

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000707-ME

GRAHAM RUTHERFORD AND  
SARAH RUTHERFORD

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE MARGARET RYAN HUDDLESTON, JUDGE  
ACTION NO. 12-CI-00358

TIM TAYLOR,  
MELISSA TAYLOR AND  
CHRIS POPPY

APPELLEES

OPINION  
REVERSING

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BEFORE: CAPERTON, LAMBERT AND MOORE, JUDGES.

MOORE, JUDGE: Graham and Sarah Rutherford appeal the Warren Circuit Court's Findings of Fact, Conclusions of Law, and Judgment granting Tim and Melissa Taylor's petition for grandparent visitation. After careful review of the record, we reverse.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Tim and Melissa Taylor filed a Motion for Grandparent Visitation in Warren Circuit Court in March 2012 requesting visitation with L.G.P. (DOB 5/5/2008) and C.S.R. (DOB 4/13/2011). L.G.P. is the son of Appellee, Chris Poppy,<sup>1</sup> and Sarah Rutherford. C.S.R. is the son of Sarah and Graham Rutherford. Tim Taylor is the father of Sarah Rutherford. Melissa Taylor is the wife of Tim Taylor and has no biological relationship to Sarah or her two children.

During the trial, the testimony established that there was a family meeting called by Sarah in January of 2012. The meeting took place at the home of Sarah's mother, Marketta Ring, and her stepfather, David Ring. Sarah, her husband Graham, Marketta and David, and Tim were present for the meeting. Sarah testified that she had called the meeting to confront her parents about why they did not take any action when she was molested by her cousin when she was younger. Sarah and her parents stated that she was around seven years old when she told them about it. Sarah testified that she wanted to have the meeting because she was struggling with what happened to her and the relationship her father kept with the cousin over the years. Tim left the meeting upset and angry.

Sarah has avoided family functions where the cousin will be present since she was molested. She testified that she wanted to work through this issue with her father so they could maintain and work on their relationship. She also

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<sup>1</sup> Chris Poppy testified at trial that he only wanted what was best for his child. His only concern was that if visitation was granted, he did not want it to interfere with his co-parenting time of L.G.P.

testified that she would like for her children to have a relationship with their grandparents. Sarah, Graham, Marketta and David all testified that Tim admitted at the meeting that he had let the cousin around Sarah's son, L.G.P., when he watched him. Tim denied ever letting the cousin around L.G.P. Sarah stated that she could not trust Melissa and Tim to keep her children away from the cousin, and she felt she could no longer maintain the relationship.

Prior to the January 2012 meeting, Tim did see the children fairly regularly. Tim testified that he watched L.G.P. for two to three days a week until L.G.P. was about one year old. Sarah testified that her father became too unreliable to watch L.G.P. After Tim stopped watching L.G.P. and after C.S.R. was born, he would see the children periodically.

Tim testified that he has had a wonderful relationship with Sarah and that seeing the children was never a problem before the meeting. He testified to the time he watched L.G.P. but also stated that the younger child, C.S.R., does not know him. Since the petition for visitation was filed, Tim admitted that he had made unfounded complaints about Graham and about Sarah's mother and stepfather. He admitted in his testimony that he made complaints against Graham to his employer claiming that he was an unfit parent. The claims were all resolved in Graham's favor. Tim also admitted to calling social services on Marketta and David Ring and complained that they were abusive to L.G.P. and C.S.R. and that David was involved with drugs. Those claims were unsubstantiated by social services.

Sarah's husband and the father of C.S.R., Graham, testified as well.

He testified that Sarah and her father have not had a stable relationship. He stated that he attempted to talk with Tim after the January meeting to convince him to work on his relationship with Sarah, but Tim never reached out to her. He stated that the stress between Sarah and her father created stress at home, and both he and Sarah did not want their children growing up around all of the conflict. Graham testified that the reasons why he and Sarah do not want the children around the Taylors is because of what transpired at the January meeting, Tim's continued relationship with the cousin, and the strained relationship between Tim and Sarah. He stated that they do not get along with nor do they trust Tim and Melissa.

