

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001612-MR

SHELLY FRANCIS PORTER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CI-00637

HERBERT ALLAN LEE ADAMS
and CAROL JUNE DALE

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, HUDDLESTON, and JOHNSON, Judges.

BUCKINGHAM, JUDGE: Shelly Francis Porter appeals from an order of the Fayette Circuit Court increasing grandparent visitation to Carol June Dale. We vacate and remand.

Porter and Herbert Allan Adams are the natural parents of a male child born on October 19, 1998. Porter and Adams were not married, but Adams was adjudged by the Scott District Court to be the natural father of the child. Dale is Adams' mother and the child's grandmother.

In February 2001, Adams and Dale filed a verified petition for visitation in the Fayette Circuit Court. They

requested a definite visitation schedule in their petition, and they also requested that Adams be awarded joint custody of the child. Porter filed a *pro se* response and represented herself before the circuit court.

Porter and Dale, acting on behalf of herself and Adams, participated in mediation in order to work out the details of visitation and custody. A mediation agreement was entered which allowed Adams visitation on alternate weekends as well as holiday visitation. As for the summer vacation period, Adams was awarded one week visitation for each of two months of the summer, and Dale was awarded one week visitation for one month during that time. Further, the agreement provided that Porter and Adams would have joint custody of the child with Porter being the primary residential parent.

In June 2001, Adams and Dale filed a Motion for Definite Time-Sharing. Therein, they requested the court to set definite dates for the summer visitation, and Dale requested "definite time-sharing with said minor child the first seven (7) days of each month." Porter filed a *pro se* response, and the circuit court heard the motion at its motion hour on June 22, 2001.

Concerning Dale's grandparent visitation request, the court awarded her visitation with the child on the first seven days of each month throughout the year. The court entered the order granting Dale's motion without taking evidence concerning the best interests of the child, and the court made no findings of fact or conclusions that additional grandparent visitation

would be in the best interests of the child. This appeal by Porter followed.

Porter first argues that the applicable statute concerning grandparent visitation violates her due process rights by infringing upon the fundamental rights of parents to make child-rearing decisions. We disagree. In King v. King, Ky., 828 S.W.2d 630 (1992), the Kentucky Supreme Court upheld the constitutionality of KRS¹ 405.021, the grandparent visitation statute. Id. at 632.

KRS 405.021(1) provides in pertinent part that "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." Our supreme court in the King case stated that grandparent visitation cannot be granted until after a circuit court action is filed, a hearing is conducted, and findings of fact and conclusions of law are entered finding that the best interests of the child will be served by granting such visitation. King, 828 S.W.2d at 632.

In the instant case, the only "hearing" held by the circuit court was conducted during the court's motion hour. Porter was examined under oath, but Dale was allowed to make unsworn statements. Neither party was given the right to cross-examine the other, and no witnesses were presented. Further, the court did not make any findings of fact or enter any conclusions of law, and specifically, it did not determine that visitation

¹ Kentucky Revised Statutes.

was in the best interests of the child. Therefore, due to the failure to grant a meaningful hearing on this matter and the failure to enter findings of fact and conclusions of law concerning the best interests of the child, we must vacate and remand the circuit court's order for further proceedings.

Furthermore, Porter has argued that the application of the grandparent visitation statute in this case was unconstitutional because the trial court failed to accord any special weight or deference to her decision, as a fit custodial parent, to deny further grandparent visitation. In support of her argument, she cites Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). A panel of this court has now addressed the application of the Troxel case to grandparent visitation issues in Kentucky. See Scott v. Scott, 2001-CA-000447-MR (rendered June 21, 2002, to be published).

This court in the Scott case held that "grandparent visitation may only be granted over the objection of an otherwise fit custodial parent if it is shown by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparent." The court further held that "[t]o apply KRS 405.021 without a required showing of harm creates precisely the result that was ruled unconstitutional by the U.S. Supreme Court in Troxel." This panel agrees with the panel of the court in the Scott case.

Therefore, we vacate the order of the circuit court and remand the matter for further proceedings. On remand, the circuit court must conduct a hearing and enter findings of fact

and conclusions of law concerning the best interests of the child. Furthermore, the circuit court must give presumptive weight to the wishes of Porter and require Dale to show by clear and convincing evidence that harm to her grandchild will result from a deprivation of the visitation she seeks.

ALL CONCUR.

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