

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001162-ME

WILLIAM ALEXANDER

APPELLANT

v. APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CI-00401

OSIE CARRIER

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: This is an appeal from an order granting appellee's motion for grandparent visitation. We believe the trial court properly found it was in the best interest of the minor child to have visitation with appellee. We further adjudge that the trial court was not collaterally estopped from allowing contact between the child and other family members during appellee's visitation. Hence, we affirm.

The child at issue, D.B., was born in 1992 to Laura Bartley. Because of Laura Bartley's chronic drug abuse, D.B.'s

primary caregiver during her first nine years was her mother's sister, Joan Jackson. The evidence was undisputed that during those years, when Jackson worked, Jackson's mother (the child's maternal grandmother), Osie Carrier, took care of D.B.

According to appellant, William Alexander, it was not until the year 2000 that he learned that he was the father of D.B. In 2000, when the Cabinet for Families and Children sought repayment by Alexander of child support for D.B., Alexander requested a paternity test. The test confirmed that he was indeed the father of D.B. Subsequently, Alexander was awarded custody of D.B. D.B. has lived exclusively with Alexander, his wife, and their four children since November 8, 2001.

After obtaining custody of D.B., Alexander refused to allow Jackson unsupervised visitation with the child. Thereupon, Jackson filed a motion in the Fayette Circuit Court for unsupervised visitation with D.B. and for visitation between D.B. and her younger half-brother who grew up with D.B. and of whom Jackson has custody. The Fayette Circuit Court denied the motion for visitation, reasoning that Alexander, as the legal custodian, had the exclusive right to determine visitation issues regarding D.B. unless he was proven to be unfit. Jackson appealed the ruling to this Court. On July 23, 2004, this Court affirmed the ruling denying visitation with Jackson, but

remanded the action for a determination of whether visitation between D.B. and her younger brother was warranted.

While the appeal in Jackson's motion for visitation with D.B. was pending in this Court, D.B.'s maternal grandmother, Osie Carrier, filed a motion in the Rowan Circuit Court for visitation with D.B. Alexander had initially allowed Osie supervised visitation with D.B. at his house, but after Jackson filed her motion for visitation, he refused to allow Osie to see D.B. A hearing on the matter was held on May 28, 2004. At the hearing, Osie Carrier, Joan Jackson, D.B.'s half-brother, Jeremy, and D.B.'s half-sister, Jessica, testified for Osie. Alexander and D.B.'s therapist testified for Alexander. The court also insisted on interviewing D.B. in chambers before making a final determination.

On June 9, 2004, the court entered its order granting Osie visitation with D.B. one Saturday a month from 9:00 a.m. to 5:00 p.m. The visitation was ordered to take place at Osie's home. Because of Osie's health problems (diabetes and vision loss), transportation of D.B. was to be provided by Osie's family. The order specifically provided that all family members, with the exception of D.B.'s mother, were allowed to be present during the visitation and that D.B. was allowed to leave Osie's home with family members during the visitation for short trips to go out to eat or to the store. The order also stated

that no family member shall use drugs or alcohol around D.B. at anytime during the visitation. This appeal by Alexander followed.

KRS 405.021(1) provides:

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. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.

Alexander first argues that the trial court erred in not recognizing that Alexander has the right to determine who may visit with his daughter. While it is true that it is a fundamental right of parents to raise their children as they see fit and that their decisions must therefore be given deference by the courts, see Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), this Court has held that a grandparent may challenge a parent's decision not to allow that grandparent visitation with the minor child. Vibbert v. Vibbert, 144 S.W.3d 292 (Ky.App. 2004). In Vibbert, this Court *en banc* overruled the standard set in Scott v. Scott, 80 S.W.3d 447 (Ky.App. 2002), wherein the grandparent had to prove by

clear and convincing evidence that depriving the child of visitation with the grandparent would harm the child. Under the new standard enunciated in Vibbert, the grandparent must prove, by clear and convincing evidence, that the requested visitation would be in the best interest of the child. Vibbert, 144 S.W.3d at 295. In determining if visitation with the grandparent is in the child's best interest, the Court stated that the following factors should be considered:

the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; the wishes and preferences of the child.

Id. at 295.

