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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000382-ME

M.F. APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 12-CI-503410

K.M. AND N.R. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

VANMETER, JUDGE: M.F. ("grandmother") appeals from the February 13, 2014, order of the Jefferson Circuit Court which terminated her visitation with her four-year-old granddaughter, C.R.; denied her motion to hold C.R.'s father in contempt; and denied her motion for attorney's fees. For the following reasons, we affirm.

Grandmother is the maternal grandparent of C.R.; K.M. is the child's natural mother and N.R. is the child's natural father. Mother and father divorced in August 2011 after approximately four years of marriage. Initially, they shared joint custody of the child, with mother designated as primary residential parent. No set parenting schedule was in place, but father saw the child every other weekend. In June 2012, father filed a motion to increase his parenting time. In September 2012, father received temporary custody of the child through an emergency protective order entered as a result of alleged sexual abuse of the child by mother's boyfriend's son.

Following a hearing, the circuit court awarded father temporary sole custody and gave mother one hour of supervised visitation per week. In June 2013, mother and father began family therapy with the child's therapist and made significant progress towards improving their parenting relationship. The parties agreed in September 2013 to resume joint custody of the child, with father serving as primary residential parent and mother receiving parenting time every other weekend plus one overnight a week. This agreement received the full support of the child's therapist and was adopted by order of the court in January 2014.

While mother and father were working through their custody issues, grandmother had regular contact with the child. In fact, grandmother and father entered into a temporary agreed order in December 2012 allowing grandmother visitation for a minimum of four overnights a month and two consecutive weeks of vacation every summer. Mother was not a party to that agreement.

In June 2013, grandmother filed a motion to hold father in contempt for not complying with the agreed order. In response, father filed a motion to suspend the temporary visitation order. In July 2013, the court directed father to comply with the agreed order; thereafter, grandmother filed a motion to clarify the visitation schedule, which the court did. In October 2013, grandmother filed another motion to hold father in contempt for failure to comply with the visitation schedule. Father again filed a motion to suspend grandmother's visitation. The court then entered an order reducing grandmother's visits and in January 2014, this case came before the court for a bench trial.

During the six-hour trial, grandmother, mother, and father were allotted two hours each to present evidence, cross-examine witnesses, and make any arguments. After considering all the evidence, the court entered an order terminating grandmother's visitation, denying her motion to hold father in contempt, and denying her motion for attorney's fees. Grandmother now appeals.

On appeal, grandmother claims the court applied the incorrect burden of proof, failed to consider the strength of her relationship with the child, and relied on improperly admitted evidence. We disagree.

In a grandparent visitation case, this court reviews the circuit court's findings of fact for clear error and its conclusions of law *de novo*. *Walker v. Blair*, 382 S.W.3d 862, 867 (Ky. 2012). We give due regard "'to the opportunity of the trial court to judge the credibility of the witnesses.'" *Id.* (quoting CR[1] 52.01). The

[1] Kentucky Rules of Civil Procedure.

circuit court's findings of fact will not be disturbed unless the findings are "manifestly against the weight of the evidence." *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008).

Grandmother first alleges the court committed clear error by placing the burden of proof on her to overcome the presumption that mother and father, as fit parents, were acting in the child's best interests in denying grandparent visitation, and to further prove that grandparent visitation was in the child's best interests. In support, grandmother points to the court's statements at the outset of trial that mother and father had the burden of proof since father was seeking to modify an existing visitation order. The court then organized the presentation of evidence accordingly. However, in its final order, the court shifted the burden of proof to grandmother and proceeded to apply the "best interests of the child" analysis set forth in *Walker*, 382 S.W.3d at 870-71.

Under that analysis, "a fit parent is presumed to act in the best interest of the child. A grandparent petitioning for child visitation contrary to the wishes of the child's parent can overcome this presumption of validity only with clear and convincing evidence that granting visitation to the grandparent is in the child's best interest." *Id.* at 866. *See also* KRS[2] 405.021(1) ("[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.").

[2] Kentucky Revised Statutes.

Here, the court's utilization of the "best interests" standard articulated in *Walker* was correct. Contrary to grandmother's assertion, she was not entitled to established visitation rights under the terms of the agreed order so as to require shifting the burden of proof to the parents to modify an existing court order. Rather, the agreed order between grandmother and father was interlocutory and subject to revision by the court. CR 54.02(1). The agreed order was not final and appealable since it did not finally adjudicate the rights of all the parties (mother was not a party to the agreement), and it did not contain the requisite finality language. *Id.* Moreover, the court's preliminary determination concerning the burden of proof only affected the order in which the evidence was presented, not the substance of testimony itself. *See* KRE[3] 611 ("[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]"). Thus, if any error did occur, the error was harmless. *See* CR 61.01 ("[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Next, grandmother asserts the court failed to consider the strength of her relationship with the child, and how severing their bond would harm the child. As an initial matter, we note that grandmother did not request the court to make a finding of fact on this issue after entry of the court's final order. CR 52.04 states:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding

[3] Kentucky Rules of Evidence.

