

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002354-MR

DOROTHEA E. BRENYO

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 90-CI-01854

NINA JEAN WITTENBARGER AND
DANIEL R. BRENYO

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Dorothea E. Brenyo (hereinafter "Dorothea") has appealed from the Fayette Circuit Court's October 11, 2002, order denying her motion to alter, amend or vacate the September 3, 2002, order terminating grandparent visitation without having held an evidentiary hearing. The grandchild in question is Daniel Alexander Brenyo (hereinafter "Alex"), the natural child of Nina Jean Wittenbarger (hereinafter "Nina") and Dorothea's

son, Daniel Brenyo (hereinafter "Daniel"). Having considered the applicable case law in light of the specific facts of this case, we must affirm.

At the outset, we note that both Nina and Daniel are proceeding without counsel and that neither filed a brief in this matter. For this reason, we could invoke CR 76.12(8)(c) and either accept Dorothea's statement of the facts and issues as correct, reverse the circuit court's decision if Dorothea's brief reasonably appears to sustain the action, or consider Nina's and Daniel's failure to file a brief as a confession of error and reverse without considering the merits of the appeal. However, we choose not to invoke any of those options, and we shall review the merits of this appeal, although we shall not spend considerable time reciting the factual background.

Alex was born on December 28, 1989, in Lexington, Kentucky to Nina and Daniel, who were never married to each other. Daniel filed a petition with the circuit court in 1990 regarding custody and support, and the circuit court entered an agreed judgment on July 9, 1990, awarding permanent custody to Nina. Daniel was ordered to pay child support and was also awarded visitation. Daniel moved out of the state for employment purposes for several years following the entry of the agreed judgment. During this time, Dorothea spent considerable time watching Alex in order to assist Nina. In 1998, Daniel

filed a motion to amend the agreed judgment pursuant to CR 60.02(f), requesting custody of Alex. Nina was eventually restored to her full custodial rights as sole custodian, and Daniel was permitted to continue his visitation rights.

On August 6, 1998, Dorothea and her husband, Daniel Brenyo, Sr.,¹ filed a motion to intervene and for visitation pursuant to KRS 405.021, Kentucky's grandparent visitation statute. Although Nina initially opposed the motion due to the interference with Alex's schedule, she eventually relented in order to end their conflict. On January 25, 1999, the circuit court granted the motion to intervene and for visitation, and set grandparent visitation for every Tuesday. It is evident in the record that problems continued between the parties as the circuit court ordered them all to attend parenting coordination sessions. The circuit court later granted Dorothea several days of visitation during Alex's summer breaks.

In 2002, all of the parties continued to have problems agreeing upon visitation times, and Dorothea filed a motion to set the summer visitation schedule and to clarify visitation rules and procedures. Nina objected to the motion and also moved to terminate grandparent visitation, asserting that visitation with Dorothea every Tuesday was not in Alex's best interest and that Dorothea would be able to see Alex during

¹ Daniel Brenyo, Sr., passed away at some point during the course of proceedings, although the record does not reflect when this occurred.

Daniel's visitation time. On July 26, 2002, the circuit court heard arguments from counsel for Nina and Dorothea. Nina argued that Dorothea could not prove that Alex would be harmed because she would still be able to see him. Dorothea argued that visitation with her would be in Alex's best interest, and that Daniel was prepared to testify to this. On September 3, 2002, the circuit court granted Nina's motion to terminate grandparent visitation, and indicated that Dorothea "is not precluded from spending time with Alex during periods of visitation to which [Daniel] is permitted."

Dorothea filed a motion to vacate the order terminating grandparent visitation on September 13, 2002, arguing that Nina had waived her right to claim that KRS 405.021 was unconstitutional, that Nina's use of Dorothea as a child provider created a "special factor", and that the circuit court failed to conduct an evidentiary hearing and determine whether harm to the child might result. Nina, on the other hand, argued that she had not used Dorothea as a childcare provider, that no "special factors" existed, and that an evidentiary hearing was unnecessary under the current case law because no harm could come to the child as there was no denial of a relationship between Dorothea and Alex. By a bench ruling on September 26, 2002, and by written order entered October 11, 2002, the circuit court denied Dorothea's motion to alter, amend or vacate,

finding that she had ample time to see Alex during times Daniel had visitation with him. This appeal followed.

In her brief, Dorothea argues that Nina's right to raise her child as she sees fit is not absolute, that she waived her right to oppose grandparent visitation, that the trial court erred in failing to conduct an evidentiary hearing and make specific findings of fact or conclusions of law, and that the applicable standard for termination of visitation in this case should be the best interest of the child. It is apparent from the record that Daniel is aligned with Dorothea's interest, so it is not surprising that he did not file a brief in opposition to her arguments. However, we are aware that Nina, through her attorney, objected to Dorothea's arguments below, and although she has not filed a brief with this Court, we have reviewed her filings contained in the record on the issue of grandparent visitation. Below, Nina relied on this Court's at that time new opinion in Scott v. Scott, Ky.App., 80 S.W.3d 447 (2002), to argue that Dorothea could not establish a right to a hearing because she could never establish that harm to the child would result by clear and convincing evidence. She asserted that there was no denial of a relationship between Alex and Dorothea.

