

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002811-MR

STACEY GREGORY

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 99-CI-00115

MARK GREGORY AND
GAIL ROBINSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, KNOPF, AND McANULTY, JUDGES.

BUCKINGHAM, JUDGE: Appellant Stacy¹ Ellen Gregory appeals from an order of the Bullitt Circuit Court granting visitation with her child to the child's grandmother, Appellee Gayle² Robinson. We affirm.

Stacy Ellen Gregory and Mark Allen Gregory were married on February 21, 1997. On November 24, 1997, Stacy gave birth to their only child, a daughter. Stacy filed a petition to dissolve

¹ Although the appellant's name in the notice of appeal is spelled "Stacey", the correct spelling is "Stacy."

² Although the appellee's name in the notice of appeal is spelled "Gail", the correct spelling is "Gayle."

her marriage from Mark in the Bullitt Circuit Court on February 19, 1999. On May 26, 1999, the court entered a decree dissolving the marriage and awarding custody of the child to Stacy.

In November 1999, Mark moved the court to set a reasonable child visitation schedule so that he could visit with his daughter. On the same day, Mark's mother, Gayle Robinson filed a motion for leave to file an intervening complaint. Therein, she sought to establish her grandparent visitation rights pursuant to KRS³ 405.021. Robinson's motion to intervene was granted, and the matter was thereafter referred to a domestic relations commissioner (DRC) for hearing.

On March 17, 2000, the DRC entered a report and found that:

Having heard and considered all the evidence, the Commissioner believes that both Mark and Gayle have a genuine love for [the child], and in the event it is shown that they do not pose a danger to the child, it is in the child's best interest to have an ongoing relationship with both. However, given the extremely serious incidents of violence in Mark's past, and the seriousness of the allegations against Gayle, the Commissioner should err on the side of caution in making sure that the child is protected.

The DRC then ordered Mark and Gayle to undergo psychological evaluations prior to any decision being made on unsupervised visitation rights. Meanwhile, Mark was granted supervised visitation with the child, and Gayle was allowed to see the child during Mark's visitation.

³ Kentucky Revised Statutes.

On August 3, 2000, a psychological evaluation report concerning Gayle was filed with the court by a licensed clinical psychologist. The report stated that there did not appear to be any reason Gayle should be denied visitation with her granddaughter. On September 21, 2000, the DRC filed a second report. In that report, the DRC recommended that Gayle be granted unsupervised visitation with the child on the fourth Saturday of each month from 9:00 a.m. until 7:00 p.m. He further recommended that Gayle not permit the child to have unsupervised contact with Mark. The trial judge followed the DRC's recommendations and entered an order on December 1, 2000, granting Gayle visitation with the child. This appeal followed.

Stacy raises two arguments on appeal. First, she contends that Kentucky's grandparent visitation statute, KRS 405.021, is unconstitutional in light of a recent U.S. Supreme Court ruling. Stacy extends her constitutional challenge further by arguing that the statute is void as a matter of public policy because it interferes with the custodial parent's constitutional rights. Second, she maintains that the trial court abused its discretion in granting Gayle grandparent visitation. For the below stated reasons, we reject both arguments.

First, Stacy argues that KRS 405.021 is unconstitutional in light of a recent decision of the U.S. Supreme Court in Troxel v. Granville, 120 S.Ct. 2054 (2000). KRS 405.021 provides in relevant part that "[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.” KRS 405.021(1).⁴

We will not reach the merits of Stacy’s arguments on this issue because she failed to give notice to the Attorney General that she was challenging the constitutionality of the statute. Our rules of procedure require that “[w]hen the constitutionality of an act of the General Assembly affecting the public interest is drawn into question in any action, the movant shall serve a copy of the pleading, motion or other paper first raising the challenge upon the Attorney-General.” CR⁵ 24.03. Likewise, KRS 418.075 requires the Attorney General to be served with a copy of the petition challenging the constitutional validity of a statute so that he may be heard on this issue. KRS 418.075(1).

We have examined the record and determine that the Attorney General was never notified by Stacy of her constitutional challenge to KRS 405.021. The first mention of the Troxel case is in the DRC’s report of September 21, 2000. Therein, the DRC notes Stacy’s argument that grandparent visitation is barred by the Troxel case.⁶ The next mention of the Troxel case and the constitutional validity of KRS 405.021 is

⁴ The Troxel case considered the constitutionality of a broad visitation statute enacted by the state of Washington. The Kentucky grandparent visitation statute, which is much narrower in scope, was found to be constitutional by the Kentucky Supreme Court in King v. King, Ky., 828 S.W.2d 630, 632 (1992).

⁵ Kentucky Rules of Civil Procedure.

⁶ The DRC also concluded that the Troxel case did not preclude the court from granting grandparent visitation.

found in the record in Stacy's exceptions to the DRC's report. There is no indication that the exceptions and motion filed by Stacy were served on the Attorney General. Because the Attorney General was not given notice, we may not consider the issue of the constitutionality of the statute. See Adventist Health Systems v. Trude, Ky., 880 S.W.2d 539, 542 (1994), and Maney v. Mary Chiles Hosp., Ky., 785 S.W.2d 480, 482 (1990).

Stacy also maintains that the statute is void as a matter of public policy. She asserts in this regard that the statute interferes with the custodial parent's constitutional rights. Again, because this argument is a constitutional challenge to the validity of the statute, we may not consider it due to the failure to give notice to the Attorney General. Trude, supra; Maney, supra.

Stacy's second argument is that the trial court abused its discretion in granting grandparent visitation to Gayle. In her brief, Stacy makes various allegations against Gayle, including allegations that Gayle has been a child abuser. However, Stacy did not cite to the record so that we could review the evidence to support her allegations.

When Stacy designated the trial court record to this court pursuant to CR 75.01, she designated "all pleadings and exhibits at trial but does not include any mechanically recorded testimony of the proceedings[.]" Therefore, we do not have before us a record of the testimony of any of the parties or witnesses who testified before the DRC or trial court. CR 76.12(4)(c)(iv) requires that the argument portion of a brief

contain "ample supportive references to the record." See also CR 76.12(4)(c)(iii).

The allegations made by Stacy in her brief are serious. Gayle asserts in her brief that Stacy offered "no objective proof of abuse" into the record to support the accusations. In Stacy's reply brief, Stacy did not take the opportunity to cite to evidence in the record. Rather, she merely asserted that Gayle had not denied the allegations in her brief. While this failure to cite to the record would be sufficient for this court to strike Stacy's brief,⁷ we find this an extreme remedy and so turn to the merits of her argument that the court abused its discretion in granting Gayle visitation with her granddaughter.

This court noted in Colonial Life & Acc. Inc. Co. v. Weartz, Ky. App., 638 S.W.2d 891 (1982), that "we are required to assume that any evidence in the record not before us supports the findings of the lower court[.]" Id. at 893. Thus, we assume that the testimony given in this case, which has not been made a part of the record for our review, supports the findings of the trial court that it would be in the best interest of the child for Gayle to have grandparent visitation. Therefore, we must conclude that the trial court did not abuse its discretion in this regard.

The order of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

⁷ See CR 76.12(8)(a).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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