

RENDERED: JANUARY 7, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002373-ME

LUISA CIMA; AND
DONATELLO ROSIGNOLI, SR.

APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RODERICK MESSER
ACTION NO. 08-CI-00971

GINO CIMA

APPELLEE

AND

NO. 2010-CA-000339-ME

LUISA CIMA; AND
DONATELLO ROSIGNOLI, SR.

APPELLANTS

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
ACTION NO. 08-CI-00971

GINO CIMA

APPELLEE

OPINION
AFFIRMING IN PART AND VACATING IN PART

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE, KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

KELLER, JUDGE: Donatello Rosignoli, Sr., (Rosignoli) and Luisa Cima (Luisa) appeal from the trial court's order granting grandparent visitation to Gino Cima (Gino). On Appeal, Rosignoli and Luisa argue that KRS 405.021 is unconstitutional on its face and as applied to Gino and Luisa. They also argue that the trial court erred in setting various ground rules regarding visitation and in dismissing Rosignoli's petition for an order granting him visitation. For the following reasons, we affirm in part and vacate in part.

FACTS

Although the litigation in this matter has been contentious, the underlying facts are not in dispute. Joseph Aaron Cima (Aaron)² was the son of Gino. Luisa and Aaron had a relationship that produced a child, Aaron Rider Cima (Rider), born on August 4, 2006. Following Rider's birth, Aaron and Luisa lived together "off and on" in Luisa's house in Corbin, finally separating in the spring of 2008. Following their separation, Aaron moved into Gino's house, where he lived with Gino and Gino's wife Laura.

Luisa and Aaron had no formalized custody agreement or visitation schedule until they entered into an agreed order in August 2008. The agreement

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² Throughout the proceedings Joseph Aaron Cima was referred to as either Hank or Aaron. Because he was most often referred to as Aaron, we use that name.

provided for joint custody with Luisa designated as primary residential custodian and for Aaron to have visitation one evening per week and every other weekend. Because Aaron was living with Gino and Laura, his visitation took place at their house and they developed a close relationship with Rider. It does not appear that Luisa had any problem with this arrangement.

On December 9, 2008, Aaron died in a work-related accident. The parties disagree about what transpired immediately after Aaron's death. Gino and Laura testified that they sought visitation with Rider and that Luisa refused. Luisa testified that she offered to let Gino and Laura visit with Rider at her home, but they did not respond to her offer.

Regardless of which version of events is correct, any relationship Luisa and the Cimas had deteriorated rapidly and, ten days after Aaron's death, Gino filed a petition seeking temporary and permanent visitation.³ In his petition, Gino alleged that he, Laura, and the extended Cima family had developed a close relationship with Rider and that it would be in Rider's best interest for that relationship to continue. Luisa responded, stating that she opposed unsupervised visitation because Gino and members of the Cima family were heavy smokers, which would endanger Rider's health. Luisa also stated that granting visitation to Gino would interfere with the rights of Rider's maternal grandfather, Rosignoli, and with the rights of Rider's paternal grandmother. We note that neither Rider's

³ We note that the petition also named Laura as a petitioner. However, the family court dismissed her because she is not the biological grandmother.

paternal grandmother nor his maternal grandmother participated in these proceedings.

The day after Luisa filed her response, Rosignoli filed a motion to intervene and an intervening complaint. In his intervening complaint, Rosignoli reiterated Luisa's statement that a ruling in favor of Gino could adversely impact his rights as Rider's maternal grandfather as well as the rights of Rider's maternal grandmother. Rosignoli also alleged that Gino had been abusive to Aaron, that Gino had hidden property belonging to Luisa from her, and that "a deep and irreconcilable conflict" existed between Luisa and Gino. Based on these allegations, Rosignoli asked the court to award him grandparent visitation with Rider and to deny Gino's request for unsupervised visitation. Gino objected to Rosignoli's motion to intervene, arguing that Rosignoli lacked standing because there was no evidence that Luisa had interfered with his ability to visit with Rider.

Following a brief hearing on January 12, 2009, the court ordered that Gino should have visitation every other Saturday and Sunday from 10:00 a.m. to 6:00 p.m. The court also ordered that no one should smoke cigarettes in Rider's presence and referred the matter to the domestic relations commissioner (DRC) for additional proceedings. On February 6, 2009, the court scheduled a final hearing and granted Rosignoli's motion to intervene. On February 18, 2009, the court appointed a guardian *ad litem* (GAL).

