

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000892-MR

DANA M. GUASTINI

APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS JUDGE
ACTION NO. 05-CI-00112

MICHELLE CONN

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Dana M. Guastini appeals from an order of the Bath Circuit Court denying her motion to grant her visitation with her paternal grandson over the objection of the child's mother, Michelle Conn. For the reasons stated below, we vacate and remand.

Ryan Chance Conn was born on October 27, 2004. His mother is appellee Michelle Conn. Ryan's father is Ralph D. Keyes, Dana's son. Ralph was killed in an

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

accident on June 2, 2004, while Ryan was in vitro. Dana presently lives in Cincinnati, Ohio, and is married to Tony Guastini. Michelle and Ryan live in Salt Lick, Bath County, Kentucky.

Following Ryan's birth, except for one occasion, Michelle has denied Dana's request for visitation with the child.

Ralph has a daughter, Raelyn, whose mother is Denise Leyba. They live in California. The record discloses that Dana currently enjoys a successful visitation relationship with Raelyn. The record further discloses, however, that Michelle has resisted efforts by Denise to establish a relationship between Raelyn and Ryan.

On June 14, 2005, Dana filed a complaint in Bath Circuit Court seeking visitation with Ryan. The complaint sought visitation with Ryan for two hours every other month. In her answer Michelle, among other things, alleged that the requested visitation would not be in the child's best interest.

Following a hearing, on April 13, 2007, the trial court entered an order denying Guastini's request for visitation and dismissing the complaint. This appeal followed.

Before us, Dana contends that the trial court erred in denying her visitation with Ryan.

In *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky.App. 2004), 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.” 144 S.W.3d at 294 (citing *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). We held that to comport with this constitutional requirement, KRS² 405.021 must be construed to impose a burden on the grandparent seeking visitation of overcoming that 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.” *Fitch v. Burns*, 782 S.W.2d 618, 622 (Ky. 1989). This Court will affirm a trial court's factual findings if they are supported by substantial evidence. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky.2004). We are not to reweigh the evidence or to second guess the trial court's credibility determinations. *Id.* Where the burden of persuasion is clear and convincing proof, substantial evidence is evidence a rational fact finder could deem equal to that standard. *Francis v. Gonzales*, 442 F.3d 131, (2nd Cir.2006) (The substantial evidence test becomes more demanding as the underlying burden of proof increases.).

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 together; the potential detriments and benefits to the child from granting visitation; the effect granting visitation

² Kentucky Revised Statutes.

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. 144 S.W.3d at 295.

Evidence adduced at the April 4, 2007, hearing demonstrated, that, while they were once on friendly terms, there is animosity between Dana and Michelle. The underlying cause of the dispute appears to be money. Ralph had a life insurance policy with a death benefit of \$70,000.00. Michelle was named as the sole beneficiary on the policy. It appears that Dana believes that she should have been included as a co-beneficiary on the policy and that some of the proceeds should have been used for the benefit of Raelyn. It further appears that Dana believes that she was unfairly burdened with paying funeral expenses she believes should have been paid by Michelle and her family. Discussions and correspondence concerning these issues appear to have led to animosity between the parties which, in turn, led to Michelle's refusal to permit Dana to have visitation with Ryan. The refusal led to further unfriendly correspondence, including a hostile card to Michelle from Dana's mother. Dissension over the possession of Ralph's wallet also appears to have contributed to the rift.

Denise, Raelyn's mother, testified by deposition in strong support of Dana. Denise described Dana as a loving and caring grandmother whose relationship with Raelyn was a significant benefit to the child.

In its April 13, 2007, order the trial court made, in relevant part, the following findings of fact and conclusions of law:

[FINDINGS OF FACT:]

1. The child, Ryan Chance Conn, is the grandson of Dana Guastini, being the child of her deceased child, Ralph Keyes, date of death June 2, 2004.
2. The child, Ryan Chance Conn, is less than three years old, having been born on October 27, 2004.
3. The Petitioner, Dana Guastini, has visited with the child, Ryan Chance Conn, once since his birth for approximately two hours.
4. The parties' relationship is acrimonious.
5. Petitioner presented no evidence that the Respondent, Michelle Conn, is not a fit parent.

CONCLUSION[S] OF LAW

By virtue of *Scott v. Scott*, Ky.App., 80 S.W.3d 447 (2002) and *Vibbert v. Vibbert*, Ky.App., 144 S.W.3d 292 (2004), a “grandparent seeking visitation must prove, by clear and convincing evidence, that the requested visitation is in the best interest of the child.” The Petitioner has failed to meet that burden. The *Vibbert* court set out a broad array of factors to determine whether visitation is in the best interest of the child, including, but not limited to: the nature and stability of the relationship of the child and grandparent and the amount of time spent together. There is no relationship between the child and grandparent as they have spent practically no time together.

Courts have always recognized a fit parent's superior right, constitutionally, as to how she raises her child. This includes the right to say who the child visits. *Troxel v. Granville*, 530 U.S. 157, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

THEREFORE, it is hereby ORDERED and ADJUDGED, as follows:

1. Petitioner's complaint for grandparent visitation with Ryan Chance Conn is hereby DISMISSED.

The trial court applied the controlling authority, *Vibbert*; however, we believe that the trial court should not have focused exclusively on the nature and stability of the relationship of the child and grandparent and the amount of time spent together.

In a situation such as the one at bar - where the grandparent has always been denied visitation - we believe the factors relied upon by the trial court cannot be decisive to the decision. If visitation has always been denied, of course “[t]here is no relationship between the child and grandparent.” If this were to be the deciding factor, a grandparent denied visitation from the outset would never be able to prove her case.³ For this reason, we believe the trial court misapplied *Vibbert*.

In cases where the grandparent has always been denied visitation we believe the *Vibbert* factors relating to 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; and the wishes and preferences of the child become the determinative factors. It appears from the trial court's order, however, that these factors were not considered at all.

³ We believe the *Vibbert* factors relating to the nature and stability of the relationship of the child and grandparent and the amount of time spent together become of crucial relevance only where there has been a prior relationship and the parent seeks to cut off the relationship by denying future visitation.

In summary, we are persuaded that the trial court erred by construing the determinative factors in this case to be the nature and stability of the relationship of the child and grandparent and the amount of time spent together. We are therefore constrained to remand the case for a reconsideration of the visitation decision with emphasis placed upon the *Vibbert* factors unassociated with the establishment of a prior relationship between Dana and Ryan. In this vein, the trial court should consider Dana's success in establishing a relationship with her granddaughter Raelyn, and whether establishing a similar relationship with Ryan would be in Ryan's best interest. We would further note that *Vibbert* does not sanction the withholding of visitation for vindictive reasons as being in the child's best interest.

For the foregoing reasons the judgment of the Bath Circuit Court is vacated and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dana Guastini with the assistance of her
husband Tony Guastini, pro se
Cincinnati, Ohio

BRIEF FOR APPELLEE:

Leslie Richardson Smith
Owingsville, Kentucky