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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001210-ME

SARA PEYTON — APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 14-CI-00231

TAMELA PAINTER; AND
LARRY DEWAYNE MURRAY — APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: D. LAMBERT, MAZE, AND VANMETER, JUDGES.

MAZE, JUDGE: Sara Peyton appeals from an order of the Simpson Circuit Court awarding visitation with her child L.D.M. to the maternal grandmother, Tamela Painter. We agree with Peyton, that the trial court's factual findings were insufficient to justify an award of grandparent visitation. Hence, we reverse and remand for entry of additional findings.

Sara Peyton and Larry Dewayne Murray are the mother and father, respectively, of L.D.M., born January 2008. Tamela Painter is Peyton's mother and the maternal grandmother of L.D.M. Peyton and Murray separated in February 2009, at which time she and L.D.M. moved in with Painter. In the dissolution proceeding, Peyton received sole custody of L.D.M. Murray received supervised visitation at first, and then unsupervised visitation.

While they were living with Painter, Peyton would get L.D.M. dressed and dropped off at daycare. Painter would pick up the child in the afternoon and care for him until Peyton got off work. Painter also assisted transporting the child to visits with his father. Peyton voiced concerns about Painter's enforcement of rules, and Painter often commented that Peyton was being overprotective.

Peyton remarried in May 2011 and moved out of Painter's house at that time. Painter saw L.D.M. less frequently after that time, but still had occasional visits. However, Peyton and Painter continued to have disagreements regarding the child. Peyton objected to several emotional outbursts by Painter in the presence of L.D.M. and felt that Painter was undermining her authority with the child.

The disagreements culminated in several heated arguments between Peyton and Painter in December of 2011. Peyton and Painter entered into counseling over visitation in January of 2012. However, Peyton discovered that Painter was secretly seeing L.D.M. during the child's visits with his father. In

early April of 2012, Peyton cut off all communication with Painter. Painter continued to see L.D.M. during the child's visits with Murray.

On August 13, 2014, Painter brought a verified petition seeking grandparent visitation pursuant to KRS[1] 405.021. Peyton filed an answer opposing the petition. The trial court conducted an evidentiary hearing on March 23, 2015. Thereafter, on May 6, 2015, the trial court entered findings of fact, conclusions of law and an order granting Painter's petition for grandparent visitation. The court gave Painter visitation with L.D.M. every Monday from after school until 6:30 pm.

Peyton filed a motion to alter, amend or vacate the order pursuant to CR[2] 59.05. She also filed a motion for more specific findings, or, in the alternative, to adjust the visitation schedule. Following a hearing, the trial court denied the motion to set aside visitation or for more specific findings. However, the court did modify the visitation schedule to reflect particular issues that Peyton had raised. Peyton now appeals to this Court.

As an initial matter, Peyton raises several procedural issues, which she asserts should entitle her to automatically prevail in this appeal. In her reply brief, Peyton argues that Painter's brief should be stricken as untimely. However, the Appellee's brief was filed on October 20, 2015, which was the date that the Clerk's Office designated it to be due. Furthermore, while this Court may order a brief stricken for failure to comply with CR 76.28, such a remedy is not appropriate

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

where the deficiency is minor, and particularly not in cases involving custody or visitation matters. *Ellis v. Ellis*, 420 S.W.3d 528, 529 (Ky. App. 2014). Even if the brief was untimely, this Court finds no basis to treat the deficiency as a confession of error.

Peyton also contends that Painter's citation to an unpublished case, *Gentile v. Hardin*, 2013-CA-001513-ME, 2014 WL 1882752 (Ky. App. 2014), warrants striking of her brief without leave to refile. We disagree. CR 76.28(4)(c) permits this Court to consider unpublished opinions as persuasive authority. The 2002 amendment to this rule supersedes prior authority holding that a brief may be stricken for citation to unpublished opinions. The current rule also permits this Court to judge for itself any persuasive value of an unpublished opinion. Consequently, neither of Peyton's arguments for striking Painter's brief are well-taken.

The parties agree that the controlling issue in this appeal concerns the proper application of the decision of the Kentucky Supreme Court in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012). In that case, the Kentucky Supreme Court addressed the scope of grandparent visitation in light of the ruling by the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000). The Court in *Walker* began with the statutory authority for grandparent visitation, which did not exist as common law. KRS 405.021(1) permits a circuit court to grant visitation to maternal or paternal grandparents of a child and to issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.