The DRC held a hearing on March 13, 2009. At the hearing, Gino, Laura, and Gino's daughter testified that Gino and Rider had developed a close

relationship and that Rider had a good relationship with Gino's extended family members. Gino also testified that he would respect Luisa's wishes as the custodial parent and that visitation would be in Rider's best interest.

Luisa testified that she believed Rider should have a relationship with all of his relatives and that she did not object to Gino having visitation. However, she stated that any such visitation should be supervised. When asked why, Luisa stated that, because her reasons were based on hearsay, she could not respond. Luisa also testified that she planned to move to Lexington as soon as she sold her house in Corbin.⁴

Rosignoli testified that his house was only three minutes from Luisa's and that he visited with Rider on a fairly regular basis. In fact, he admitted that his access to Rider is only limited by the constraints of his and Luisa's work schedules and Rider's availability.⁵

Following the hearing, the GAL issued a report indicating that all of the parties, despite some "mud slinging," were "good and positive influences" on Rider. She recommended that Luisa have sole custody of Rider, with Gino having visitation of one full weekend a month, three weeks in the summer, and "time

⁴ We note that Luisa was questioned at length by Gino's attorney about her work activities, including whether she had ever worked as an exotic dancer, employment she denied having. Luisa's fitness as a parent was not before the circuit court and is not before us. Therefore, we question the relevance of this "evidence" and choose not to summarize that testimony in any detail herein.

⁵ We note that Gino's attorney questioned Rosignoli and Rosignoli testified at length about his work history and his criminal record. However, that testimony by Rosignoli is not relevant to our decision; therefore, we choose not to summarize it in any detail herein.

during holidays.” Finally, the GAL noted “the obvious animosity between [the] two families” and expressed some concern regarding what impact that animosity might have on Rider.

On August 18, 2009, Luisa advised Gino’s attorney that she had moved to Lexington. She indicated that, because Gino lives near Corbin, they would need to make arrangements for Rider’s transportation for visitation. If there was any response, it is not part of the record.

On September 11, 2009, the DRC filed her report.⁶ In her report, the DRC found that: Gino and Rider had developed a close bond; Gino is in good health and has never been charged criminally; Rider had developed a relationship with Gino’s wife and his extended family; Gino will not interfere with Luisa’s “custodial rights”; “it is unlikely that the parties will be able to work together without court intervention”; and Rosignoli has a good relationship with Rider and a safe and appropriate house for Rider to visit.

The DRC then stated that “the initial question” was whether a grandparent was being denied access to his grandchild. Based on the testimony of Rosignoli and Luisa, the DRC concluded that Rosignoli was receiving ample visitation and any award of specific visitation “would be error.” As to Gino, the DRC found as follows:

⁶ We note that a copy of that report is not in the record we received from the circuit court. However, a copy is among the documents in an appendix to Luisa and Rosignoli’s brief. That copy is missing page three.

In order to determine whether . . . Gino . . . should be awarded [visitation] the court must consider several factors. Factors (1) and (2) concern “the nature and stability of the relationship between the child and the grandparent seeking visitation” and “the amount of time the children and grandparent spent together.” Evidence clearly established that prior to the filing of this action in 2008, Rider and Gino spent a great deal of time together. They have a loving bond and stable relationship. Factor (3) concerns “the potential detriments and benefits to the children from granting visitation.” The court finds no potential detriments to a regular visitation between Rider and Gino. Quite the opposite, there are numerous benefits that Rider would have given a regular visitation with Gino. Factor (4) concerns “the effect granting visitation would have on the children’s relationship with the parents.” In the present case, it is clear from the record that visitation would have no effect on Rider’s relationship with his mother. Louisa [sic] is capable of making the decisions as Rider’s custodian. The court is of the opinion that Gino understands his role and the detriment to Rider if he interferes with Louisa’s [sic] role. Factor (5) concerns “the physical and emotional health of all the adults involved, grandparents and parents alike.” The court is confident that Gino and his family are physically and emotionally fit to take care of Rider and insure his safety and provide a loving environment. Factor (6) concerns “the stability of the children’s living and schooling arrangements.” There was no evidence presented that would negatively impact Rider’s living and schooling arrangements if Gino was awarded visitation. The final factor, (7), which the court shall consider concerns “the wishes and preferences of the child.” It is obvious that Gino and Rider have a close bond. There was no evidence presented to suggest to this court that Rider would object to a regular visitation with Gino. In fact, the minor child was represented by an experienced guardian ad litem who advocates and recommends such visitation on his behalf. In short, when all factors are considered, the court sees many benefits for an award of regular grandparent visitation. There is no evidence that said visitation would be detrimental to

the best interests of the child. Furthermore, all statutory factors are met to the satisfaction of this court.

