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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000539-ME

JENNIFER SANDERS — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 16-CI-00327

PATRICIA BAKER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND DIXON, JUDGES; AND BUCKINGHAM,[1] SPECIAL JUDGE.

DIXON, JUDGE: Jennifer Sanders appeals from the Nelson Circuit Court's November 8, 2018, findings of fact, conclusions of law and judgment granting

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Patricia Baker's motion for grandparent visitation with two of Sanders' children pursuant to KRS[2] 405.021. We affirm.

The core facts are undisputed. Sanders is the mother of two children at issue here, K.A. and J.A. (collectively "the children"),[3] each of whom was born in 2010. The children's father was Dominic Allen, Baker's son, who passed away in 2012. In 2016, Baker filed a petition for grandparent visitation pursuant to KRS 405.021 (misidentified in the petition as KRS 405.091).

In October 2018, the trial court held a final hearing on Baker's petition. At the beginning of the hearing, Sanders' counsel asked the court if it planned to proceed under the new or former version of KRS 405.021. That determination was significant because in 2018, the General Assembly amended the statute by adding, in relevant part, language stating that "[i]f the parent of the child who is the son or daughter of the grandparent [seeking visitation] is deceased, there shall be a rebuttable presumption that visitation with the grandparent is in the best interest of the child if the grandparent can prove a pre-existing significant and viable relationship with the child." KRS 405.021(1)(b). The trial court stated that the proceedings were "obviously" under the "new law" because it was already in

[2] Kentucky Revised Statutes.

[3] To help protect their identity, we shall use the children's initials.

effect. Video Record, 10/30/18 at 1:09:14. Sanders' counsel neither objected nor asked for a continuance.

Sanders' counsel then asked the court which statutory subsection was applicable. That question was also significant because the longstanding provision of KRS 405.021(1)(a) provides that a court may order grandparent visitation if it is in the grandchild's best interest (*i.e.*, the burden is on the grandparent), whereas subsection (1)(b) contains a rebuttable presumption in favor of grandparent visitation upon the death of a child's parent, provided the grandparent had a "pre-existing significant and viable relationship with the child" as defined by subsection (1)(c) (*i.e.*, the burden is on the parent once the presumption applies). The trial court responded that it would review the evidence and make that determination later. Again, Sanders' counsel neither objected nor asked for a continuance.

The court also gratuitously remarked that it was unsure about the constitutionality of the recent amendments to KRS 405.021, to which Sanders' counsel explicitly responded that Sanders was not challenging the statute's constitutionality.

The parties then presented their evidence. On November 8, 2018, the court issued its decision. The court first made the findings required for a typical "best interest" grandparent visitation petition, noting that a fit parent is presumed to make decisions which are in a child's best interest. Thus, Baker was required to

show by clear and convincing evidence that Sanders' belief that grandparent visitation was not in her children's best interest was incorrect pursuant to KRS 405.021(1)(a). The court then addressed the eight factors approved by the Supreme Court in *Walker v. Blair*, 382 S.W.3d 862 (Ky. 2012) for making that determination.[4] The court's findings on those factors are somewhat mixed, with some favoring Sanders but most either neutral or favoring Baker.

The court, however, did not decide the matter based solely upon the eight *Walker* factors. Instead, as it foreshadowed at the hearing, the court found that Baker had satisfied the rebuttable presumption in favor of grandparent visitation under KRS 405.021(1)(b). Therefore, "[a]fter considering all of the evidence in conjunction with the rebuttable presumption contained in KRS 405.021(1), this Court finds that [Baker] has established by clear and convincing

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[4] 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 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; []
> 7) the wishes and preferences of the child [; and]
> 8) the motivation of the adults participating in the grandparent visitation proceedings.

Walker, 382 S.W.3d at 871.

evidence that grandparent visitation is in the best interests of [the children]." Record (R.) at 144. The court then granted Baker unsupervised visitation for several hours one Sunday per month, as well as on some holidays.

On November 19, 2018, Sanders filed a combined motion for a new trial under CR[5] 59.01 and to alter, amend, or vacate the judgment under CR 59.05. The motion asked the court to declare the newly-effective portions of KRS 405.021(1) unconstitutional. Sanders also alleged that the court failed to give her an opportunity to challenge the constitutionality of those amendments at trial and that the court's application of the new version of KRS 405.021 deprived her of a fair trial. Sanders further asserted that the court's conclusions on many of the *Walker* factors were either erroneous or not based upon the evidence. Sanders served a copy of her motion upon the Kentucky Attorney General.

