RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001692-ME

BROOKS HOUCK — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN D. SEAY, JUDGE
ACTION NO. 15-CI-00446

SHERRY G. BALLARD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Appellant, Brooks Houck, appeals from a judgment of the Nelson Circuit Court granting Appellee, Sherry Ballard, grandparent visitation pursuant to KRS 405.021. For the reasons set forth herein, we reverse the decision of the trial court and remand this matter for further proceedings consistent with this opinion.

E.P.H. is the minor son of Houck and Crystal Rogers. Houck and Rogers were not married but had been living together with E.P.H. and several of Rogers' other children. During the Fourth of July weekend 2015, Rogers disappeared and her whereabouts remain unknown. Houck and the Ballard family (Rogers' family) have been at odds since Rogers' disappearance as Houck has been the only suspect named in the matter. E.P.H., who was only two years old at the time of Rogers' disappearance, continues to live with Houck, and Rogers' other children reside with the Ballard family.

On July 31, 2015, Sherry and Thomas Ballard,[1] Rogers' parents, filed a petition for grandparent visitation in the Nelson Circuit Court pursuant to KRS 405.021. Following a hearing, the trial court entered a temporary order on December 10, 2015, granting the Ballards visitation with E.P.H. for four hours on alternating Saturdays. Subsequently, additional hearings were held to review the status of the temporary order and each time additional visitation was granted.

The trial court held a final hearing on January 26, 2017, during which numerous witnesses testified. In its subsequent order entered on September 28, 2017, the trial court granted the Ballards visitation with E.P.H. from Saturday at 10:00 am until Sunday at 6:00 pm every other weekend, in addition to holidays in accordance with the local rules. In so doing, the trial court acknowledged the

[1] Thomas was shot and killed in November 2016. Sherry is the only Appellee herein.

animosity between the parties but observed that "[t]he potential benefit to E.P.H. in having contact with a loving grandmother who has been such a significant part of his life and contact with his older siblings, outweighs the potential for detriments of visitation." The trial court further concluded,

> The court believes that both Houck and the Ballards came into the hearing with the motivation of protecting E.P.H.'s best interest; they simply have differing opinions as to what is in his best interest.
>
> After considering all the relevant facts the court has determined that Houck is mistaken in his belief that visitation with the Ballards is not in E.P.H.'s best interest. The court understands Houck's position given the current tension between petitioner, her late husband and himself. However, the court believes that Sherry Ballard is a loving grandmother and will not say or do things in E.P.H.'s presence that would harm his relationship with Houck.

Houck thereafter appealed to this Court as a matter of right.

Houck argues on appeal that the trial court erred in determining that he was clearly mistaken in his belief that grandparent visitation was not in E.P.H.'s best interest. Houck contends that his motivation in denying visitation with the Ballards is to protect E.P.H. from the clear negativity and hostility, and to prevent a wedge from being driven between him and E.P.H, thus damaging their relationship. Furthermore, Houck argues that the trial court erred by failing to hold Ballard to the clear and convincing evidentiary standard that is required to show that grandparent visitation was in E.P.H.'s best interest.

A family court's factual findings are reviewed for clear error, and therefore, the clearly erroneous standard is used. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); CR 52.01. Further, 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 family court's opportunity "to judge the credibility of the witnesses." CR 52.01. Nonetheless, statutory interpretation and application of the appropriate standard to the facts are issues of law and, consequently, are reviewed *de novo*. *Hill v. Thompson*, 297 S.W.3d 892, 895 (Ky. App. 2009).

In the seminal case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the United States Supreme Court considered grandparent visitation and the federal constitutional implications of state statutes that permit courts to grant non-parent visitation with children over the objections of their parents. The Court noted that the Due Process Clause of the Fourteenth Amendment gives parents a fundamental liberty interest in the care, custody, and control of their children. *Id.*, 530 U.S. at 66, 120 S.Ct. at 2060. Further, the Court recognized "a presumption that fit parents act in the best interests of their children[,]" and as such,

> so long as a parent adequately cares for his or her children (*i.e.*, 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.

Id. 68-69, 120 S.Ct. 2061 (citing *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

In *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012), our Supreme Court discussed the impact of *Troxel* on Kentucky's grandparent visitation statute, KRS 405.021(1), which states in pertinent part, "The 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 *Walker* Court upheld the constitutionality of the statute, but emphasized that for the statute to comport with *Troxel*, courts must presume that a fit parent acts in his or her child's best interest:

> When 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. "[T]he Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." So long as a parent is fit, "there will normally be no reason for the [s]tate 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).