After considering all of the testimony, the trial court concluded that Tim and Melissa rebutted by clear and convincing evidence the presumption that Sarah and Graham were acting in the best interests of the children by denying visitation with them. Additionally, the trial court concluded that it was in the best interest of the children to have reasonable visitation time with their grandparents. The court ordered visitation rights to Tim and Melissa on one Sunday per month during daylight hours for a period of four hours. The trial court further ordered Tim and Melissa to not allow any contact between the children and the cousin during the visitation time. In addition, the parties were ordered not to mention familial conflicts to the children. Tim and Sarah were ordered by the trial court to seek family counseling until their counselor determines that they no longer need counseling.

Four days after the trial court's order was entered, the Taylors filed a motion regarding visitation in which Tim stated that he had called, sent text messages, left voicemails, and sent a certified letter to his daughter and her husband to set up a time to visit the grandchildren. He further stated in the motion that he did not receive any replies, but that he did receive a letter. He claimed the letter said that Sarah, Graham and the children were moving out of Kentucky and that Sarah would do whatever it took to keep her children from Tim and Melissa.

In Sarah and Graham's response to the self-help motion, they affirmed that a letter was sent to Tim from Sarah, but that it was sent prior to the time the court's order was entered. The letter did state that Sarah and Graham would be moving because Sarah was joining the Air Force National Guard. The letter did not state that Sarah would do whatever it took to keep the children from Tim and Melissa. Sarah and Graham requested in the response to the motion for the court to modify the order to require the visits to be supervised. The response to the motion further acknowledged that arrangements had been made for Tim and Melissa to have visitation with the children at a birthday party. However, Tim and Melissa declined to exercise their visitation because they would not be allowed to be alone with the children. Then Sarah and Graham filed a notice of appeal of the court's order granting visitation to Tim and Melissa. The trial court then entered an order modifying visitation in which it ordered the parties to make an appointment with the counselor they selected for their therapy. The court additionally ordered the following:

It is further ordered that because of the level of animosity on behalf of both the Petitioners and Respondents, the Petitioners Grandparents visitations is [sic] modified such that they shall have visitation for two hours a month on the third Sunday of the month at the Greenwood Mall from 2:00 p.m. until 4:00 p.m., beginning April 21, 2013, with the exchange of the children to take place at the carousal [sic] until such time as the visitation is advanced through the family therapist. The Petitioners shall stay at the mall during their visitation time and shall not remove the children from the mall. Neither the Petitioners nor the Respondents shall involve the children in this action nor shall they talk about the other parties to the children in this action.

We now consider Sarah and Graham's arguments set forth in their appeal.

## II. STANDARD OF REVIEW

We review the factual findings in a grandparents' visitation rights case to determine whether they are clearly erroneous. *Walker v. Blair*, 382 S.W.3d 862, 867 (Ky. 2012). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

“Substantial evidence’ is evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable men.” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Additionally, we give due regard “to the opportunity of the trial court to judge the

credibility of witnesses.” Kentucky Rules of Civil Procedure (CR) 52.01. “[T]he interpretation of KRS<sup>2</sup> 405.021(1) ... and the application of the appropriate standard to the facts are issues of law that we review de novo.” *Walker*, 382 S.W.3d at 867 (citing *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011)).

### III. ANALYSIS

At the outset of our analysis, we note that the Taylors have not filed a responsive brief. CR 76.12(8)(c) provides:

[i]f the appellee’s brief has not been filed within the time allowed, the court may: (i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.

“The decision as to how to proceed in imposing such penalties is a matter committed to our discretion.” *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We decline to impose any of these penalties and, accordingly, proceed with our review of the appeal.

Sarah and Graham argue on appeal that the trial court erred in its interpretation of Kentucky Revised Statutes (KRS) 405.021(1) and the application of the standard provided in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012).

Additionally, they challenge the trial court’s factual findings by asserting that the findings do not support its conclusion that the Taylors rebutted the presumption by

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<sup>2</sup> Kentucky Revised Statutes

clear and convincing evidence that the Rutherfords were acting in the best interests of the children by denying visitation. We agree.

The Supreme Court recently clarified how to interpret Kentucky's grandparent visitation statute, KRS 405.021(1), in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), consistently with the constitutional principles expressed in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).<sup>3</sup> KRS 405.021(1) provides in relevant part “[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.” The Supreme Court explained “[w]hen considering a petition for grandparent visitation, the court must presume that a fit parent is making decisions that are in the child’s best interest.” *Walker*, 382 S.W.3d at 870. The Court further provided:

The grandparent petitioning for child visitation must rebut this presumption with clear and convincing evidence that visitation with the grandparent is in the child’s best interest. In other words, the grandparent must show that the fit parent is clearly mistaken in the belief that grandparent visitation is not in the child’s best interest. If the grandparent fails to present such evidence to the court, then parental opposition alone is sufficient to deny the grandparent visitation.

