

RENDERED: MAY 26, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2005-CA-001836-ME

B.A.B.

APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT  
HONORABLE DAVID E. MELCHER, JUDGE  
ACTION NO. 05-CI-00003

R.B. AND T.B.

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOFF, AND MINTON, JUDGES.

KNOFF, JUDGE: B.A.B. appeals from an order of the Pendleton Family Court, entered April 20, 2005, awarding her parents, R.B. and T.B., grandparents' visitation with her daughter A.B.

B.A.B. contends that her parents failed to prove by clear and convincing evidence that the visitation they seek with A.B. is in A.B.'s best interest. We affirm.

B.A.B. was just eighteen or nineteen and still living at her parents' Campbell County home when she gave birth to A.B. in July 2003. B.A.B. had been abandoned by A.B.'s father, and

so looked to her parents for help. They remodeled their basement to provide her and the baby with a small apartment. And a few weeks after the birth, when B.A.B. resumed full-time work and training in a part-time massage therapy program, they assumed a large portion of the child's primary care. In about January 2004, B.A.B. began dating J.G. Not long thereafter she again became pregnant. Perhaps anticipating R.B. and T.B.'s reaction, B.A.B. and J.G. did not tell them about her pregnancy for several months, apparently not until the course of nature forced the news into the open. It seems that R.B. and T.B. expressed a certain amount of anger and dismay at the news and a certain amount of hostility toward J.G. B.A.B. suffered complications with her pregnancy, and while she was in the hospital the families clashed over A.B.'s care. The upshot was that R.B. and T.B. felt betrayed, and B.A.B., J.G., and J.G.'s family felt offended. After the premature birth of their son, D.G., in late October, B.A.B. and J.G. began living with J.G.'s family in Pendleton County and denied R.B. and T.B. any contact with their grandchildren, A.B and D.G. According to R.B. and T.B., J.G. even threatened to adopt A.B. and prevent their ever seeing her again.

In November 2004, R.B. and T.B. petitioned the Campbell Family Court for an order granting them visitation with A.B., the child they had lived with for her first sixteen months

and grown to love. The matter was transferred to the Pendleton Family Court in January 2005 and heard by that court on April 14, 2005. Noting the uncontroverted evidence of R.B.'s and T.B.'s intimate daily relationship with A.B. throughout her young life and of B.A.B.'s having abruptly and completely severed that relationship, the court found that monthly visitation with R.B. and T.B. was in A.B.'s best interest. On appeal, B.A.B. contends that the trial court's best-interest finding is not supported by clear and convincing evidence and so should be overturned. We disagree.

KRS 405.021 provides in part that

[t]he Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child . . . if it determines that it is in the best interest of the child to do so.

In Vibbert v. Vibbert,<sup>1</sup> this Court noted that under the federal constitution "[a] fit parent's [child-rearing] decision must be given deference by the courts, and courts considering the issue must presume that a fit parent's decision is in the child's best interest."<sup>2</sup> We held that to comport with this constitutional requirement, KRS 405.021 must be construed to impose a burden on the grandparent seeking visitation of overcoming that

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<sup>1</sup> 144 S.W.3d 292 (Ky.App. 2004).

<sup>2</sup> 144 S.W.3d at 294 (citing Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

presumption by proving clearly and convincingly that visitation is in the child's best interest. Clear and convincing proof, our Supreme Court has said, is proof that renders the matter to be proven "highly probable." It requires evidence "substantially more persuasive than a preponderance . . . but not beyond a reasonable doubt."<sup>3</sup> This Court will affirm a trial court's factual findings if they are supported by substantial evidence.<sup>4</sup> We are not to reweigh the evidence or to second guess the trial court's credibility determinations.<sup>5</sup> Where the burden of persuasion is clear and convincing proof, substantial evidence is evidence a rational fact finder could deem equal to that standard.<sup>6</sup>

Clear and convincing proof in this context need not be limited to evidence that a lack of visitation will be harmful to the child. Rather, we explained in Vibbert, the best-interest determination is to be made on the basis of the totality of the circumstances, including such factors as

the nature and stability of the relationship  
between the child and the grandparent  
seeking visitation; the amount of time spent

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<sup>3</sup> Fitch v. Burns, 782 S.W.2d 618, 622 (Ky. 1989).

<sup>4</sup> Vinson v. Sorrell, 136 S.W.3d 465 (Ky. 2004).

<sup>5</sup> *Id.*

<sup>6</sup> Francis v. Gonzales, \_\_\_ F.3d \_\_\_, 2006 WL 768549 (2<sup>nd</sup> Cir. 2006) (The substantial evidence test becomes more demanding as the underlying burden of proof increases.).

together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation would have on the child's relationship with the parents; [and] the physical and emotional health of all the adults involved, parents and grandparents alike.<sup>7</sup>

Here, there is no dispute that all of the parties are both physically and emotionally capable of providing A.B. with love and nurture and are eager to do so. As the trial court noted, R.B. and T.B.'s relationship with the child was especially close and stable for well over a year during a very formative period in the child's life. The potential detriment to the child of disrupting that sort of relationship is widely recognized. The reason for the disruption, furthermore, clearly had nothing to do with advancing A.B.'s interest. The complete severing of contact was instead meant to hurt R.B. and T.B. because B.A.B. felt hurt by them. The complete denial of visitation as opposed to its reasonable restriction is an important factor in determining whether the presumption in favor of the parent's decision may be over borne, as is an obviously vindictive motive on the part of the parent.<sup>8</sup> The one-day-per-month visitation awarded in this case is not at all likely to

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<sup>7</sup> 144 S.W.3d at 295.

<sup>8</sup> Cf. Troxel v. Granville, *supra* (emphasizing that the parent in that case had not severed visitation but merely sought to limit it); and cf. King v. King, 828 S.W.2d 630, 632 (Ky. 1992) (upholding a visitation award in the face of a "petty dispute" between the parent and grandparent).

interfere with the parent's relationship with A.B., particularly given the grandparents' stated desire to shield their grandchild from the adults' bad feelings. There is thus substantial evidence supporting a finding that visitation with the grandparents who provided so much of her early care is clearly and convincingly in A.B.'s best interest. Accordingly, we affirm the April 20, 2005, order of the Pendleton Circuit Court.

ALL CONCUR.

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