. ("the mother") were unmarried parents of the child, who was born in January 2011. The mother, who had sole custody of the child, died on March 17, 2014. The mother was the grandmother's daughter.

In March 2014, the grandmother filed a petition in the Jefferson Juvenile Court ("the juvenile court") alleging that the child was dependent. In May 2014, the juvenile court entered a pendente lite order granting the father custody of the child and granting the grandmother visitation with the child. On May 4, 2015, the juvenile court entered a judgment

2180912

finding that the child was not dependent. In the judgment, the juvenile court granted sole custody of the child to the father and his wife, L.J., and granted visitation to the grandmother. After the grandmother appealed and the father cross-appealed the judgment, this court held that the record was inadequate for our review and transferred the grandmother's appeal to the Jefferson Circuit Court, Bessemer Division ("the circuit court"). S.J. v. K.J., 206 So. 3d 641 (Ala. Civ. App. 2016).¹ In February 2017, the grandmother filed an amended petition in the circuit court. In August 2017, the grandmother filed a motion in the circuit court to voluntarily dismiss the dependency proceedings. On August 28, 2017, the circuit court entered an order granting the grandmother's motion to dismiss.

On September 7, 2017, the grandmother filed a complaint against the father in the trial court seeking visitation with the child pursuant to the Grandparent Visitation Act. On September 4, 2018, the trial court conducted a trial during which the father, the father's wife, and the grandmother testified. The grandmother testified that she had lived with the mother and the child before the mother died. According to

¹Apparently, at some point, the grandmother's last name changed.

2180912

the grandmother, the child has cousins, aunts, and uncles on the mother's side of the family. The father testified that the child has nine siblings on his side of the family and that the siblings, who vary in age, visit the father but do not live in his residence with his wife and the child.

The grandmother testified that, during the dependency proceedings, she exercised her court-ordered visitation on the second and fourth weekend of each month from May 2014 to January 2017 and that she had weekend visitations in May 2017, a 10-day visitation in June and July 2017, a supervised visitation in December 2017, and a brief visitation the weekend before the trial. The grandmother testified that she was late in bringing back the child only once. The father testified regarding a few incidents with the grandmother's visitations. The father testified that the child was upset after some visitations with the grandmother because, he alleged, her family had said bad things about the father and the grandmother had told the child that she was taking him from the father to live with her. The grandmother denied saying anything negative about the father to the child but

2180912

admitted that she might have told him that she had wanted full rights and custody.

The father testified that he and the grandmother have an adversarial relationship, which he described as "bad blood." According to the father, the poor relationship with the grandmother began after the mother died. The father testified that the grandmother wanted to fill the role of parent for the child. The father admitted that, in 2016, he filed a criminal-harassment charge against the grandmother; the grandmother was found not guilty after a trial. The father claimed that sensitive information about him was spread in social media during the dependency proceedings.

According to the grandmother, she and the father have never had the opportunity to have a relationship. The grandmother testified that she did not know the father before the mother's death and that, a few days after the mother's death, the father telephoned her and said he was taking the child even if he had to bring law-enforcement officers with him. The grandmother testified that she and the father have had a difference of opinion about what would be best for the child since the mother died. According to the grandmother, she

2180912

has shown a willingness to "hit the reset button" with her relationship with the father, but, she says, he is not willing to do the same.

L.J. testified that she had been married to the father for six years and three months. According to L.J., the grandmother and the father have never had a good relationship because both are still grieving over the death of the mother. L.J. testified that she has no problem with the grandmother's seeing the child, and that one weekend a month of visitation would be feasible, but that she did not want a court order dictating when or what to do with the child. The father testified as follows:

"Q. Yeah. Okay. And you're not opposed to [the grandmother's] having visitation, are you? You just want a limited visitation; isn't that right?

"A. I don't mind her having visitation.

"Q. Okay. But what you're concerned about is how much visitation?

"A. Correct.

"Q. Is that right?

"A. Yes.

"Q. And we have discussed this over the period of time trying to work something out and we just couldn't come to an agreement?

2180912

"A. Correct.

"Q. And that's why we're here today to let the judge decide?

"A. Yes.

"Q. So, you're not opposed to visitation. You're just asking the court to limit the visitation; is that right?

"A. Yes. Yes.

"Q. Okay. So, what in your opinion -- considering all the facts here, what in your opinion would be reasonable?

". . . .

"A. A weekend a month.

"Q. Why just one? She was getting two weekends a month for two and a half years. Why one weekend a month now?

"A. Due to the circumstances of what she wants and he has two parents in the household, I think that's suitable for a grandparent. My grandparents don't even see him that much.

"Q. But that's by their choice, though, isn't it?

"A. It should be by my choice."

The father further clarified that he was not opposed to the grandmother's having visitation but that he did not want her to receive the amount of visitation she was seeking. The father testified that he would like the child to have some

2180912

communication, and a relationship, with the grandmother, but not by court order.

On September 10, 2018, the trial court entered a judgment granting the grandmother visitation rights with the child, without stating any findings of fact. The father appealed the judgment to this court. In K.J. v. S.B., [Ms. 2180098, June 28, 2019] ___ So. 3d ___, ___ (Ala. Civ. App. 2019), we reversed the judgment and remanded the cause for the trial court to "'make specific written findings of fact in support of its rulings'" as required in § 30-3-4.2(f).