Walker, 382 S.W.3d at 870-71(footnotes omitted).

Essentially, in a grandparent visitation dispute, a parent and grandparent are not on equal footing, and a parent's decision to deny visitation is given special weight. Furthermore, the *Walker* Court explained that because a fit parent is presumed to act in the best interest of the child, a grandparent seeking visitation against a parent's wishes must overcome the presumption by clear and convincing evidence. Thus, for a court to grant visitation over the wishes of the parents, the grandparents must establish compelling evidence, that is, clear and convincing, that visitation is in the child's best interest. *Id.* at 871. 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." *Id.* "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 [clear and convincing] heightened standard of proof is required." *Vibbert v. Vibbert*, 144 S.W.3d 292, 295 (Ky. App. 2004).

While "best interest" is a broad term, the *Walker* Court adopted a nonexclusive list of factors, which initially were delineated by this Court in *Vibbert*, for a trial court to consider when grandparent visitation is sought. With some necessary modification, those factors are:

> 1) the nature and stability of the relationship between the child and the grandparent seeking visitation;
>
> 2) the amount of time the grandparent and 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 [custodial nonparents];
>
> 5) the physical and emotional health of all the adults involved, [nonparents] and grandparents alike;
>
> 6) the stability of the child's living and schooling arrangements; and
>
> 7) the wishes and preferences of the child.

Walker, 382 S.W.3d at 871. Moreover, *Walker* added an additional factor: "the motivation of the adults participating in the grandparent visitation proceedings." *Id.*

Chief among these factors is a consideration of the effect that granting non-parent visitation would have on the child's relationship with his parents.

In *Troxel*, the Court noted that "[t]he extension of statutory rights in this area to persons other than a child's parents ... comes with an obvious cost. For example, the [s]tate's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship." *Id.*, 530 U.S. at 64, 120 S.Ct. at 2059. The Kentucky Supreme Court has recognized that this reasoning is especially true where animosity exists between the parent and grandparent. *Walker*, 382 S.W.3d at 872. "Grandparent visitation should not be granted if it is clearly detrimental to the parent-child relationship." *Id.*

In *Grayson v. Grayson*, 319 S.W.3d 426 (Ky. App. 2010), a trial court granted limited grandparent visitation over the vehement objection of the parents. The paternal grandmother therein had exhibited extreme vitriol toward her daughter-in-law and, perhaps to a lesser degree, toward her son. In reversing the decision of the trial court, a panel of this Court held,

> [T]he state of discord prevailing here is far more than a "trivial disagreement" and exceeds the bounds of a "family quarrel of little significance."
>
> Requiring a child to have visitation with a grandparent who has extreme animosity toward the child's parent would be inherently unhealthy for the child and would potentially undermine the relationship between the child and its parent. . . .
>
> We respect the views of the distinguished trial court. If this case were governed by an abuse of discretion standard, we might be inclined to uphold the judgment of very limited visitation between Appellee and her

> grandchildren. We discern an endeavor by the trial court to preserve a thread in the torn fabric of this family. But this was not a discretionary ruling by the trial court. The court was required to apply KRS 405.021 and determine whether visitation was affirmatively proven by clear and convincing evidence to be in the children's best interest. Applying this standard, we can reach no conclusion other than that the trial court erred as a matter of law in its conclusions and judgment upon the evidence.

Id. at 432 (quoting *King v. King*, 828 S.W.2d 630 (Ky. 1992), *overruled by Walker*, 382 S.W.3d at 870).

The *Walker* court further answered the question as to whether clear and convincing proof of a loving relationship between a grandparent and grandchild alone is enough to overcome the parental presumption:

> Except in special circumstances, it is not enough. . . . "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. Again, these determinations are fact-intensive. To allow visitation on a lesser showing would put fit grandparents on equal footing as fit parents, which violates the Due Process Clause.

Walker, 382 S.W.3d at 872 (footnote omitted).

After reviewing the record, we must conclude that the trial court did not give proper weight to Houck's decision, and his concern for the potential harm to the parental relationship between him and E.P.H. that would result if visitation

was allowed. Although the trial court acknowledged the hostility between the parties, it nevertheless concluded that because the Ballards testified they would not make negative comments in front of E.P.H., the benefits of visitation outweighed any possible detriment. Unfortunately, we are of the opinion that the record refutes that notion. The evidence presented during the hearing clearly established that members of the Ballard family have continuously exhibited animosity and vitriol towards Houck through social media and the posting of signs throughout the community. Ballard even harassed Houck's girlfriend, Crystal Maupin, and her family, to the point of following her into a restaurant (where E.P.H. was present) to take photos of Maupin for the purpose of posting them on Facebook. Several Ballard family members have even publicly accused Houck of being responsible for Thomas's death in 2016.