In March 2019, the trial court denied Sanders' CR 59 motion. First, it found it lacked jurisdiction to entertain the motion because it was filed eleven days after the judgment was entered, one day after the ten-day deadline. However, the tenth day after November 8, 2018 (November 18, 2018), was a Sunday and, thus, Sanders was permitted to file the motion on the following Monday under CR 6.01.

Nevertheless, despite (erroneously) believing it lacked jurisdiction to entertain the motion, the trial court went on to determine that Sanders had waived

[5] Kentucky Rules of Civil Procedure.

her right to challenge the constitutionality of recent amendments to KRS 405.021(1) by failing to do so earlier. The court also reminded Sanders that it had stated at the hearing that the case was "obviously" under the "new law," and Sanders had not moved for a continuance or other relief, thus belying her argument that she would have moved for a continuance had she known the court would apply the recent statutory amendments. The court also said it had "considered all other arguments" made by Sanders but had found "no reason" to amend its decision.

Sanders then filed this appeal. Sanders did not serve the Attorney General with a copy of the notice of appeal. In addition, she stated she was appealing from both the original judgment and the order denying her motion for new trial/motion to vacate, which is improper since an order denying a CR 59.05 motion is not final and appealable. *Ford v. Ford*, 578 S.W.3d 356, 365 (Ky. App. 2019). "Accordingly, the appeal is from the underlying judgment, not the denial of the CR 59.05 motion"; thus, "[w]hen a trial court *denies* a CR 59.05 motion, and a party erroneously designates that order in his or her notice of appeal, we utilize a substantial compliance analysis and consider the appeal properly taken from the final *judgment that was the subject of the CR 59.05 motion.*" *Id.* at 366 (quotation marks and citation omitted).

Sanders' first argument is that her post-judgment motion was timely since the last day of the ten-day filing period was a Sunday and her motion was

filed on Monday, the next business day. As previously stated, we agree. That does not, however, mean Sanders is entitled to substantive relief as she must still show errors in the original judgment, as we have held that we lack jurisdiction to remedy errors within a CR 59.05 ruling. *Id.* at 365.

Sanders' second argument is that the 2018 amendments to KRS 405.021(1) are unconstitutional. We cannot address this argument for two primary reasons. First, Sanders failed to serve the Attorney General with a copy of the notice of appeal as required by KRS 418.075(2).[6] Second, Sanders did not timely challenge the statute's constitutionality in the trial court. Her claims to the contrary notwithstanding, the trial court did not prevent her from raising such a challenge at the hearing (though there is no indication she had notified the Attorney General of a challenge to the statute's constitutionality). Indeed, Sanders expressly asserted at the hearing that she was not challenging the constitutionality of KRS 405.021(1)(b) and (c). Sanders waited until her post-judgment motion to raise the constitutionality argument, at which point it was too late. Nothing prevented Sanders from raising the issue sooner since the amendments to KRS 405.021 had already been effective for months. *See, e.g., Gullion v. Gullion*, 163

[6] That subsection provides: "In any appeal to the Kentucky Court of Appeals . . . which involves the constitutional validity of a statute, the Attorney General shall, before the filing of the appellant's brief, be served with a copy of the pleading, paper, or other documents which initiate the appeal in the appellate forum."

S.W.3d 888, 893 (Ky. 2005) (citations omitted) ("A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment.").[7]

Sanders' final argument is that the trial court erred in its eight *Walker* findings. However, though the trial court addressed the *Walker* factors, it also based its decision upon the rebuttable presumption in the 2018 version of KRS 405.021(1)(b). The *Walker* factors are used to resolve typical grandparent visitation petitions, not the specialized situations covered by subsection (1)(b) which apply only when there has been a parental death and a pre-existing significant relationship between the grandparent and grandchild.[8]

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[7] Although we decline to consider the argument on the merits, we do note that a panel of this Court has rejected a similar argument that the 2018 amendments to KRS 405.021(1) were unconstitutional, though a motion for discretionary review was granted March 18, 2020. *Robison v. Pinto*, 2019-CA-000435-ME, No. 2019 WL 4724761, at *4 (Ky. App. Sept. 27, 2019).

