

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001193-MR

KATHERINE BLEVINS

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 93-CI-00367

JEFFREY CECIL; STEPHEN CECIL
and BRENDA CECIL

APPELLEES

OPINION
AFFIRMING IN PART;
REVERSING IN PART and REMANDING
** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND MILLER, JUDGES.

EMBERTON, CHIEF JUDGE: Katherine Dillard (now Blevins) and Jeffrey Cecil are the natural parents of Josh, born on September 12, 1992. Stephen and Brenda Cecil are Josh's grandparents. Katherine appeals from a judgment granting Jeff's request for visitation with Josh and refusing to reconsider its prior grandparent visitation order.

Jeff is a diagnosed schizophrenic who has a history of drug use, violent behavior, and numerous hospitalizations. Without detailing the entire history of this case, it is clear that Jeff has had continual mental instability and Katherine has

fought vigorously to deny him visitation with Josh. Precipitated in part because of Katherine's marriage and move to Minnesota, in August 1996, the court, following a hearing, awarded visitation to Jeff and Josh's grandparents on specified dates including a visit in Kentucky from 6:00 p.m., on December 25 until December 30 of each year and for ten days during the summer months.

In the fall of 1997, Jeff's mental condition deteriorated and he had violent episodes including threatening Katherine on December 22, 1997. The trial court, after hearing evidence and considering the report of Roland Gabbert, LCSW, modified the August visitation by entry of an interlocutory order suspending Jeff's visitation privileges. It further held that future visitations by Jeff under the August 1996, order "be dependent upon Jeff seeking and receiving psychiatric treatment and medication."

In August 2000, Jeff filed a motion seeking to have his visitation privilege restored to the schedule set forth in the August 1996 order. The evidence reveals that following the December 1997 order, Jeff's mental health continued to be poor and in 1998, he was hospitalized at the Hardin Memorial Hospital and in a Chicago hospital for a stay of unknown duration. Mental inquest proceedings were conducted in 1998 and 1999. From 1996 through 1999 Jeff's behavior continued to be erratic and his mental health condition showed little improvement. In May 1999, after Jeff assaulted his father and caused damage to his father's home, he was committed to Central State Hospital where he

remained until August 5, 1999. After his discharge, Jeff continued outpatient treatment and medication.

Katherine alleges that the standard of proof should have been that applicable to a modification of visitation, the best interest test.¹ Instead, the trial court held that under Smith v. Smith,² Katherine had the burden of persuading the court that visitation by Jeff would seriously endanger Josh's mental, moral, or emotional health, and only then would the best interests test apply. It is Katherine's position that Jeff seeks to modify the existing visitation order, specifically the December 22, 1997 order, suspending Jeff's visitation rights. We disagree.

Jeff was granted visitation privileges on August 16, 1996. Although his visitation was suspended by the December 1997 order, his rights were not terminated nor did the court find there was serious endangerment to the child. As noted by the court in Smith:

In this jurisdiction the non-custodial parent cannot be denied reasonable visitation with his or her child[ren] unless there has been a finding that visitation will seriously endanger the child. The non-custodial parent is not required to show visitation is in the child's best interest and the appellee's argument that Robert failed in his burden of proof is specious. Clearly the statute has created the presumption that visitation is in the child's best interest for the obvious reason that a child needs and deserves the affection and companionship of both its parents. The burden of proving that visitation would harm the child is on the one

¹ Kentucky Revised Statutes 403.320.

² Ky. App., 869 S.W.2d 55 (1994).

who would deny visitation.³ (Citations omitted).

The order only suspended Jeff's rights and specifically stated that visitation would resume if he successfully received medical treatment. Essentially, the visitation issue was deferred until Jeff was treated for his mental condition. The trial court correctly applied the law and placed the burden on Katherine who sought to deny Jeff visitation.

