RENDERED: OCTOBER 26, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

ORDERED NOT PUBLISHED BY SUPREME COURT: FEBRAURY 13, 2008
(2007-SC-0887-DE)

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002141-ME

KATHERINE L. ZOELLER
AND ROBERT ZOELLER — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY WISMAN BERRY, JUDGE
ACTION NO. 04-CI-502629

JOHN K. GUTTERMAN AND P.M.F., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Katherine L. Zoeller and Robert Zoeller appeal from an order of the Jefferson Family Court in which the court held that John K. Gutterman had standing to seek grandparent visitation and that visitation would be in the best interest of the child, P.M.F. We conclude that Gutterman, the biological grandfather of the child, had standing to pursue a visitation order after the child was adopted by his biological grandmother,

Katherine L. Zoeller, and her husband, Robert Zoeller. We further affirm the award of visitation.

Katherine Zoeller and Gutterman were married from 1980 through 1992. Two children were born of that marriage including a daughter, Ashley. On January 22, 2000, Ashley, then fifteen years old and unmarried, gave birth to the child. No known or putative father was named. In July of 2002, Ashley agreed for her mother and stepfather, Robert Zoeller, to be the court-appointed guardians for her son. On May 3, 2004, Ashley unexpectedly died.

On July 2, 2004, the Zoellers filed a petition to adopt the child and the case was assigned to the Jefferson Family Court, Division Three. Unaware of the pending adoption petition, on July 13, 2004, Gutterman filed a petition for grandparent visitation pursuant to KRS 405.021 which was assigned to the Jefferson Family Court, Division Four. On August 23, 2004, prior to the entry of a grandparent visitation order, the adoption petition was granted.

Subsequently, Gutterman filed an amendment to his petition in the visitation action and the Zoellers responded stating that Gutterman had no standing to seek grandparent visitation because of the adoption.

A Guardian Ad Litem was appointed for the child. The GAL filed her report and motion requesting that Gutterman be granted immediate visitation. On October 27, 2004, the family court set a hearing date for February 7, 2005, but did not order visitation. However, after Gutterman filed a motion requesting immediate visitation, the court ordered that Gutterman have temporary visitation with the child every weekend.

The Zoellers then filed an original action in this court seeking a writ of prohibition asserting that the family court acted outside of its jurisdiction or, alternatively, that no visitation should have been ordered prior to an evidentiary hearing. This court granted the petition and held that the family court was required to conduct an evidentiary hearing and make findings regarding the best interest of the child prior to granting temporary grandparent visitation. KRS 405.021. We further held that the family court must resolve the issue of whether Gutterman had standing since his right to visitation was not established prior to the adoption of the child.

Although the petition was granted, the Zoellers appealed to the Kentucky Supreme Court seeking review of this court's order. The issues raised in their appeal were the jurisdiction of the family court to decide the visitation action and Gutterman's alleged lack of standing. The Supreme Court affirmed and, in a memorandum opinion, held that the family court possessed subject matter jurisdiction but that the family court had not yet the opportunity to determine whether the child's adoption precluded Gutterman from grandparent visitation.

Following an evidentiary hearing, the family court entered its findings of fact, conclusions of law and orders. Addressing the standing issue, the family court held that Gutterman had standing to proceed. It further held that it was in the child's best interest that he continue his relationship with his grandfather and, therefore, granted the petition for grandparent visitation and established the terms of visitation.

The Zoellers filed CR 52 and CR 59 motions both of which were denied and this appeal followed. Subsequently, the Zoellers filed a motion for intermediate relief with this court and requested emergency relief which was denied.

The Zoellers have zealously pursued their contention that Gutterman lacked standing to assert his right to grandparent visitation. Grandparent visitation is of relatively recent origin and is found in statutory law, now codified in KRS 405.021, which provides as follows:

> (1) 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. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.
>
> (2) The action shall be brought in Circuit Court in the county in which the child resides.
>
> (3) The Circuit Court may grant noncustodial parental visitation rights to the grandparent of a child if the parent of the child who is the son or daughter of the grandparent is deceased and the grandparent has assumed the financial obligation of child support owed by the deceased parent, unless the court determines that the visitation is not in the best interest of the child. If visitation is not granted, the grandparent shall not be responsible for child support.

