

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002197-ME

NICK L. HART AND
PHYLLIS HART

APPELLANTS

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 09-CI-01888

JOHN COOPER HARRIS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, LAMBERT AND VANMETER, JUDGES.

DIXON, JUDGE: In this grandparent visitation action, Nick and Phyllis Hart (Grandparents) appeal from an order of the Daviess Circuit Court sustaining John Cooper Harris's (Father) exceptions to the recommended order of the domestic relations commissioner (DRC) and awarding the Harts reasonable visitation with their grandson at the discretion of Harris, the child's father. We affirm.

Father was married to Grandparents' daughter, Heather Harris (Mother). Prior to their marriage, Mother gave birth to a son, (Child), in June 2006. At that time, Father lived in Owensboro, Kentucky, and Mother lived in a mobile home next door to Grandparents in Gentryville, Indiana. After Child was born, Mother would frequently stay at Father's house in Owensboro with Child and Mother's two daughters from a prior marriage. Grandparents occasionally picked Child up at daycare when he was in Gentryville with Mother, and Child spent one overnight visit with Grandparents when Mother and Father were out of town.

In January 2009, Mother and Father married, and Mother moved to Owensboro with Child and her daughters. Tragically, in September 2009, Mother was killed in a motor vehicle accident. Following her death, the relationship between Grandparents and Father soured. On December 29, 2009, Grandparents filed a petition for grandparent visitation in Daviess Circuit Court. In March 2010, the court adopted the DRC's recommended temporary visitation schedule, which provided Grandparents two hours with Child every other Saturday in Owensboro.

On June 18, 2010, the DRC held a trial and heard testimony from the parties and other family members. The DRC found that grandparent visitation was in Child's best interest and recommended that Grandparents have overnight visitation every other weekend at their home in Gentryville. Father filed exceptions to the proposed order, contending the visitation recommended by the DRC was unreasonable.

In August 2010, the trial court held a hearing as to Father's exceptions. The court sustained the exceptions and rendered an order awarding Grandparents visitation on either Christmas or Thanksgiving and reasonable summer visitation. The court further ordered additional visitation as Father deemed appropriate for Child

At the outset, we note the trial court owes no deference to the recommendations of the DRC, Kentucky Rules of Civil Procedure (CR) 53.05, and the court has broad discretion to rely on the report to reach its own independent conclusions. *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997). Furthermore, this Court will not reverse a visitation order unless it constituted "a manifest abuse of discretion, or [was] clearly erroneous in light of the facts and circumstances of the case." *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky. App. 2000).

In the case at bar, the parties do not dispute that it is in Child's best interest to have contact with Grandparents; accordingly, Grandparents contend they are entitled to the overnight weekend visits recommended by the DRC. Grandparents assert that it was unreasonable and erroneous for the court to allow Father discretion in deciding appropriate times for visitation in addition to the holiday and summer visits ordered by the Court. Grandparents opine that the court's order is tantamount to denying them visitation, as they believe Father will not provide them additional time to visit with Child.

Pursuant to Kentucky Revised Statutes (KRS) 405.021(1), a 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.” In *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004), this Court addressed the application of the grandparent visitation statute, noting:

We believe that a modified “best interest” standard can be used in cases where grandparent visitation is sought within the constitutional framework of *Troxel* [*v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)]. What *Troxel* requires us to recognize is that a fit parent has a superior right, constitutionally, to all others in making decisions regarding the raising of his or her children, including who may and may not visit them. A fit parent's decision must be given deference by the courts, and courts considering the issue must presume that a fit parent's decision is in the child's best interest.

Id. at 294.¹

Essentially, the parties disagree regarding what constitutes “reasonable” grandparent visitation. While KRS 405.021 does not define the term “reasonable,” this Court addressed the meaning of “reasonable” as to non-custodial parent visitation in *Drury v. Drury*, 32 S.W.3d 521. This Court noted that “[w]hat constitutes ‘reasonable visitation’ is a matter which must be decided based upon the circumstances of each parent and the children, rather than any set formula.” *Id.* at 524.

At the trial before the DRC, Grandparents gave conflicting testimony regarding the amount of time they spent with Child prior to Mother’s death, and

¹ *Vibbert* goes on to delineate additional factors for a court to consider in determining the best interest of the child. *Id.* at 295. We need not address those factors since it is undisputed that visitation is in Child’s best interest.

their testimony admitted Mother frequently stayed in Owensboro before she permanently moved there in January 2009. Grandfather acknowledged that he did not like Father and that he had not approved of Mother's relationship with Father. Grandfather also admitted that, following Mother's death, he accused Father of being abusive toward her. In her testimony, Grandmother admitted that Father brought Child to visit them on Halloween 2009, and she asked Father to stay outside of their home. Grandfather conceded that, after the Halloween visit, Father was willing to allow Grandparents to have a supervised visit in Owensboro; however, Grandparents declined because Grandfather found the notion of a supervised visit "ridiculous." Father testified that he had not realized Mother's family did not like him until after she passed away. In explaining why he opposed the visitation requested by Grandparents, Father cited Child's young age, his reliance on Father as his only parent, and the lack of an established relationship between Child and Grandparents.

At the hearing on Father's exceptions, the trial court spoke to the parties from the bench. The court emphasized that Child, who had just turned four, was young and relied on Father as his only living parent. The court explained that, while some visitation was in Child's best interest, it was not in his best interest to spend every other weekend in Gentryville with Grandparents over Father's objection. The court acknowledged Father's superior right to make decisions regarding Child's upbringing. *Vibbert*, 144 S.W.3d at 294. The court advised Father to prepare Child for extended visits with Grandparents as he matured. The

court ordered visitation on Christmas or Thanksgiving, a reasonable summer visit, and any additional visitation schedule on which the parties could agree. The trial court admonished Father that he was obligated to recognize Grandparents' right to visit Child, and Father advised the court he was willing to work out a schedule for additional visitation. Finally, the court advised Grandparents they could subsequently seek enforcement of the order if Father failed to comply.

Despite Grandparents' arguments to the contrary, the trial court properly reviewed the evidence of record and assessed what type of visitation would serve the best interest of Child in light of his young age, his mother's recent death, his attachment to Father, and the quality of contact he had with Grandparents prior to Mother's death. It was undisputed Child had spent only one overnight visit with Grandparents before Mother died, and a reasonable inference could be drawn from the conflicting testimony that Grandparents' contact with Child was sporadic prior to Mother's death. The court was free to weigh the evidence differently than the DRC, and the testimony adduced at trial was sufficient to support the court's findings. *See Basham v. Wilkins*, 851 S.W.2d 491, 494 (Ky. App. 1993) (superseded by Statute on other grounds as stated in *Elery v. Martin*, 4 S.W.3d 550 (Ky. App. 1999)). We acknowledge Grandparents' concern that Father could refuse to provide additional visitation by agreement; however, the trial court clearly explained it expected the parties to reach an agreement and that it would enforce the order in the event of noncompliance. *See* KRS 405.021(1).

While Grandparents are dissatisfied that the court allowed Father deference in determining the appropriate amount of additional visitation between Child and Grandparents, we are mindful that the court has broad discretion to establish a visitation plan tailored to the unique circumstances of each case. *Drury*, 32 S.W.3d at 525. After careful review, we find no clear error or manifest abuse of discretion in the court's decision.

For the reasons stated herein, the order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

John W. Tullis
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Evan Taylor
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