The primary issue before this Court is the proper procedure a trial court must follow in terminating previously

ordered grandparent visitation. As Dorothea suggests, this appears to be an issue of first impression in the Commonwealth.

KRS 405.021 provides for grandparent visitation rights in the Commonwealth, and allows a circuit court to “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.” KRS 405.021(1). In Scott v. Scott, 80 S.W.3d 447, 448 (2002), this Court noted that this statute “has withstood a facial constitutional challenge.” Citing King v. King, Ky., 828 S.W.2d 630 (1992), this Court repeated the Supreme Court of Kentucky’s holding:

The [Supreme] Court [of Kentucky] assumed that a special bond exists between grandparents and grandchildren, which must be considered in abridging the fundamental right of parents to object to grandparent contact. [Id. at 632.] “The arbitrariness of the statute,” the Court said, “is obviated by the requirement that visitation be granted by a court only after finding that it is in the best interest of the child.” [Id.]

Scott, supra, at 448. Therefore, we need not address the constitutionality of KRS 405.021 any further, nor shall we need to address Dorothea’s contention that Nina is precluded from raising a constitutional challenge due to her failure to notify the Attorney General of her intention to do so.

Although this appeal deals with the termination of grandparent visitation, a review of the statute and cases addressing the petition for grandparent visitation will be helpful. In King, the Supreme Court of Kentucky reviewed Kentucky's grandparent visitation statute, KRS 405.021, and held that "visitation cannot be granted until an action is filed in Circuit Court, a hearing conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation." King, supra, at 632. Although not explicitly required by the statute, the requirement for a hearing on grandparent visitation was implied by the Supreme Court in the King decision. Mustain v. Kennedy, Ky.App., 971 S.W.2d 830 (1998). In 2000, the United States Supreme Court issued its opinion of Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), which this Court discussed at length in Scott, supra. We stated that in Troxel, the Supreme Court "recognized an established line of cases holding that the right of parents to control the care, custody and upbringing of their children is one of the oldest and most fundamental rights recognized by the constitution." Scott, supra, at 449. Furthermore, we noted that the Supreme Court stated that a trial court must accord deference to a parent's decision that visitation would not be in the best interest of

the child, and that its failure to do so would amount to an unconstitutional application of the statute. Id. at 449-50. Finally, we addressed Justice Lambert's dissent in King and held that in order to apply KRS 405.021 "in a constitutionally permissible manner,"

based on Kentucky precedent, that grandparent visitation may only be granted over the objection of an otherwise fit custodial parent if it is shown by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparent.

Id. 450-51.

In the present appeal, Dorothea argues that Scott should not be applied retroactively so that the best interest of the child standard should still be applied. Additionally, she asserts that she should have been afforded an evidentiary hearing as she requested and that the circuit court should have entered findings of fact and conclusions of law based upon evidence introduced at the hearing. Based upon the circumstances of this case, we disagree, and hold that the circuit court did not commit any error in terminating grandparent visitation without an evidentiary hearing.

We agree with Nina's argument below that Dorothea failed to establish her entitlement to an evidentiary hearing. Dorothea certainly cannot argue that she is no longer able to have any contact with Alex. Rather, Daniel's visitation with

Alex is still continuing, and the record does not reflect that he has expressed any reservation regarding Dorothea's continued interaction with his son, unlike the parent or parents in the cases Dorothea cites. In fact, counsel for Dorothea stated that Daniel was ready to testify that it would be in Alex's best interest for grandparent visitation to continue. Furthermore, the circuit court made a finding on the record that Dorothea was still seeing Alex. Therefore, Dorothea would be unable to establish in a hearing either that it would be in Alex's best interest for grandparent visitation to continue or that harm would result from a deprivation of visitation because their contact would not be extinguished.

Additionally, we believe that the circuit court adequately supported its decision in bench rulings and written orders. We disagree with Dorothea's assertion that the circuit court rested its decision solely on the basis of Nina's objection to continued visitation. Our review of the record indicates that the circuit court based its decision on a number of factors, including Nina's wishes, Alex's age as well as his school and extra-curricular activities, and the fact that Dorothea would still be able to see Alex during his visitation with her son, Daniel.

In conclusion, we note that the facts of this case, most importantly that Dorothea still has contact with Alex, have

not required us to make the determination as to whether a circuit court must hold an evidentiary hearing and enter appropriate findings of fact and conclusions of law based upon evidence introduced at the hearing prior to terminating grandparent visitation or as to the applicable standard of proof. Those determinations must wait for a later day.

For the foregoing reasons, the Fayette Circuit Court's orders terminating grandparent visitation and denying the motion to alter, amend or vacate are affirmed.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEES

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