Having made the above findings, the DRC recommended that Gino have visitation with Rider every other weekend, for two nonconsecutive weeks in the summer, and from Christmas through New Year's Day, with regular phone contact during the week.

Luisa timely filed exceptions to the DRC's report arguing that the DRC's findings were not supported by clear and convincing evidence, that the amount of visitation recommended by the DRC was excessive, and that granting Gino extended visitation in the face of Luisa's opposition interfered with her "constitutional right to raise her child as she sees fit." Rosignoli also filed exceptions adopting Luisa's arguments and arguing that: KRS 405.021 is unconstitutional on its face and as applied to Luisa and Gino; the DRC was biased against him and Luisa; that the DRC's report was "full of misstatements" and not supported by the evidence; and the animosity between Luisa and Gino "will certainly be psychologically harmful to" Rider.

Following a hearing on October 12, 2009, the court adopted the report of the DRC, in part, limiting visitation to one weekend per month, one week in the summer, and one overnight visit during the Christmas holiday season.

Furthermore, the court ordered Gino to pick up Rider in Lexington and to return him to Lexington. Gino then filed a motion to alter, amend, or vacate, asking the

court to adopt the visitation schedule recommended by the DRC, which the court denied. Rosignoli and Luisa then filed their notice of appeal.

After Luisa and Rosignoli appealed the above order, Gino filed a motion asking the court: to designate a specific weekend for visitation, to designate a spot for exchanges of Rider to take place; and to permit either his wife or daughter to transport Rider. The court granted that motion ordering that visitation take place on the second weekend of each month; that the exchanges take place in the Berea Wal-Mart parking lot; and that either Laura or Jessica could transport Rider if Gino was not available. In dismissing Rosignoli as a party, the court found that there was no indication that Luisa had ever interfered with his visitation with Rider.

Luisa and Rosignoli then appealed the above two post-appeal orders and this Court consolidated the appeals.

STANDARD OF REVIEW

Construction and interpretation of a statute is a question of law, which we review *de novo* and without reference to or deference to the circuit court. *Hill v. Thompson*, 297 S.W.3d 892 (Ky. App. 2009). However, we review the circuit court's orders on visitation matters for abuse of discretion. *Wireman v. Perkins*, 229 S.W.3d 919 (Ky. App. 2007). With the preceding standards in mind, we review the issues raised by Luisa and Rosignoli on appeal.

ANALYSIS

Appellants challenging the constitutionality of a statute on appeal are required to serve on the Attorney General a copy of their prehearing statement and notice of appeal. CR 76.03(5) and KRS 418.075(2). If the appellants fail to make the required service on the attorney general, any issues regarding the constitutionality of a statute are not properly before this Court and not subject to our review. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 466 (Ky. 2004).

Luisa and Rosignoli did not serve either of their notices of appeal on the Attorney General. Therefore, their arguments regarding the constitutionality of KRS 405.021 are not properly preserved and we need not address them. That being noted, the Supreme Court of Kentucky, in *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992), held that KRS 405.021 is constitutional. “The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.” Rules of the Supreme Court (SCR) 1.030(8)(a). Therefore, even if we were inclined to overrule *King*, which we are not, we are foreclosed from doing so, and we cannot hold that KRS 405.021 is unconstitutional on its face.

Likewise, we are not persuaded by Luisa’s argument that KRS 405.021 is unconstitutional as applied to her and Gino. In support of her argument, Luisa relies primarily on *Troxell v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 49 (2000), wherein the United States Supreme Court determined that Washington state’s nonparental visitation rights statute was unconstitutional.

Although there are some similarities between *Troxell* and the case herein, Luisa's reliance on *Troxell* is misplaced.

In *Troxell*, the parents, who were never married, had two children. The parents separated and, after the separation, the father lived with his parents, the children's paternal grandparents. Because the father was living with his parents, his visitation with his children took place at his parents' house. The father died and his parents sought visitation under a Washington statute that permitted any person to seek visitation at any time. The Washington Supreme Court held that the statute unconstitutionally interfered with the mother's right to rear her children. In doing so, the Washington Supreme Court held that a state could interfere with that right "only to prevent harm or potential harm to a child." *Id.* at 60-63, 120 S. Ct. at 2054-59. Furthermore, the Washington Supreme Court noted that the statute, by permitting any person to bring an action for visitation at any time, was too broad. *Id.* at 63, 120 S. Ct. at 2059.

