RENDERED: MAY 2, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002334-MR

KRISTIN NICOLE BROWNE — APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID JERNIGAN, JUDGE
ACTION NO. 01-CI-00043

ROXANA COTTRELL
AUBREY C. GOODWIN — APPELLEES

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Kentucky Revised Statute 405.021 authorizes the circuit court to "grant reasonable visitation rights to either the paternal or maternal grandparents of a child . . . if it determines that it is in the best interest of the child to do so." Pursuant to this statute, the Muhlenberg Circuit Court ordered that Roxana Cottrell be granted visitation with her grandson, K.T.G.,[1] Kristin Nicole Browne, K.T.G.'s mother,

[1] The judgment granting visitation was entered August 31, 2001, and was made final and appealable by order entered September 28,

opposed the visitation and now appeals from the circuit court's order. She maintains that the court's application of KRS 405.021 violated her fundamental right under the due process clause of the federal constitution to raise her son as she sees fit. We agree and so must vacate the visitation order and remand.

As noted by this Court in Scott v. Scott,[2] the United States Supreme Court has recently addressed this issue. In Troxel v. Granville,[3] a case in which grandparents had been awarded visitation under the Washington nonparental visitation statute, a plurality of the Supreme Court recognized that the due process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. The Washington visitation order violated that right, the plurality held, because the trial court had failed to give "at least some special weight to the parent's own determination" of what was best for the child.[4] On the contrary,

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2001. Roxana Cottrell is the paternal grandmother. Her son, Aubrey C. Goodwin, is a named party but has no interest in this appeal.

[2] Ky. App., 80 S.W.3d 447 (2002).

[3] 530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000).

[4] 530 U.S. at 70, 147 L. Ed. 2d at 59.

> it gave no special weight at all to Granville's [the mother's] determination of her daughters' best interests. More importantly, it appears that the Superior Court applied exactly the opposite presumption....
>
> The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be "impacted adversely." In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters....
>
> The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.... In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters.[5]

In this case, too, the trial court failed to explain why the fit parent's decision to limit visitation should be overborne. It noted only that, in its estimation, visitation with the grandmother would not be harmful. Under Troxel and Scott, this is not enough. Unless "it is shown by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparents," the parent's decision is entitled to deference as presumptively for the

[5] 530 U.S. at 69-70, 147 L. Ed. 2d at 58-59 (citations omitted).

child's good.[6] Because the trial court did not apply this standard of deference for a fit parent's wishes, it must reconsider the grandmother's petition.

Accordingly, we vacate the trial court's orders of August 31 and September 28, 2001, and remand so that the court may reconsider Cottrell's petition for visitation pursuant to the correct legal standard.

ALL CONCUR.

BRIEF FOR APPELLANT:

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No brief for appellee.

[6] Scott v. Scott, 80 S.W.3d at 451.