

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000411-ME

AMY CAROLYN HENSON

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY, JR., JUDGE
ACTION NO. 05-CI-00533

JACKIE HENSON AND LISA HENSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Amy Carolyn Henson appeals from the findings of fact, conclusions of law, and judgment of the Marshall Circuit Court awarding grandparent visitation of Amy's two minor children to Jackie and Lisa Henson.

We affirm.

Amy Carolyn Henson and Joshua Joseph Henson are the biological parents of two minor children. Jackie Henson and Lisa Henson are the children's

paternal grandparents. Amy and Joshua were divorced in 2007, at which time Amy was designated as the primary residential parent of the children and Joshua was given timesharing every weekend. In 2008, Amy sought to decrease Joshua's timesharing. At that time, Amy testified that Joshua's timesharing was primarily being exercised by Jackie and Lisa. In response to Amy's request, Joshua indicated concern regarding Amy's care of the children and alleged that Amy routinely left the children unattended and failed to meet their basic needs. The trial court denied Amy's motion to modify timesharing.

Joshua died on April 20, 2010. Thereafter, Jackie and Lisa continued to enjoy timesharing with the children until sometime in 2010, when they were denied time with the children for almost a month. On October 15, 2010, Jackie and Lisa filed a petition to establish grandparent visitation. The application was granted and the matter was set for a hearing on December 28, 2010. Following the hearing, the trial court issued a judgment entered on January 5, 2011, awarding grandparent visitation to Jackie and Lisa. This appeal followed.

Grandparent visitation rights are governed by KRS 405.021, which, in relevant part, states that "[t]he 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." KRS 405.021(1). This Court will not reverse an award of grandparent visitation "unless it constitutes a manifest abuse of discretion, or was clearly

erroneous in light of the facts and circumstances of the case.” *Grant v. Lynn*, 268 S.W.3d 382, 390 (Ky.App. 2008) (citation omitted).

Amy argues that the trial court erred by applying a parental fitness standard as opposed to the best interest standard articulated by KRS 405.021. Specifically, Amy challenges that portion of the trial court’s judgment that reads as follows:

[Amy] asserts that the reasonableness of the visitation, specifically the amount and duration, should be in her discretion. Courts must give deference to a *fit* parent’s decision regarding the visitation of their children.

Kentucky law provides little guidance to the determination of a “fit parent[.]” The Kentucky Supreme Court addressed the proof necessary to show unfitness of a parent in a custody action by summarizing:

“ . . . The type of evidence that is necessary to show unfitness on the part of the mother in this custody battle with a third party is: (1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.” [citation omitted]

It cannot be determined that Amy is a fit parent. She has failed, over the years, for reasons other than poverty alone, to provide essential care for the children. Jackie and Lisa provided the majority of [oldest child’s] care for the first couple of years of his life. Even when Amy was living in their home, Jackie and Lisa provided for the majority of the children’s care. Amy denied her children contact with Jackie and Lisa for almost a month knowing that the children were bonded with them and had either lived with them or visited them each weekend since [oldest child] was born and [youngest child] was approximately six months old. It cannot be determined

that if the visitation decision was left totally in Amy's discretion that she would allow reasonable visitation.

We find no error with the trial court's findings. Although Amy argues that the trial court erred because it failed to make a finding regarding the best interests of the children pursuant to the mandates of KRS 405.021, all parties agreed that the issue of the children's best interest was stipulated to by Amy. There was no need for the trial court to make additional findings on an uncontested issue.

Furthermore, Amy's stipulation as to the best interests of the children barred any subsequent claims that it was not appropriately determined by the trial court. The trial court noted the stipulation twice in its judgment and further found that the children had bonded with Jackie and Lisa; that the children had resided with Jackie and Lisa for a portion of the children's lives; that Jackie and Lisa had intermittently been the primary care providers and financial supporters of the children; and that Jackie and Lisa had exercised liberal visitation with the children during their lifetime. We find no error with these findings and find no abuse of discretion in the trial court's use of the findings as support for its judgment.

Amy next argues that the trial court erred by failing to give proper notice that the issue of parental fitness was before the court and by also failing to give Amy a hearing and an opportunity to be heard. Again, we do not agree. An order was entered on November 3, 2010, stating that each party would be allowed to present three character witnesses. Counsel for Amy questioned her character

witness regarding Amy's ability to care for the children and whether they had ever been removed from her care. Counsel for Amy argued to the trial court regarding Amy's parental fitness. It is clear that the issue of parental fitness was addressed by both parties. Amy's argument is, therefore, without merit.

Amy's final argument is that even if the issue of parental fitness was properly before the trial court, the trial court erred when it improperly applied the parental fitness standard. Specifically, Amy argues that the trial court failed to make an additional finding as to whether her parental abilities would improve pursuant to *Forester v. Forester*, 974 S.W.2d 928 (Ky.App. 1998). We do not agree that this was error warranting a reversal of the judgment.

The trial court's parental fitness analysis was not done to support its award of visitation to Jackie and Lisa, but to determine whether Amy was the appropriate party to determine the specifics of that visitation. Within its discretion, the trial court may "issue any necessary orders" to carry out the award of visitation. KRS 405.021(1). The trial court used its assessment of Amy's parental fitness to support its decision that it should determine the frequency and duration of the visits. Because the trial court acted within its discretion, any error in its assessment of Amy's parental fitness is harmless.

In conclusion, Amy has failed to cite any error that would rise to the level of making the award of visitation "a manifest abuse of discretion" or "clearly erroneous." Accordingly, the award will not be disturbed.

For the foregoing reasons, the findings of fact, conclusions of law, and judgment of the Marshall Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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