

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002172-MR

ARCHIE VANCE

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
ACTION NO. 05-CI-01314

MARSHALL PAUL VANCE; SUE G.
VANCE

APPELLEES

OPINION AFFIRMING

** ** *

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

WINE, JUDGE: This is an appeal from an order of the Daviess Circuit Court denying Archie Vance's ("Archie") motion for grandparent visitation. He argues the trial court's determination that Appellees were not acting out of vindictiveness was error. Having concluded that the trial court's factual findings were supported by substantial evidence, that it correctly applied the law, and that it did not abuse its discretion by denying Archie grandparent visitation rights, we affirm.

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Appellees, Marshall and Sue Vance, are the parents of two minor children, Phillip, age 9 and Gwendolyn, age 6. Marshall is a staff psychiatrist at River Valley Behavioral Health in Owensboro, Kentucky. Archie is Marshall's father. Archie filed a *pro se* petition for grandparent visitation in September 2005, seeking grandparent visitation with the children pursuant to KRS 405.021. The Vances moved for summary judgment on all claims. The trial court denied summary judgment stating there was an issue of fact as to whether the Vances were acting out of vindictiveness pursuant to *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky.App. 2004).

Subsequently, the trial court referred the matter to the Domestic Relations Commissioner ("DRC") for an evidentiary hearing and findings consistent with *Vibbert*. The hearing before the DRC took place on May 16, 2006. At the hearing, it was undisputed that the children had never met Archie. Marshall testified that he did not want his father to ever meet the children. Marshall also testified that he and Archie do not have a relationship and have not been in contact with each other for twenty-five years. Marshall testified that he had a terrible childhood because of his father. Specifically, Marshall testified that Archie was a vindictive drunk who would beat him and his mother when he was intoxicated. Marshall added that his grandfather and uncle served as primary father figures in his life. Marshall indicated that his children are mentally and emotionally healthy and the family is stable. Marshall stated he believed if his father had contact with his children, Archie would maliciously and intentionally be divisive of the children's relationship with their parents.

Conversely, Archie testified that he never mistreated Marshall and that he did not have an alcohol problem. He testified that he had a very good relationship with his son and was happily married to his second wife for the last twenty-two years. His first marriage to Marshall's mother also lasted twenty-two years. He noted that he had never been treated for alcohol related problems, never had a DUI arrest, and had never been arrested for an assault or domestic violence related offense. He denied hitting Marshall and his mother.

Marshall's wife, Sue, also testified that she attempted a relationship with Archie several years ago but after six months Archie talked very negatively about Marshall and his mother. Sue stated it was then that she understood her husband's position that it would not be mentally or emotionally healthy for Archie to have contact with the children.

The DRC considered the evidence and recommended findings of fact that Marshall and his wife were not acting out of vindictiveness, but rather were genuinely concerned for their children's mental and emotional health should Archie be granted grandparent visitation. The DRC concluded, because Archie had no prior contact with the children, the potential detriments from contact outweighed the benefits of visitation. Archie filed exceptions to the DRC's recommended findings, arguing that they were erroneous. On September 27, 2006, the trial court denied Archie's exceptions and adopted the DRC's report. This appeal followed.

Archie argues that the only reasonable interpretation of the evidence is that Marshall and Sue are acting out of vindictiveness in refusing to allow him to visit their children. We disagree. Under the most recent standard in *Vibbert*, the grandparent must prove, by clear and convincing evidence, that the requested visitation would be in the best interest of the child. *Vibbert*, 144 S.W.3d at 295. In determining whether visitation with the grandparent is in the child's best interest, the Court stated that the following factors should be considered:

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.

Id. at 295.

The trial court considered all of these factors and properly concluded that visitation was not in the best interest of the children. Based on the evidence, the court could find no indication that the Vances were motivated by vindictiveness but were only concerned about their children's health and well-being. In reviewing the trial court's findings, this Court is not authorized "to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence." *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999), *citing Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990).

Archie contends that the issue of whether a grandparent's visitation rights can be established where no prior relationship between the grandparent and the child existed is one of first impression in Kentucky. However, as indicated above, the *Vibbert* Court included this issue as one of the factors to be considered in determining whether grandparent visitation is in the best interest of the child. The trial court, in considering the substantial evidence, concluded that Archie's visitation would be disruptive to the stability of the children's otherwise stable family life. We cannot say that the trial court abused its discretion in denying grandparent visitation to Archie. Accordingly, we affirm the Daviess Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Evan Taylor
Owensboro, Kentucky

BRIEF FOR APPELLEES:

Albert W. Barber, III
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