The United States Supreme Court affirmed the Washington Supreme Court, finding particularly significant the apparent failure of the lower court in Washington to afford any material weight to the mother's wishes. *Id.* at 72, 120 S. Ct. at 2063. However, the United States Supreme Court stated that it would not impose a *per se* standard for determining the constitutionality of a nonparental rights statute, "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis." *Id.* at 72, 120 S. Ct. 2064.

Luisa argues that KRS 405.021, like Washington's statute, does not provide what weight, if any, must be given to the wishes of the parent. However, as implied by the United States Supreme Court in *Troxell*, statutory language that might otherwise be constitutionally questionable can be interpreted in a constitutional manner. *Id.* at 67, 120 S. Ct. 2061. In *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004), this Court determined that KRS 405.021 could be interpreted so as to comply with the constitutional requirements of *Troxell*. Specifically, this court recognized 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.” *Vibbert*, 144 S.W.3d at 294. We then set forth a nonexclusive list of factors that a trial court should consider when making a determination regarding grandparent visitation. Those factors are more than sufficient to protect a parent's constitutional right to determine how to rear her child. The DRC herein discussed each factor and how it applied to Luisa and Gino. Therefore, we discern nothing unconstitutional about the circuit court's application of KRS 405.021 to Luisa in granting visitation with Gino.

We next determine if the amount of visitation granted to Gino interferes with Luisa's right to rear Rider. Luisa and Rosignoli argue that the amount of visitation is excessive. However, the cases they cite indicate that, depending on the circumstances, the amount of acceptable visitation may vary widely. The amount of visitation awarded herein, essentially one weekend per month, does not go beyond what is acceptable and the appellants have not pointed

to any Kentucky case that mandates a contrary finding. Therefore, we hold that the circuit court did not abuse its discretion with regard to the amount of visitation awarded.

Having determined that KRS 405.021 is constitutional facially and as applied to Luisa and Gino and that the amount of visitation is not excessive, we next address whether the circuit court had jurisdiction to enter an order regarding what weekend the visitation should occur, where the parties should exchange Rider, and who could transport Rider to and from Gino's home.

As noted by the Appellants, the circuit court entered the order regarding those issues after they had filed their appeal. As a general rule, except for issues involving child custody and support, the circuit court loses jurisdiction to rule on any issues once a notice of appeal has been filed. *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000). We believe that a further exception can be found in KRS 403.320(3), which states that “[t]he court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child . . .” Because the parties apparently could not agree regarding when visitation should occur or to the terms of the exchange of Rider, the circuit court retained jurisdiction to rule on those matters. Therefore, we discern no procedural error in the court's doing so. Furthermore, in light of the parties' apparent inability to agree on such matters, we discern no abuse of discretion in the circuit court's order regarding where and how exchanges of Rider are to occur and who may transport him.

Finally, we agree with Rosignoli that the circuit court impermissibly dismissed him after the notices of appeal had been filed. Therefore, we must vacate the circuit court's Supplemental Findings of Fact and Order to the extent it dismissed Rosignoli as a party. However, we note that, when it adopted the DRC's report, the circuit court also adopted the DRC's finding that Luisa had never denied Rosignoli visitation and that ordering specific visitation would be improper. Rosignoli has not directly raised the circuit court's denial of his request for a visitation order on appeal. Therefore, our holding regarding Rosignoli's dismissal does not have any impact on the circuit court's refusal to grant specific visitation.

CONCLUSION

KRS 405.021 is constitutional on its face and as applied to the parties herein. Therefore, the circuit court's award of visitation to Rider's paternal grandfather did not violate Luisa's constitutional right to rear Rider as she sees fit. The circuit court did not abuse its discretion in awarding Gino visitation and the court retained jurisdiction to set additional terms regarding visitation after the appellants filed their first notice of appeal. Furthermore, the circuit court did not abuse its discretion when it found that Rosignoli was not entitled to a specific award of visitation because Luisa had never interfered with his visitation. Therefore, we affirm those portions of the circuit court's orders. However, the circuit court did not have jurisdiction to dismiss Rosignoli as a party after he filed his first notice of appeal. Therefore, the circuit court's supplemental order is vacated and Rosignoli is reinstated as a party.

ALL CONCUR.

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