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<sup>3</sup> In *Troxel*, the United States Supreme Court considered the constitutional implications of a state statute that allowed courts to grant non-parent visitation with children over parental objections. That Court recognized that parents have a constitutionally protected liberty interest in the care, custody and control of their children without interference from the state. *Troxel*, 530 U.S. at 65-66, 120 S.Ct. at 2060. To protect this liberty interest, the Court stated that appropriate weight must be given in non-parent visitation proceedings to the parents’ decision to deny visitation as there is a presumption that fit parents act in the best interest of their children. *Id.* at 69-70, S.Ct. at 2062.



A trial court can look at several factors to determine whether visitation is clearly in the child's best interest. ....[I]ncluding:

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

To this list, we add:

- 8) The motivation of the adults participating in the grandparent visitation proceedings.

*Walker* 382 S.W.3d at 871. "Grandparent visitation cases are fact-intensive inquiries for trial courts." *Id.* at 873. The burden of proving that visitation with the grandchildren is in their best interest is on the grandparents. *Id.* at 871. They must do so by clear and convincing evidence. *Id.* The burden is not on the parent to show why visitation should be denied. *Id.* at 873. "Given that these cases involve the fundamental right of parents to raise their children as they see fit

without undue interference from the state, the use of the heightened standard of proof is required.” *Grayson v. Grayson*, 319 S.W.3d 426, 430-1 (Ky. App. 2010).

The trial court in this case, like the Court in *Walker*, focused on the potential detriment that could come to the children from not granting visitation; the effect that granting visitation would have on the children’s relationship with the parents; the nature and stability of the relationship between the children and the grandparent seeking visitation; and the motivations of the adults participating in the grandparent visitation proceedings. The trial court also noted that in addition to those particular relevant factors that the physical and emotional health of all of the adults involved, parents and grandparents alike, would likely carry the most weight in its decision. The trial court in this case made the following findings in its Findings of Fact, Conclusions of Law, and Judgment:

The Court finds that there will be a high detriment, and low benefit to the minor children, L.G.P. and C.S.R., by not allowing visitation with the Petitioners Tim and Melissa Taylor. This is due to the longstanding relationship between the grandparents and the grandchildren prior to the denial of grandparent visitation.

The Court also finds that there is a potential for emotional volatility between the Petitioner Tim Taylor and his daughter, the Respondent Sarah Rutherford, which could lead to deterioration in the relationships and health of all parties involved. The Court finds that due to events in the pair’s past that could lead to said emotional volatility, family therapy is the best manner in which to mitigate future toxicity of the health of the relationships of grandparents, parents, and children alike.

The Court finds prior to the denial of visitation with Tim and Melissa Taylor, the Petitioners enjoyed a good-natured and stable relationship with the minor grandchildren.

The Court also finds that the motivation of the Respondents in denying the Petitioner's visitation time with the grandchildren was spiteful and arbitrary. The events that prompted the meeting that occurred on or around January 27, 2012 were well known by all parties before the denial of grandparent visitation occurred, and the beginning of these proceedings.

The Court, after considering all of the testimony and evidence, finds by clear and convincing evidence that the Petitioners have rebutted the presumption that Respondents are acting in their children's best interest by denying visitation with the Petitioners, and that it is in the best interest of the children to have reasonable visitation time with the Petitioners Tim and Melissa Taylor.

Turning to consideration of the factors, the *Walker* Court stated that “[t]he effect that granting visitation would have on the child’s relationship with the parents is an important factor for the best interest analysis.” *Walker*, 382 S.W.3d at 872. The granting of visitation could place a considerable burden on the parent-child relationship, especially if animosity exists between the parent and grandparent. *Id.* “Grandparent visitation should not be granted if it is clearly detrimental to the parent-child relationship.” *Id.* In this case, there are emotional scars and issues that are putting significant stress on the relationship between Sarah and Tim. Sarah testified that she feared that Tim would manipulate the children and use them against her. She stated that her father manipulated her throughout her childhood, particularly when her parents got divorced. Graham testified that he

does not trust Melissa and Tim with the children. Clearly, granting visitation at this point in time considering the strained relationship and animosity between Graham and Sarah and Tim and Melissa could be detrimental to and possibly undermine Sarah and Graham's relationship with the children.