The reason for the statute's enactment was the General Assembly's recognition that the stability of the family unit has been plagued by an increased divorce rate, mobility of families, and an increase in the number of children born to unmarried parents. In view of the changing dynamics of the family unit, the General Assembly enacted KRS 405.021 to preserve some semblance of family and generational contact. *King v. King*, 828 S.W.2d 630, 632 (Ky. 1992). When confronted with a constitutional challenge to the statute, the court in *King* emphasized the positive role grandparents have in children's lives.

> If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents. Thus, we find that KRS 405.021 is constitutional.

Id.

As originally drafted in 1976, the grandparents' visitation statute was limited to conferring the right to seek visitation to grandparents of a child whose parent was deceased. *Hicks v. Enl*ow, 764 S.W.2d 68, 71 (Ky. 1989). In 1984, the statute was expanded and was no longer limited to grandparents of deceased parents. Not addressed in the versions of the statute that preexisted 1996, however, were those situations when the rights of the child of the grandparent had been terminated and/or the child adopted.

In *Hicks*, the Court was confronted with three different scenarios which, because they all involved a common question of law, were heard together. Two of the cases dealt with the issue of whether grandparents could seek visitation following a legal adoption and, the third, involuntary termination procedures. Because *Hicks* was the catalyst for the 1996 amendment to KRS 405.021, we discuss each case.

As background to its opinion, the Court emphasized that the grandparents' visitation statute is not exclusive and must be read in conformity with the termination and adoption statutes. Specifically, KRS 199.520(2) provides that upon entry of the judgment of adoption, from and after the date of the filing of the petition, the "child shall be

deemed the child of the petitioners." The only exception is contained in the second sentence of that same statute stating that it does not apply to stepparent adoptions. The termination statutes, however, do not contain a stepparent adoption exception.[1] The reason for the omission is recited in *Hicks* as follows:

> The overriding considerations expressed through the termination and adoption statutes for cutting, finally and irrevocably, all connections to the biological parent and his family where there has been a final order terminating parental rights and where there has been an adoption introducing the child into a new family, simply do not apply where there has been only a stepparent adoption with no prior legal severance of the bond to the grandparents.

Id. at 72. After setting forth the applicable statutory law, the Court discussed the individual cases involved.

The first involved the paternal grandparents of two children whose parents were killed in a single occurrence. A custody battle then ensued in Alabama, the deceased parents' state of residence, between the paternal and maternal grandparents in which the maternal grandparents prevailed. Subsequently, in a contested adoption proceeding, the Enlows, a maternal first cousin and her spouse, adopted the children. Interpreting Alabama law, the Alabama court held that the paternal grandparents' rights to visitation were severed by the adoptions.

After the adoptive parents moved to Kentucky, the paternal grandparents pursued their visitation rights under KRS 405.021, but were again unsuccessful. Affirming the trial court, the Court held that the grandparents' rights did not extend to adoptions which were not stepparent adoptions.

[1] See KRS Chapter 625 *et. seq.*

The second case involved a petition brought by a grandmother two years after an order terminating the parental rights of her son. Although the court sympathized with the grandmother, it nevertheless found that the termination statute completely severed the connection to the terminated parent and the connection through him to his family. *Id*. at 74.

The final case considered in *Hicks* concerned grandparent visitation rights after the grandparent's son had died and the adoption of the child by the surviving parent's spouse. The court agreed with the trial court that the adoption by the stepparent did not sever the grandparent's rights to visitation. *Id*.

The harsh result reached in *Hicks* in non-stepparent adoptions prompted the General Assembly to amend KRS 405.021 and add the following language:

> Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.

The purpose of the amendment was to change the existing law. "It was neither logical nor consistent with public policy to sever the child from an established grandparent relationship without first determining if such action was in the child's best interest." *Dotson v. Rowe*, 957 S.W.2d 269, 271 (Ky.App. 1997).