Prior to *Troxel*, this statute was interpreted to establish a presumption that visitation with a grandparent will generally be in the best interests of the child. *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992). Consequently, a parent's objection to grandparent visitation, standing alone, would not be sufficient to deny visitation to a grandparent. *Id.* at 632-33.

The continued viability of this rule was called into question after the United States Supreme Court rendered its decision in *Troxel v. Granville*, *supra*. In that case, the Court considered the constitutionality of a Washington-state statute which authorized trial courts to grant third-party visitation rights whenever visitation may serve the best interest of the child. A plurality of the United States Supreme Court found that the statute unconstitutionally interfered with parents' fundamental right to raise their children. *Troxel*, 530 U.S. at 65-66. A majority of the Court agreed that parents have a fundamental liberty interest in the care, custody, and control of their children, that "there is a presumption that fit parents act in the best interests of their children." *Id.* at 68.

However, the Court in *Troxel* did not reach a consensus regarding the precise scope of this right beyond the specific statute at issue and the particular circumstances of the case before it. Consequently, this Court subsequently was faced with interpreting KRS 405.021(1) in light of the federal constitutional rights delineated in *Troxel*. In *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004), this Court, sitting *en banc*, acknowledged *Troxel*'s requirement that a fit parent's decisions regarding third-party visitation must be presumed to be in the child's best

interests. *Id.* at 294. However, the Court held that a grandparent is not required to show that a denial of visitation will cause actual harm to the child. *Id.* (overruling *Scott v. Scott*, 80 S.W.3d 447 (Ky. App. 2002)).

Rather, the Court in *Vibbert* adopted a modified-best-interests standard which starts with the presumption that visitation against the parent's wishes is not in the child's best interest. The grandparent must rebut this presumption with clear and convincing evidence that visitation is in the child's best interest. *Id.* at 294-95. In determining whether the visitation is in the child's best interest, a trial court must consider a broad array of factors, including but not limited to: the nature and stability of the relationship between the child and the grandparent seeking visitation; the amount of time spent together; the potential detriments and benefits to the child resulting from granting visitation; the effect granting visitation would have on the child's relationship with the parents; the physical and emotional health of all the adults involved, parents and grandparents alike; the stability of the child's living and schooling arrangements; and the wishes and preferences of the child. *Id.* at 295.

Despite this Court's ruling in *Vibbert*, confusion remained about the application of the presumption in favor of the parent's decisions and the modified best-interests standard. These issues were further confused because *King* was never explicitly overruled. As a result, the statute was still read by some as favoring grandparent visitation. The issue was finally placed squarely before the Kentucky Supreme Court in *Walker*. After examining the development of

standards from *King* through *Troxel* and *Vibbert*, the Kentucky Supreme Court in *Walker* explicitly recognized that the approach set out in *King* was no longer valid. *Walker*, 382 S.W.3d at 668-70. As the Court in *Walker* explained,

> [s]o long as a parent is fit, there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. So a fit parent's wishes are not just a factor to consider in determining what is in the child's best interest. The constitutional presumption that a fit parent acts in the child's best interest is the starting point for a trial court's analysis under KRS 405.021(1).

Id. at 870-71 (footnotes and internal quotations omitted).

The Court in *Walker* went on to approve of the modified best-interests standard and factors set out in *Vibbert*. *Id.* at 871. The Court emphasized that the focus of these factors is not whether the parent is fit to make a decision regarding third-party visitation. A grandparent seeking visitation over the objections of the parent is not required to show that the parent is unfit, but she must present clear and convincing evidence that the parent is mistaken in the belief that visitation would not be in the best interests of the child. *Id.* at 871-72. See also *Fairhurst v. Moon*, 416 S.W.3d 788 (Ky. App. 2013).

We review the trial court's factual findings under the clearly-erroneous standard. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). A finding supported by substantial evidence is not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is that which is "sufficient to induce conviction in the mind of a reasonable person." *Rearden v.*

Rearden, 296 S.W.3d 438, 441 (Ky. App. 2009). Moreover, we must give due regard to the trial court's opportunity "to judge the credibility of the witnesses." CR 52.01. However, the trial court's interpretation and application of KRS 405.021(1) in accordance with federal constitutional law and the application of the appropriate standard to the facts are issues of law and subject to *de novo* review by this Court. *Walker*, 382 S.W.3d at 867.