Even more troubling, however, is the testimony of Houck and Maupin concerning E.P.H.'s behavior. Houck testified that after returning from visits with the Ballards, E.P.H. is sullen and uncooperative. Houck further stated that E.P.H. is extremely accusatory, asking him "what did you do to my mommy," and that "everyone wants to know." Maupin similarly testified that E.P.H. is accusatory of Houck and less loving for several days after his visits. In discounting the relevance of this evidence, the trial court stated that Houck's testimony that E.P.H. is a well-adjusted four-year-old confirmed that there had been no negative effects from the

animosity between the parties. We disagree. Houck's and Maupin's testimony demonstrates that there has, in fact, been a detrimental aspect to E.P.H. spending time in the Ballard household.

We are likewise concerned that the trial court did not hold Ballard to the clear and convincing evidentiary standard as required by *Walker*. Citing to *Walker*, the trial court recognized that it was required to presume Houck was a fit parent acting in E.P.H.'s best interest and that the Ballards had to overcome such presumption by "presenting evidence that the fit parent 'is clearly mistaken in his belief that the grandparent visitation is not in the child's best interest.'" However, nowhere in the trial court's order are the words "clear and convincing evidence" used. Further, in discussing the *Walker* factors, the trial court focused on the relationship between Ballard and E.P.H. and concluded that "[t]he potential benefit to E.P.H. in having contact with a loving grandmother who has been such a significant part of his life and contact with his older siblings, outweighs the potential for detriments of visitation." This clearly is not the evidentiary standard required by *Walker*. We are of the opinion that the trial court not only failed to apply the correct evidentiary standard but essentially placed the burden on Houck to show visitation was not in E.P.H.'s best interest when, in fact, it was Ballard's burden to prove, by clear and convincing evidence, that Houck was clearly mistaken in his belief.

The evidence herein unquestionably establishes that the relationship between the parties is plagued by acrimony and that the hostility between them is unlikely to abate. Under such circumstances, the added strain of the trial court's intrusion upon the relationship between Houck and E.P.H. is manifest. As previously noted, *Walker* warned that grandparent visitation should not be ordered where it was clearly detrimental to the parent-child relationship. *Id.* at 872. As in *Grayson*, we appreciate the trial court's attempt "to preserve a thread in the torn fabric of this family." *Id.* at 432. The circumstances herein are tragic at best, and we are sympathetic to Ballard's desire for visitation with her grandson. Nevertheless, after reviewing the record as a whole, we are compelled to conclude that the trial court failed in both according the decision of Houck, as a fit custodial parent, any material weight, and failing to require Ballard to prove by clear and convincing evidence that Houck's decision was mistaken.

We conclude that a new evidentiary hearing is appropriate in this case because the trial court did not apply the appropriate standard in determining whether visitation with Ballard was in E.P.H.'s best interest, the trial court's findings of fact are troubling, and a year has passed since the original hearing. As such, we reverse the trial court's visitation order, and remand this case to the trial court with directions to conduct a new evidentiary hearing on Ballard's petition applying legal standards consistent with this opinion.

COMBS, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

MAZE, JUDGE, CONCURRING: I fully agree with the reasoning and result of the majority opinion. I am writing separately to emphasize that the result in this appeal is compelled by the holding in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012). In *Walker*, our Supreme Court held that a fit parent's decisions regarding grandparent visitation must be given presumptive weight absent clear and convincing evidence that the parent "clearly mistaken in the belief that grandparent visitation is not in the child's best interest." *Id.* at 871. In making this determination, the mere existence of a close relationship between the grandparent and the child, or even the fact that the child lived in the grandparent's home for a time, will not always be sufficient to overcome the parental presumption. *Goodlett v. Brittain*, 544 S.W.3d 656, 662 (Ky. App. 2018).

As the majority correctly notes, the mutual hostility between Houck and the Ballard family is especially intense. Under such circumstances, the trial court must make detailed factual findings supporting its conclusion that grandparent visitation would be in the child's best interests. Therefore, I agree with the majority's conclusion to remand this matter for additional findings consistent with *Walker v. Blair*.

BRIEF FOR APPELLANT:

Philip S. George, Jr.
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Susan Hanrahan McCain
Springfield, Kentucky