Despite the underlying public policy of KRS 405.021, the Zoellers contend that the family court should not have considered the best interest of the child but instead should have dismissed the case because Gutterman did not obtain a circuit court visitation order prior to the entry of the adoption decree. They rely on *E.D. v. Commonwealth*, 152 S.W.3d 261 (Ky.App. 2004), where the Court held that a maternal grandparent had no

standing to seek grandparent visitation after her daughter's parental rights were involuntarily terminated.

> Clearly KRS 405.021 requires a visitation order issued by the circuit court prior to the termination of parental rights of a grandparent's son or daughter to protect grandparent visitation rights with the children of that son or daughter.

Id. at 264-265.

We do not disagree with the interpretation given KRS 405.021. "[T]he existence and extent of grandparent's rights is exclusively the prerogative of the legislature, and we are limited to interpreting and applying the statutory mandate." *Hicks*, 764 S.W.2d at 71. However, *E.D.* was an involuntary termination case and there was no comment as to when a grandparent's visitation petition must be filed if one or both of the parents are deceased. More importantly, the facts did not present the situation such as in this action where the family court found that the adoption statute was utilized as a means to subterfuge the grandparents' visitation statute.

When one or both parents are deceased, there is no termination proceeding rather the parent's rights lapse upon the death. As a result, there is no contested proceeding such as a termination action or divorce proceeding to alert a grandparent that visitation rights need to be asserted. Yet, unfortunately, neither the grandparents' visitation statute nor the adoption statutes require notice to a grandparent of a pending adoption petition. Thus, if we follow the result reached in *E.D.*, after the death of the parent, there will be a race to the courthouse to conclude the adoption prior to the grandparent's visitation petition.

In this case, the family court expressed its displeasure that the Zoellers did not inform the Court or Gutterman of the pending adoption proceeding and stated as follows:

> Had the Court been aware that there was an adoption proceeding pending in one courtroom and a grandparent visitation action pending in another, the adoption would have been postponed pending the outcome of the grandparent visitation hearing or the visitation issue would have immediately been scheduled for hearing. As an adoption proceeding is usually unopposed, it would almost always be concluded before a contested visitation hearing. This Court does not believe the intent of the General Assembly was to allow one party to deprive another of such a substantive right as continuation of a familial relationship by knowingly manipulating the justice system in this way.

With this poignant statement we agree.

To function at a fair and efficient level, the court must be informed of all the facts of the controversy before it. The administration of justice cannot tolerate litigants who, either through active misrepresentation or through silence, manipulate the judicial process so as to deprive an opposing litigant of access to the courts.

In *Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006), the court stressed the obligation of an attorney to be honest and forthcoming with the court. That case dealt with a situation where an attorney failed to inform opposing counsel that his client had died. After the time for reviver had passed, the decedent's counsel filed a motion to dismiss. Holding that the statute of limitations could not be asserted, the court reasoned that although no statute or rule required the attorney to give notice of his client's death to opposing counsel, there was an ethical obligation.

> The art of practicing law is building, or defending, a case against the adversary. While we do acknowledge that lawyers do not have a duty, except as otherwise established, to practice the case for the opposing counsel-this is still an adversarial profession-the esteem of the legal profession requires some disclosures to meet the rules of professional ethics. Thus, this Court feels that candor and honesty necessarily require disclosure of such a significant fact as the death of one's client . . . . Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. (citations and internal quotations omitted).

Id. at 305. We believe that the pending adoption petition in this case was such a significant fact that the Zoellers were required to inform the court of its existence.

The significance of informing the courts of simultaneous proceedings concerning children is expressed in KRS 403.838(4) which states that "[e]ach party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding." Although no similar provision is found in the grandparents' visitation statute or in the adoption statutes, we apply its premise to the present situation.

