STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED
April 14, 2011
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: THE MATTER OF:

ROBIN L. AND JANET L.,
Petitioners below, Appellees

vs.) No. 35679 (Kanawha County No. 99-D-2184)

MELISSA A. AND WARREN LEE A.,
Respondents below, Appellants

MEMORANDUM DECISION

The respondents below and appellants herein, Melissa A.[1] (formerly L.) and Warren Lee A. (hereinafter "parents," collectively, or "Melissa" and "Warren," separately), appeal from an order entered December 16, 2009, by the Circuit Court of Kanawha County, which denied their petition for appeal from a November 13, 2009, order of the Family Court of Kanawha County. In the motion underlying the family court's order, the parents sought to terminate the grandparent visitation that had been granted between the minor child, Jon A. (hereinafter "Jon" or "child"), and the biological father's parents, Robin L. and Janet L. (hereinafter "grandparents"). On appeal to this Court, the parents argue that it is no longer in Jon's best interests to continue visitation with his grandparents. Based on the parties' briefs and oral arguments, the record designated for our consideration, and the pertinent authorities, we find that the lower court erred, and we hereby reverse the rulings. Further, this case presents no new or significant questions of law and will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The underlying facts of this case show a history of spiteful conduct between Jon's parents and his grandparents, as was evident in this Court's previous review. *See In Re: The Adoption of Jon L.*, 218 W. Va. 489, 625 S.E.2d 251 (2005) (hereinafter "*Jon I*"). As more fully explained in *Jon I*, Melissa married Jonathon L., and they had one child, Jon, the minor

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[1]"We follow our past practice in . . . cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

child who is the subject of the grandparent visitation at issue in this appeal. Melissa and Jonathon divorced, and, subsequent thereto, in 2000, Jonathon died in a car accident.[2] In 2003, Melissa married Warren, who subsequently adopted Jon.[3]

On December 23, 2007, the grandfather[4] sought and was awarded a domestic violence protective order against Warren based on the allegation that Jon had suffered a "bruise from whipping with [a] belt buckle[.]" Jon was placed with the grandparents, and Melissa filed a petition requesting that he be returned to her custody. On January 2, 2008, the family court entered a ninety-day protective order against Warren. Custody of Jon was returned to Melissa, with the agreed provision that there would be no contact between father and son. The allegations against Warren ultimately were dismissed upon motion of the State, finding that the charge was *baseless*.

Timothy S. Saar, Ph.D. conducted a forensic interview of Jon. His report, dated July 23, 2008, states that "Jon reported that he had a bruise on his stomach from an air hockey table at a friend's home while vigorously playing the game." The grandparents noticed the

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[2]Initially, after Jonathon's death, Melissa agreed to liberal grandparent visitation between her son and his paternal grandparents, Jonathon's parents. Following various disputes over visitation time, on March 23, 2004, an agreed order of modification was entered wherein the grandparents' time with Jon was set at one overnight visit per month during the school year and two overnight visits per month during the summer. Additionally, the grandparents were awarded visitation with Jon for four hours on Thanksgiving Day, nine hours on Christmas Eve, and nine hours on the day after Christmas. Exceptions also were made for extended instances of vacation so that the grandparents could take Jon with them.

[3]The grandparents objected to both the adoption and to the parents' request to change Jon's surname to reflect that of his adoptive father, Warren. The lower court granted the adoption but refused the requested name change. The parents appealed to this Court, which held that "[a]n adoptive parent may, incident to an adoption proceeding, change his/her adopted child's name to reflect the new adoptive relationship." Syl. pt. 4, in part, *Jon I*.

[4]As a result of Warren's adoption of Jon, the grandparents are more appropriately referred to as Jon's *former* grandparents. *See* W. Va. Code § 48-22-703 (2001) (Repl. Vol. 2009) (recognizing change in familial relationships upon entry of final adoption order). However, this Court will refer to them as "grandparents" for ease of identification and in recognition that a pre-adoption order of visitation has been entered in this case. *See* W. Va. Code § 48-10-902 (2001) (Repl. Vol. 2009) (explaining that remarriage of custodial parent, followed by child's adoption by stepparent, does not automatically vacate an existing order for grandparent visitation).

bruise during visitation and "were overpowering in their insistence that his father had hit him with a belt." During his interviews with Dr. Saar, Jon repeatedly stated that his grandparents forced him to lie to the police and report that his father had hit him. Dr. Saar testified that Jon's version of the events to him remained unchanged during four separate interviews. Based on all of the above, Dr. Saar concluded that

> Jon was coached by his grandparents into accusing his father of abusing him. The manipulation of this cognitively impaired child by his grandparents should be considered emotional abuse and should call into question the [grandparents'] ability to care for this child. Based on this examination, if Jon is to be allowed any future visitation with his grandparents, that a neutral, non-relative, third-party supervise these visits. The risk that these grandparents will continue to victimize this child in an attempt to use him as a weapon against his biological mother and adoptive father is high and should not be dismissed.