Although the trial judge did not make written findings of fact in her order granting Osie's motion for visitation, she did orally give the reasons for her decision at the conclusion of the hearing on the motion on May 28, 2004. The court noted the strong bond that D.B. had with Osie, since Osie had cared for D.B. for nine years whenever Jackson was working. The court also revealed that, during her interview with D.B., D.B. expressed her strong desire to see Osie and maintain contact

with other members of the family (Jackson, D.B.'s siblings, and a niece). The judge specifically noted her concern that D.B. would likely grow to resent Alexander if he tried to keep her from the family with whom she had spent so much of her life. As for any potential conflicts with D.B.'s school activities, the order specifically provided that in the event of such a conflict, the visitation would be rescheduled for the following Saturday.

A trial court's findings of fact regarding visitation will be upheld unless they are clearly erroneous. See Reichle v. Reichle, 719 S.W.2d 442 (Ky. 1986). Osie testified that she took care of D.B., as well as her other grandchildren, whenever Jackson worked. She stated that since D.B. was a baby, she bathed her, fed her, dressed her, helped her with her schoolwork, played with her and took care of her when she was sick. Osie testified that D.B. was her "baby" and she missed her very much since Alexander had forbidden D.B. from seeing her. She stated that she only saw D.B. twice during the time that Alexander allowed supervised visitation at his house because she had difficulty making the trip due to her poor health. Jackson's testimony corroborated Osie's regarding how much care she had provided for D.B. over the years and how close she was to D.B.

Alexander testified that he did not want D.B. to have any further visitation with her mother's family because he did not approve of their "lifestyle" and was afraid she would be negatively influenced by them. He testified his family goes to church and that he has set certain rules and guidelines for his children. He claimed that D.B.'s mother's family "runs around" and might allow D.B. to hang out at places and with people that a twelve-year-old shouldn't be around. However, Alexander admitted that he did not believe that Osie was involved in this type of behavior. In later discussions with the trial judge on the record after she announced her ruling, Alexander admitted that he too was concerned that D.B. might hold it against him if she was prevented from seeing her mother's family.

D.B.'s therapist testified that D.B. had adjusted very well to being placed in Alexander's custody and being integrated into his family. She stated that D.B. was doing very well in school and seemed happy and healthy. She had concerns, however, that D.B. could be easily influenced and that this was a critical stage in her development. The therapist testified that D.B. had expressed to her that she missed Jackson very much and wanted to see her grandmother and siblings.

In our view, the trial court's findings regarding the best interest of D.B. were supported by substantial evidence and were, thus, not clearly erroneous. It is obvious that the court

carefully weighed the potential risks and benefits to D.B. in arriving at its decision to grant visitation to Osie. The court specifically acknowledged Alexander's concerns about D.B.'s well-being and made every effort in its order to minimize the possibility that D.B. would be exposed to any negative influences. The order forbids the use of drugs or alcohol by anyone during visitation with D.B. and forbids the parties from speaking negatively to D.B. about other family members. The order mandates that visitation be at Osie's home and that D.B. can leave with family members only for trips of short duration. Finally, the order states, "All parties are to refrain from any other conduct which might negatively affect the minor child while in the presence of the minor child."

Alexander's remaining argument is that collateral estoppel prevents the Rowan Circuit Court from allowing other family members, Jackson in particular, from seeing the minor child during Osie's visitation. Alexander points to the earlier order of the Fayette Circuit Court, affirmed in part by this Court, which denied Jackson's motion for visitation with D.B. Alexander argues that all of the following elements of collateral estoppel are present in this case: 1) a final decision on the merits; 2) identity of issues; 3) issues actually litigated and determined; 4) a necessary issue; 5) a litigant who lost in the previous proceeding; and 6) a full and

fair opportunity to litigate. May v. Oldfield, 698 F.Supp. 124 (E.D.Ky. 1998); Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1971).

We disagree with Alexander that there is an identity of issues in the two cases. In the proceeding before the Fayette Circuit Court, the issue was whether Jackson, D.B.'s aunt, had a right to visitation. The issue in the Rowan Circuit Court was the grandmother's right to visitation. As to Alexander's claim that the Rowan Circuit Court's order effectively allows visitation between Jackson and D.B., the Rowan Circuit Court emphasized at the hearing that it was not granting Jackson visitation rights. Rather, she was merely allowing "contact" between D.B. and other family members during Osie's visitation. The court expressed concern that by not allowing D.B. to leave Osie's home or see anyone else during the visitation, D.B. might feel "imprisoned". We would also note that Alexander was concerned that the visitation needed to be supervised by a third party because of Osie's inability to adequately supervise D.B. as a result of her poor health and bad vision. Allowing other family members to be present during the visitation would also serve as supervision of the visitation.

For the reasons stated above, the order of the Rowan Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melissa A. Wilson
Lexington, Kentucky

BRIEF FOR APPELLEE:

Traci H. Boyd
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