The paramount consideration in any matter involving a child is the child's best interest and, to make that determination, the court must be fully informed of all the significant facts including any action pending which may affect its decision or result in inconsistent decisions. We agree with the family court's conclusion that the Zoellers' concealment of the adoption proceeding was not unintentional but was a tactical maneuver to circumvent Gutterman's right to have the court determine whether visitation was in the child's best interest.

The Zoellers filed a response to the visitation petition in which no mention was made of the pending adoption petition. Moreover, a motion to dismiss was filed

stating only generally that the petition failed to state a cause of action. We can only surmise that this motion was filed to assure that their anticipated motion to dismiss based on the adoption would be preserved. Finally, after the visitation petition had been pending for two months, the Zoellers filed their motion to dismiss citing as its basis the finality of the adoption and Gutterman's lack of standing. Under the circumstances, we agree with the family court that the Zoellers' manipulation of the timing of the adoption precluded them from successfully challenging Gutterman's standing.

We now turn to the question of whether the award of visitation is in the child's best interest.

The standard to be applied in grandparent visitation cases is found in *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky.App. 2004). In that case, this court, sitting *en banc,* overruled *Scott v. Scott*, 80 S.W.3d 447 (Ky.App. 2002), and adopted a modified "best interest" standard.

> We now hold that the appropriate test under KRS 405.021 is that the courts must consider a broad array of factors in determining whether the visitation is in the child's best interest, 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 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; the wishes and preferences of the child. The grandparent seeking visitation must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child. We retain this standard of proof from Scott, noting that the Supreme Court has mandated its use when "the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money." Santosky v. Kramer, 455 U.S. 745, 756, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)

> (citation omitted). 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 this heightened standard of proof is required.

Id. at 295. The family court made extensive findings of fact and appropriately considered all relevant factors. Ultimately, it concluded that there was clear and convincing evidence that it would be in the child's best interest to have an on-going relationship with his maternal grandfather. This court will not disturb that determination unless it was clearly erroneous or an abuse of discretion. *Drury v. Drury*, 32 S.W.3d 521, 525 (Ky.App. 2000).

Gutterman testified at the hearing that prior to Ashley's death, he visited the child on a weekly basis and many of those visits included contact with members of his extended family. Numerous photographs were introduced showing the child interacting with Gutterman and his family. Since Ashley's funeral, however, he had not been permitted visitation.

Gutterman's nephew testified that his uncle was very close to Ashley and the child. He had never seen inappropriate conduct by Gutterman when he was with the child. Other members of the Gutterman family testified that they had also seen Gutterman with the child and never observed any inappropriate behavior by Gutterman. They all testified that since the funeral, the Zoellers had denied them any contact with the child.

Katherine Zoeller disputed that the child had an established relationship with Gutterman and described him as an abusive alcoholic. She testified that she feared for the child's safety and that in the late 90's he had been abusive to his own children. She introduced a series of alcohol-related offenses and assault charges dating from 1989

through 2004, and testified to instances of abuse during the parties' marriage. She admitted, however, that during her marriage to Gutterman she also had substance abuse problems. Other witnesses, including Mr. Zoeller, testified that they had observed Gutterman engage in violent behavior.

There was strong evidence that during Ashley's lifetime, Gutterman and the child had a rewarding and loving relationship and that the child had established ties to Gutterman's family. Although both Katherine and Gutterman had problems with alcohol abuse in the past, there is no evidence that Gutterman was intoxicated in the child's presence or had ever subjected him to potential harm. The death of his mother was undoubtedly emotionally traumatic for the child. For the court to sever the relationship between he and Gutterman would add to his burden and confusion. We affirm the award of visitation.

After the lengthy litigation and the family court's order, the Zoellers moved the court pursuant to CR 52 and CR 59 to reopen the proof so that additional testimony could be submitted concerning events that allegedly occurred from the date of the hearing to the date the visitation order was entered. We find nothing in the record to justify the relief requested.

Based on the foregoing, the order awarding Gutterman visitation is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Peter L. Ostermiller
James P. McCrocklin
Robert G. Stallings
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

J. Andrew White
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANTS:

Peter L. Ostermiller
Louisville, Kentucky