The trial court, and this Court, must begin with the presumption that a fit parent is making decisions that are in the child's best interest. *Id.* at 870. Consequently, Peyton's decision to prohibit grandparent visitation must not be hastily discarded or ignored. Peyton argues that Painter failed to present clear and convincing evidence showing that grandparent visitation over her objections would be in the best interests of L.D.M. Peyton points to Painter's repeated emotional outbursts and confrontational behavior in front of L.D.M. She also complains that Painter has repeatedly undermined her authority with the child. Peyton states that she has seen L.D.M. display negative behavior after returning from visitation with Painter.

Peyton also contends that Painter has attempted to control all aspects of visitation with the child, in contravention of her authority as a parent and sole custodian of the child. Peyton and Painter went through counseling to work out their differences. However, Peyton states that Painter demanded her desired visitation as a condition of continuing counseling. After Peyton learned that Painter had been seeing L.D.M. during his visitation with Murray, she discontinued

counseling and cut off all contact with her mother. Peyton added that she is unable to trust her mother because of this conduct.

The trial court acknowledged that many of Peyton's concerns were valid. However, it found that those concerns were outweighed by the close relationship which developed between Painter and L.D.M. while the child and his mother were living in Painter's home. Although Painter did not see L.D.M. as much after they left her home, the court concluded that it would be in the child's best interest to allow that relationship to continue. The court also found that limited visitation by Painter would not have a negative impact on the child's relationship with his parents, nor would it affect the stability of the child's living and schooling arrangements.

The mere existence of a close relationship between the child and the grandparent, standing alone, is insufficient to overcome the presumption that the parent is acting in the child's best interest. *Id.* at 872. Rather, Painter 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.* The Court in *Walker* recognized that a grandparent can meet this burden when there is proof that the child and grandparent lived in the same household for a period of time, or when the grandparent regularly babysat the child. *Id.*

Nevertheless, the fact that the child and grandparent lived in the same household for a period of time may not be sufficient always to overcome the parental presumption. In *Waddle v. Waddle*, 447 S.W.3d 653 (Ky. App. 2014), the

mother and child also lived in the grandparents' home for an extended period of time. However, this Court still reversed the trial court's order granting visitation, noting that the trial court failed to address the clear-and-convincing evidence standard necessary to overcome the parental presumption. *Id.* at 657. Rather, the trial court merely made a conclusory finding that the grandparents had a loving relationship and that visitation was in the child's best interest. *Id.* This Court concluded that the findings were insufficient to support an award of grandparent visitation under the *Walker* standard, and remanded for additional evidence and findings. *Id.*[3]

We find no significant difference between the findings at issue in *Waddle* and those in the present case. Here, the trial court acknowledged that Peyton has legitimate concerns regarding Painter's behavior. However, the court focused entirely on the prior close relationship between Painter and L.D.M. The trial court addressed several other *Vibbert* factors – that limited visitation would not have a negative impact on the child's relationship with his parents, and the motivations of the parties. But the court did not point to any particular evidence supporting these findings. Moreover, the trial court did not give special weight to Peyton's objection to visitation as a mother. Like in *Waddle*, we must conclude that "neither the evidence proffered nor the findings made were sufficient to

[3] Following remand, the trial court in *Waddle* again granted visitation to the grandparents over the parent's objection. In a subsequent appeal, this Court again reversed, concluding that the evidence and findings were still insufficient to overcome the presumption in favor of the parent. *Waddle v. Ray*, No. 2015-CA-000561-ME, 2016 WL 675910 (Ky. App. 2016).

support an award of grandparent visitation in light of Kentucky statutory and case law provisions." *Id.*

Under the circumstances, the most appropriate remedy is to vacate the award of grandparent visitation and remand this matter for additional findings of fact in accord with the standard set out in *Walker v. Blair* and *Waddle v. Waddle*. Under this standard, the trial court must presume that Peyton, as L.D.M.'s parent, is acting in his best interest. In order to rebut this presumption, Painter must provide clear and convincing evidence that visitation is in L.D.M.'s best interest, applying the factors in the modified-best-interest standard. Additionally, the trial court must provide written findings of fact with reference to the specific evidence supporting its determinations.

We would also add that the central focus of this matter should be what is in the best interests of L.D.M. Like the trial court, we accept that the parties love the child and want what is best for him. Ideally, the parties should be able to work through their differences for the benefit of the child. But where a grandparent seeks the intervention of the courts to compel visitation, the decision of the parent must prevail absent a clear and convincing showing by the grandparent in favor of such visitation. Anything less would elevate the grandparent to equal status with a custodial parent.

Accordingly, we vacate the order of the Simpson Circuit Court granting visitation to Painter and remand for additional findings as set forth in this opinion.

ALL CONCUR.

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