> of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Instead of asking the court to make a finding of fact, grandmother simply appealed. Under CR 52.04, reversal is not required.

That being said, on closer examination of grandmother's claimed error, grandmother essentially argues that the court should have afforded her testimony greater weight. However, the record shows the court considered all the evidence presented, which necessarily included grandmother's testimony about her relationship with the child. *See Walker*, 382 S.W.3d at 867 (appellate court gives great deference to circuit court's assessment of witness credibility). The fact that the court did not recite in its order every bit of testimony heard does not mean the court failed to consider and balance the evidence presented. In fact, the court's order specifically states otherwise. Grandmother's claim of error in this respect therefore fails.

Next, grandmother asserts the court relied on improperly admitted evidence. An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion, *i.e.* "'whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Barnett v. Commonwealth*, 317 S.W.3d 49, 61 (Ky. 2010) (citation omitted). Grandmother claims the court considered irrelevant evidence - specifically, her relationship with her own son and the fact that he does not allow her to visit with his child, and her actions or

inactions during mother's childhood. In support, grandmother cites KRE 402, which requires evidence to be relevant in order to be admissible. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401.

In this case, the court was tasked with determining whether grandparent visitation would be in the child's best interests. The evidence admitted included: a) grandmother's failure to protect her own children from physical, emotional and sexual abuse in the past; b) grandmother's current relationship or lack thereof with members of her family; c) grandmother's use of financial incentives to exert control over mother's and father's custody dispute; and d) grandmother's active concealment from father of the child's sexual abuse. This evidence was relevant to determining whether grandparent visitation would be in the child's best interests. We fail to appreciate grandmother's claim to the contrary.

Grandmother further maintains the court improperly considered evidence of text messages sent between her and her current husband during a period of time when she had taken the child on vacation out of state and denied father phone contact with the child, telling father that phone reception was not available. Father testified that he later discovered the text messages on grandmother's cell phone, after grandmother had given him the used cell phone as a gift, showing grandmother and her husband mocking father and mother, referring to them

derogatorily, and stating that the "story" to tell father to explain the lapse in communication during the vacation was that the phones were not working.

Grandmother objected to the admission of this evidence at trial, claiming father was in no position to perceive accurately whether the text messages were about him, or if the messages were actually between grandmother and her husband. Grandmother points out that father did not take part in the exchange of texts and has no ability to know whether an error existed with the phone or contacts as listed in the phone. Therefore, she avers that under KRE 601 father was incompetent to testify about the contents of the text messages purportedly sent by her to her husband.

Grandmother's objection more accurately falls under KRE 602 as an objection to father's lack of personal knowledge. KRE 602 states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of KRE 703, relating to opinion testimony by expert witnesses.

In this case, the circuit court inquired into father's knowledge of the text messages. Father explained how he came into possession of the cell phone, identified the phone numbers as belonging to grandmother and her husband, and also stated that he is commonly called "Nic," which is the name used in the text messages. Father further testified that he did not alter the text messages at any time. The court found this testimony established father's personal knowledge and

admitted the text messages as an exhibit. Moreover, later on at trial, grandmother admitted that the text messages at issue were sent between her and her husband. On appeal, grandmother has not provided any authority, other than citing the rule of evidence, in support of her claim that the court's evidentiary ruling was an abuse of its discretion. Accordingly, we decline to so hold.

Grandmother also objected to admission of the text messages on grounds that a proper foundation had not been laid as required by KRE 901(a), which states that proper authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Again, father testified, and grandmother admitted, that the text conversation at issue occurred on grandmother's phone and was between grandmother and her husband. We fail to appreciate grandmother's assertion that further evidence was required to admit the text messages in question. Other than citing the rule of evidence, grandmother has not provided any authority in support of her argument that the court's decision was an abuse of its discretion. Additionally, even if the text messages were improperly admitted, sufficient evidence exists without them to support the court's decision to terminate grandmother's visitation.

Lastly, we find unpersuasive grandmother's claim that due to the court's improper admission of the text messages, she was forced to use the bulk of her two-hour allotted time period cross-examining father about this evidence rather than presenting her own evidence. As noted above, the court's admission of the text messages was proper. Furthermore, grandmother chose how to use the two

hours she was allotted. She was afforded the same amount of time as the other parties. She cannot now complain as to her trial strategy in the use of her time. Her claim of error in this respect is wholly without merit.

For the foregoing reasons, the Jefferson Circuit Court order is affirmed.

ALL CONCUR.

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