The next factor the court considered was the nature and stability of the relationship between the children and the grandparent seeking visitation. Tim testified that he did regularly watch L.G.P. for a few days a week up until he was about one year old. However, he also testified that the younger child, C.S.R., does not know him. Sarah testified that Tim stopped watching L.G.P. because he became too unreliable. After Tim stopped watching L.G.P. and C.S.R. was born, he only saw the children from time to time. Based on the testimony at trial, the court concluded that there was a longstanding, good-natured, and stable relationship between the grandparents and the grandchildren prior to the January meeting.

We recognize that the trial court is in the best position to judge the credibility of the testimony and evidence. However, this finding is not supported by the evidence. The children are at such young ages that clearly they do not have a "longstanding relationship" with the grandparents. The youngest child does not even know Tim. Furthermore, the relationship between the grandparents and the grandchildren clearly is not stable because Tim became too unreliable to continue watching L.G.P. by the time he was a year old. Additionally, the Court in *Walker* explained:

The question arises whether clear and convincing proof of a loving relationship alone is enough to overcome the parental presumption. Except in special circumstances, it is not enough. Kentucky courts cannot presume that grandparents and grandchildren will always benefit from contact with each other. If the only proof that a grandparent can present is that they spent time with the child and attended holidays and special occasions, this alone cannot overcome the presumption that the parent is acting in the child's best interest. The grandparent must show something more-that the grandparent and child shared such a close bond that to sever contact would cause distress to the child.

*Id.* Tim failed to show anything more than that he spent some time with the children, particularly L.G.P., and immediately prior to the denial of visitation, he only saw them occasionally. Therefore, we set aside the trial court's findings regarding the relationship between Tim and Melissa Taylor and the grandchildren as clearly erroneous because they are not supported by substantial evidence.

We will consider the final two factors addressed by the trial court together as they interrelated based on the facts of this case, the motivations of the adults involved in the proceedings and the physical and emotional health of the parties involved.

A grandparent can rebut the presumption that a fit parent acts in the child's best interest by presenting proof that the parent is not actually acting in the child's best interest. If the parent is motivated purely by spite or vindictiveness, this can be proof that the parent is acting out of self-interest rather than a concern for the child's best interest. *It may also be the case that a parent is acting out of spite, but the best interest of the child truly is not served by granting grandparent visitation. So proof of vindictiveness on the parent's part does not automatically rebut the parental presumption.* It is

likewise true that grandparents may also act out of spite or vindictiveness in seeking visitation. The trial court should also consider the grandparent's motivation when determining whether grandparent visitation is in the child's best interest.

*Id.* at 872-3 (emphasis added). The trial court determined that Sarah and Graham's denial of visitation between Tim and Melissa and the children was spiteful and arbitrary because the events that prompted the meeting were known to all of the parties prior to the denial of visitation. However, it was the meeting that resurrected the emotional instability and toxicity of the relationships between the parties involved. The emotional effects from the events of Sarah's childhood were undoubtedly still causing great distress on her relationship with her father. Moreover, Tim engaged in spiteful behavior by making unfounded complaints against Graham, Marketta and David after the filing of the visitation petition. The trial court also noted in its order modifying visitation the substantial level of animosity between the parties. Due to the nature of the relationships between the parents and grandparents involved in this case, even if actions were taken out of spite by both sides, granting grandparent visitation clearly does not serve the best interests of the children at this point in time.

After review of the record, we conclude that the trial court erred as a matter of law in its judgment for failing to hold the Taylors to the clear and convincing evidentiary standard as required by KRS 405.021(1) and *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012). Accordingly, we find that Tim and Melissa have not met their burden of rebutting, by clear and convincing evidence, the presumption that

Sarah and Graham were acting in the best interests of the children by denying visitation. *Walker* clearly states that if the grandparent fails to present clear and convincing evidence, then parental opposition alone is sufficient to deny visitation. *Id.* at 871. Therefore, we reverse the Warren Circuit Court's Findings of Fact, Conclusions of Law, and Judgment granting grandparent visitation.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Joy D. Denton  
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BRIEF FOR APPELLEES:

No Brief Filed