On July 17, 2019, the trial court entered another judgment granting the grandmother visitation rights with the child, stating its factual findings in the case. On August 1, 2019, the trial court entered an order stating that it had conducted a hearing on the father's "Motion to Reconsider" and the grandmother's response to the motion.² In the order, the trial court denied the "Motion to Reconsider."

The father filed a timely notice of appeal to this court. We have jurisdiction pursuant to § 12-3-10, Ala. Code 1975.

²The father's "Motion to Reconsider" and the grandmother's response are not included in the record before this court.

Discussion

The Alabama Comment to the Grandparent Visitation Act states:

"Under common law, grandparents did not have any legal rights to court-ordered visitation with their grandchildren over the objection of the parents of the grandchild.

"Unlike parents, grandparents had no rights in regard to their grandchildren at common law. "Under common law principles, grandparents lacked any legal right to visitation and communication with the grandchildren if such visitation was forbidden by the parents." Ex parte Bronstein, 434 So. 2d 780, 782 (Ala. 1983). Therefore, the rights of grandparents to visitation with their grandchildren exist only as created by the Act; they are purely statutory.' Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011)."

"While the Legislature clearly has the authority to alter or repeal the common law, it must do so in a manner consistent with the U.S. Constitution and Alabama Constitution. See Ala. Code § 1-3-1 (1975); Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011).

"In Troxel, the court determined that 'the court must accord at least some special weight to the parent's own determination' in decisions concerning grandparent visitation. Troxel v. Granville, 530 U.S. 57, 71, 120 S.Ct. 2054, 2062, 147 L.Ed.2d 49, 59 (2000). In E.R.G., the court stated, 'In order for a grandparent-visitation statute to pass constitutional muster, it must recognize the fundamental presumption in favor of the rights of the parents.' Ex parte E.R.G., 73 So. 3d 634, 646 (Ala. 2011).

2180912

"....

"... Alabama chose to further protect the fundamental rights of parents to make decisions concerning the care, custody, and control of their children by implementing the enhanced standard of clear and convincing evidence"

Section 30-3-4.2(c) provides:

"(1) There is a rebuttable presumption that a fit parent's decision to deny or limit visitation to the petitioner is in the best interest of the child.

"(2) To rebut the presumption, the petitioner shall prove by clear and convincing evidence, both of the following:

"a. The petitioner has established a significant and viable relationship with the child for whom he or she is requesting visitation.

"b. Visitation with the petitioner is in the best interest of the child."

Section 30-3-4.2(e) provides:

"To establish that visitation with the petitioner is in the best interest of the child, the petitioner shall prove by clear and convincing evidence all of the following:

"(1) The petitioner has the capacity to give the child love, affection, and guidance.

"(2) The loss of an opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child.

2180912

"(3) The petitioner is willing to cooperate with the parent or parents if visitation with the child is allowed."

Section 30-3-4.2(a)(2) defines "harm" as "[a] finding by the court, by clear and convincing evidence, that without court-ordered visitation by the grandparent, the child's emotional, mental, or physical well-being has been, could reasonably be, or would be jeopardized." "'Clear and convincing evidence' is '[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.'" J.W.M. v. Cleburne Cty. Dep't of Human Res., 980 So. 2d 432, 434 (Ala. Civ. App. 2007) (quoting Ex parte T.V., 971 So. 2d 1, 9 (Ala. 2007), quoting in turn L.M. v. D.D.F., 840 So. 2d 171, 179 (Ala. Civ. App. 2002), quoting in turn § 6-11-20(b), Ala. Code 1975).

The father argues that the requirements in § 30-3-4.2(e) were not met with clear and convincing evidence. Section 30-3-4.2(e)(2) requires proof that the loss of a significant and viable relationship with the grandmother would harm the child. "[P]roof that a grandparent has a close, beneficial

2180912

relationship with a child is not equivalent to proof that the child will suffer harm if that relationship is limited or terminated,' and 'evidence of a beneficial relationship alone fails to rebut the presumption in favor of a fit parent's decision.'" Ex parte McElrath, 258 So. 3d 364, 369 (Ala. Civ. App. 2018) (quoting Ex parte Gentry, 238 So. 3d 66, 82 (Ala. Civ. App. 2017)). Accordingly, evidence of a beneficial relationship between the grandmother and the child was not enough to satisfy § 30-3-4.2(e)(2), and the record lacks any evidence to show that the child would suffer harm without a relationship with the grandmother. The legislature has mandated that visitation with a grandparent cannot be imposed over the objection of a custodial parent without clear and convincing proof of all the factors listed in § 30-3-4.2(e). Therefore, we reverse the judgment granting the grandmother visitation with the child and remand the cause for proceedings consistent with this opinion.³

³We pretermit discussion of the father's other arguments -- specifically, that the requirements in § 30-3-4.2(e)(1) and (3) were not met and that the grandmother violated § 30-3-4.2(g)(1), providing, in relevant part, that "[a] grandparent ... may not file a petition seeking an order for visitation more than once every 24 months absent a showing of good cause."

2180912

REVERSED AND REMANDED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ.,
concur.