Subsequent to this evaluation, the parties entered into an agreed order, setting forth a period of supervised visitation with a gradual return to the previous unsupervised schedule.

On December 5, 2008, the parents filed a motion to terminate grandparent visitation. During a hearing on the matter, Ashley Hunt, an intern psychologist under Dr. Saar's supervision, testified that it was her opinion that the best interests of Jon included visitation with his grandparents. When it became obvious that the parties were not able to reach an agreement on visitation, the lower court appointed a guardian ad litem for Jon and the proceedings were continued to allow the guardian an opportunity to investigate.

During a March 20, 2009, hearing, the guardian's written report was presented as well as his comporting testimony. The guardian opined that Jon loves all of the involved adults and wants to spend time with all of them. The guardian stated that he "cannot recommend a termination of grandparent visitation. Given the feelings Jon has for his parents and grandparents, the removal of anyone from his life would not be in his best interest."

Dr. Saar also testified at the March 20, 2009, hearing. During his testimony, Dr. Saar stated that Ashley Hunt's previous testimony was outside her realm of ability because she had not been trained in forensic opinions. Ms. Hunt's role was solely as an observer to the supervised visitations. Further, Dr. Saar stated that he maintains his original position that the grandparent visitation should be terminated. While he agreed with Ms. Hunt's assertion that the supervised visits went well, he stated that "there has not been any evidence presented that would make me go back and make another report questioning initial findings[.]" When questioned about Jon's lack of consistency to others as to how he had received his bruise, Dr.

Saar commented that he relies more on the information he personally gathered in his initial meetings with the child because they were the closest in time to the actual event. Dr. Saar further stated that the child's account to him never changed, and that Jon consistently asserted that his grandparents forced him to lie. Upon further questioning, Dr. Saar recognized that Jon has always enjoyed his time with his grandparents and that "if you enjoy something, I don't think it's beneficial to get rid of. I guess it's what the parents want for the child." However, Dr. Saar also reiterated that the false abuse allegations by the grandparents resulted in Jon being alienated from his father, which resulted in Jon feeling emotions of self-blame that were psychologically damaging to him.

The family court's order found that, "[b]ased on the reports and testimonies of Dr. Timothy Saar, Ashley Hunt and the guardian *ad litem*, the Court finds as fact that it would not be in Jon's best interest to terminate his time with his paternal grandparents[.]" The parents appealed to the circuit court, which denied their appeal by order entered December 16, 2009. In its order, the circuit court found that "the Family Court's decision not to terminate grandparent visitation was supported by the record, was not an abuse of discretion, and was not clearly erroneous." The parents then appealed to this Court.

This Court's review will include application of a well-settled standard of review. *See* Syl. pt 1, *Staton v. Staton*, 218 W. Va. 201, 624 S.E.2d 548 (2005) ("'In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.' Syllabus, *Carr v. Hancock*, 216 W. Va. 474, 607 S.E.2d 803 (2004).").

On appeal to this Court, the parents set forth various arguments; however, the common assertion in all of the assignments of error is that the best interests of Jon require that the grandparent visitation be terminated. Conversely, the grandparents and the guardian ad litem maintain that the child has a deep bond with the paternal grandparents and that it is in the best interests of Jon to continue visitation with them. This Court agrees with the parents' overarching contention, and, thus, deems it unnecessary to address all of the assigned errors.