Jeff has clearly had a great amount of psychological problems and has, in the past, not been a parental figure for Josh. However, his psychological problems are a diagnosed medical condition which this court and the medical community recognizes is amenable to treatment. The court found that Jeff has sought and continues to receive medical treatment and was not capable of exercising his visitation rights. After years of litigation in this case, being well-acquainted with the parties and Jeff's behavior, the trial court reasoned that:

Jeff's prior visitation privileges have been directly tied to control of his schizophrenic mental condition and, conversely, they have been suspended when that condition manifested itself through aberrant behavior and ideations. Control is evident when Jeff follows his prescribed medication and treatment regimen and abstains from use of marijuana and alcohol. At the time of the February 16, 2001, hearing, both Jeff and his father testified that Jeff has been doing well since his discharge from Central State Hospital on August 5, 1999, primarily because he has been faithful in taking his medication and attending monthly counseling at Communicare. Jeff testified that he had not consumed alcohol or used marijuana since April of 2000.

³ 869 S.W.2d at 56.

Jeff's therapist, Ms. Harrison, testified that his illness is very treatable; that Jeff has now accepted that fact of his illness, and that he must regularly take medication to control it; that he has been cooperative and regular in his attendance at Communicare counseling; and that reinstatement of Jeff's visitation privileges with Josh would now be appropriate.

Particularly, in this case where the court has had prolonged contact with the parties and the facts, we will not disturb the trial court's findings.

Katherine not only seeks to deny Jeff visitation rights but also terminate Brenda and Stephen's visitation. Katherine relies on Troxel v. Granville,⁴ which analyzed a Washington state grandparent visitation statute similar to this state's and ultimately held that the application of the statute to the facts presented was an unconstitutional deprivation of the right of an otherwise fit parent to raise her child.⁵ The question we are confronted with is what, if any, impact Troxel has on our grandparent visitation statute and on those decisions made prior to the Troxel decision.

The statute in Troxel and KRS 405.021 are similar in language with both using the best interests of the child standard to grant or deny visitation. The best interests test alone is constitutionally deficient to overcome the parents' constitutional right to rear their child. In absence of a showing of harm to the child by a denial of visitation, there is

⁴ 520 U.S. 57, 147 L.Ed.2d 49, 120 S.Ct. 2054 (2000).

⁵ Id. at 73. 147 L.Ed.2d at 61, 120 S.Ct. at 2064.

no compelling state interest for intervention into the affairs of a family.⁶

It is a basic tenet of child custody law that custody and visitation issues can be revisited at any time. Therefore, it is clear that where a parent moves to modify a pre-Troxel grandparent visitation order, the court is now required to resolve the issue of whether the termination of visitation would harm the child. The trial court did not make a finding in this case and therefore, we are required to remand this case for further findings. However, the grandparents have had independent visitation privileges since 1994 and, the evidence reveals, have established a familial bond with Josh. This fact is an appropriate consideration when reconsidering the visitation order.

Although we remand this case in order for the court to comply with the mandate of Troxel, we agree with the trial court that its decision has little practical significance. Brenda and Stephen are, under Jeff's visitation order, to be present at all visitations between Josh and Jeff. This is a separate order unrelated to Brenda and Stephen's independent visitation rights. Certainly, if Jeff is to have visitation rights, given his mental history, his time with Josh should be supervised and Jeff's mental health monitored. Jeff's parents, with whom he resides, who have cared for him during his illness and who have continued

⁶ King v. King, Ky., 828 S.W.2d 630, 634 (1992) (Lambert, Chief Justice dissenting).

contact with Josh, are the most likely to provide that supervision.

Finally, we find no error in the trial court's refusal to consider the free lodging and food Jeff receives from his parents in calculating Jeff's gross income. There is no provision for including such gratuities in KRS 403.212 and we decline to imply that the legislature intended there to be.

The judgment of the Nelson Circuit Court is affirmed except that the court is ordered to reconsider the issue of grandparent visitation to determine whether the denial of visitation at this time would be harmful to Josh.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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