[8] KRS 446.080(3) generally prohibits retroactive application of a statute absent a declaration of retroactivity by the General Assembly. And the 2018 amendments to KRS 405.021 took effect roughly two years after Baker filed her petition for grandparent visitation. However, Sanders only argues the amendments are unconstitutional, not that they are impermissibly retroactive. For example, she does not posit in her brief an argument in the alternative along the hypothetical lines of "If the Court finds the amendments constitutional, they nonetheless should not apply here because Baker's petition was pending long before they became effective." In addition, Sanders did not object when the trial court remarked at the hearing that the new amendments "obviously" applied. Therefore, we decline to *sua sponte* engage in the intensive task of determining, apparently as a matter of first impression, if the 2018 amendments to KRS 405.021 apply to cases which were already pending on their effective date. *See, e.g., Utility Management Group, LLC v. Pike County Fiscal Court*, 531 S.W.3d 3, 9-11 (Ky. 2017) (discussing the different retroactivity treatment afforded to substantive and remedial statutory amendments). We instead will assume, *arguendo*, that the 2018 amendments apply here.

In other words, under facts like those at hand, the court is tasked with first determining if the grandparent has shown sufficient evidence for the presumption in favor of grandparent visitation in KRS 405.021(1)(b) to apply. If the court finds the presumption applies, the burden shifts to the parent to present sufficient evidence to rebut it. If the court finds the evidence is insufficient for the presumption to apply, the question reverts to the standard one of whether it is in the best interest of the grandchild to have grandparent visitation under the settled *Walker* factors. Thus, the *Walker* factors are not designed for mandatory usage in grandparent visitation cases where the presumption of KRS 405.021(1)(b) applies. In those situations, the *Walker* factors may only offer useful, non-exclusive guidance to help courts determine whether the presumption in favor of grandparent visitation has been successfully rebutted by an objecting parent. In short, Sanders' repeated argument that Baker failed to meet her burden of proof to sufficiently satisfy the *Walker* factors is inapposite.

Sanders does not address the burden-shifting nature of KRS 405.021(1)(b), instead focusing on the *Walker* factors and repeatedly arguing that Baker failed to present clear and convincing evidence to warrant grandparent visitation.[9] We could, therefore, decline to address this case further since Sanders

[9] We note that Baker testified as to her regular, loving contact with the children from their birth until Sanders ceased permitting her to see them at some point prior to the initiation of the petition at hand. Therefore, though Sanders offered contrary evidence regarding the level of contact the

has not addressed the core issue of whether Baker met the presumption or Sanders rebutted it sufficiently. However, given the unsettled nature of the proper scope and application of KRS 405.021(1)(b), and the urgent necessity to protect children and to provide for their physical and emotional health, we will briefly address whether the trial court's conclusion to award visitation to Baker was clearly erroneous or an abuse of discretion.

The main thrust of Sanders' brief is not directed toward Baker but, rather, is directed at Baker's husband, who has an admitted history of substance abuse and failure to care properly for another child. The trial court noted that it was "troubled" by Baker's husband's history of substance abuse. R. at 142. But, as the trial court noted, Baker's husband completed substance abuse treatment and complied with the case plan initiated by the Cabinet for Health and Family Services. Therefore, the trial court's conclusion that Baker's husband was not an insuperable hurdle to her obtaining visitation was reasonable, though "the conflicting evidence in this case would have allowed another decision maker to reach a different conclusion." *Morton v. Tipton*, 569 S.W.3d 388, 400 (Ky. 2019). Similarly, we conclude the trial court's findings of fact are supported by the record

children had with Baker, we find no error in the court's conclusion that Baker had proven by a preponderance of the evidence that she had a significant and viable relationship with the children; accordingly, the presumption in favor of grandparent visitation applies. In fact, Sanders does not facially challenge that finding.

(*i.e.*, not clearly erroneous), nor is its overarching decision to grant Baker's petition "arbitrary, unreasonable, unfair, or unsupported by sound legal principles[,]" despite Sanders' arguments to the contrary. *Id. See also Nein v. Columbia*, 517 S.W.3d 492, 496 (Ky. App. 2017) (citation omitted) ("Trial courts are given broad discretion in child custody and visitation matters. Absent an abuse of discretion, we will not disturb the court's judgment.").

For the foregoing reasons, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Alan Kent Akers, Sr.
Bardstown, Kentucky

NO BRIEF FILED FOR APPELLEE