The law is settled that grandparent visitation issues are decided based on the best interests of the child.[5] *See* W. Va. Code § 48-10-101 (2006) (Repl. Vol. 2009) ("The

[5]In addition to our long-standing principle placing paramount importance on the best interests of the child, we also recognize that violation of an order of visitation constitutes

Legislature finds that circumstances arise where it is appropriate for circuit courts or family courts of this state to order that grandparents of minor children may exercise visitation with their grandchildren. The Legislature further finds that in such situations, as in all situations involving children, the best interests of the child or children are the paramount consideration."). *Accord* Syl. pt. 2, *Petition of Nearhoof*, 178 W. Va. 359, 359 S.E.2d 587 (1987) ("Upon the petition of a grandparent . . . seeking visitation rights with a grandchild or grandchildren, who is the child or are the children of the grandparent's deceased child, a trial court may order that the grandparent shall have reasonable and seasonable visitation rights with the grandchild or grandchildren provided such visitation is in the best interest of the grandchild or grandchildren involved, even though the grandchild or grandchildren has or have been adopted by the spouse of the deceased child's former spouse."). Even after a subsequent adoption of the child, if an order of grandparent visitation has been entered, a court has continuing jurisdiction to determine whether enforcement of the agreement is in the best interests of the child. *See* W. Va. Code § 48-22-704(e) (2001) (Repl. Vol. 2009) (observing that "the court may hear a petition to enforce the [visitation or communication] agreement, in which case the court shall determine whether enforcement of the agreement would serve the best interests of the child").[6]

While a best interests analysis will necessarily include an assessment of the bond and

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grounds for termination of grandparent visitation rights. *See* W. Va. Code § 48-10-1002 (2006) (Repl. Vol. 2009).

[6]While it is clear that grandparents have certain rights, their remedies are tempered by the best interests of the child and the preferences of the parents. *See* W. Va. Code § 48-10-501 (2006) (Repl. Vol. 2009) (requiring that grandparent "visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship"). *See also* Syl. pt. 3, *Lindsie D.L. v. Richard W.S.*, 214 W. Va. 750, 591 S.E.2d 308 (2003) ("The Due Process Clauses of Article III, Section 10 of the Constitution of West Virginia and of the Fourteenth Amendment of the Constitution of the United States protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). *Accord Troxel v. Granville,* 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000) (holding that Washington statute providing that any person may petition court for visitation at any time, and that court may order visitation rights for any person when visitation may serve best interest of child, violated substantive due process rights of mother when applied to permit paternal grandparents, following death of children's father, to obtain increased court-ordered visitation, in excess of what mother had thought appropriate, based solely on state trial judge's disagreement with mother as to whether children would benefit from such increased visitation).

the relationship developed between the child and the grandparents,[7] we disagree with the lower court's determination that the relationship between Jon and his grandparents is of a beneficial nature to Jon under the circumstances present here. The particular facts of this case, including the vicious nature of the grandparents' actions to forestall Jon's adoption proceedings, as well as their baseless pursuit of abuse allegations against Jon's adoptive father, illustrate a relationship in constant conflict with that of Jon's parents. The family court found, and the circuit court affirmed, "as fact that it would not be in Jon's best interest to terminate his time with his paternal grandparents." We find this assertion to be clearly wrong in light of the testimony of Dr. Saar, and in light of the visitation's interference with the parent-child relationship. The lower court's finding that the claims of interference were merely a "pretext" is not supported by the record. The grandparents were granted liberal visitation that interfered with Warren's ability to see his son due to his job schedule, as well as the fact that the grandparents ascribed their own belief system to Jon regarding such critical matters as life and death, which Jon's parents found to be inappropriate. Even though it is undisputed that Jon loves his grandparents and that he enjoys his time with them, the history of this case shows that the relationship has been detrimental to Jon in ways beyond his understanding, including a profound interference with the parents' relationship with, and right to make decisions regarding, their child. The lower court's reiteration of Dr. Saar's testimony was a mischaracterization of Dr. Saar's expert opinions as presented in the transcription of the hearing. It is clear that Dr. Saar testified that it was in the best interests of Jon to terminate his visitation with his grandparents and that nothing had happened to change his initial conclusions. We agree with Dr. Saar that such an environment is psychologically damaging to Jon and, therefore, it is in Jon's best interests to terminate grandparent visitation.

For the foregoing reasons, we find that the lower court orders, which denied the motion to terminate grandparent visitation, constituted reversible error. The grandparent visitation rights are terminated.

Reversed.

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[7]*See generally Honaker v. Burnside*, 182 W. Va. 448, 388 S.E.2d 322 (1989) (regarding continuation of relationships with those to whom the child has formed a bond). *See also* W. Va. Code § 48-10-502 (2001) (Repl. Vol. 2009) (enumerating factors to consider in determination regarding grandparent visitation).

ISSUED: April 14, 2011

CONCURRED IN BY:

Chief Justice Workman
Justice Davis
Justice Benjamin
Justice Ketchum
Justice McHugh