Schwarz v. Schwarz—62 Kan. App. 2d 103, 506 P.3d 950 (2022)

Facts: This is a grandparent visitation case. Mother and Father were in the middle of a divorce when Father suddenly died in August 2018, ending the divorce action. Subsequently, Mother began limiting contact between her two sons and the paternal Grandmother, leading Grandmother to file an action for visitation rights pursuant to K.S.A. 23-3301, which provides in subsection (b) that a district court may grant visitation rights to grandparents if it finds that a substantial relationship exists between the child and the grandparent and that visitation would be in the child's best interests. Grandmother requested that at a minimum she be given one weekend a month and a period of time during the summer or school breaks to take the children on vacation.

Although Mother acknowledged Grandmother's previous substantial contact and interaction with the children, she disputed that continuing contact with Grandmother was in the children's best interest. She testified that Grandmother openly blamed her for Father's death, which she believed had led Father's extended family to no longer want to have contact with her, and she was concerned that Grandmother would tell the children that Mother had killed Father, based on comments she had made to Mother and others. In addition, Grandmother had driven Father's older sons by a prior marriage to the family lake house to commit burglary and theft. Mother also indicated that there had been problems prior to Father's death, where Grandmother would storm off after a disagreement with Father and Mother and they would not see her for weeks or months, and that she would frequently schedule activities or make plans for the children before discussing her plans with Father and Mother. Mother did not believe that Grandmother would adhere to any of her guidelines for the children if granted visitation. It was her position that, as a fit parent, she should be permitted to decide when and whether Grandmother had visitation with the children.

After mediation was unsuccessful, the trial court appointed a GAL for the children who, after an investigation, recommended a visitation plan calling for family therapy between Grandmother and the children for as long as the therapist deemed necessary and up to two hours of visitation a month, after which Grandmother would have visitation one Saturday or Sunday a month for up to eight hours. Grandmother accepted the GAL's plan. Mother's proposed plan provided that she should be the one to determine if, when, and under what conditions the children should have contact with Grandmother.

After an evidentiary hearing, the trial court found that mother's visitation plan was unreasonable. It found the plan proposed by Grandmother and the GAL to be reasonable and in the best interests of the children, and it granted Grandmother visitation rights according to the terms of that plan. Mother appealed.

Analysis: Before turning to the merits, the Court of Appeals first addressed the issue of subject matter jurisdiction. Although jurisdiction had not been at issue in the trial court, the Court of Appeals raised the issue on its own motion, due to inconsistent decisions of previous panels on the issue. The problem arose after the legislature recodified various family law related statutes found in Chapters 23, 38 and 60 of the Kansas Statutes Annotated into a Kansas Family Law Code found

in K.S.A. Chapter 23. Prior to that time there was a statute—K.S.A. 60-1616(b)—giving the district court the authority to grant visitation rights to grandparents in divorce actions. In addition, there was another statute—K.S.A. 38-129—giving the district court the authority to grant visitation rights to grandparents if it found that a substantial relationship existed between the grandparents and the child and that visitation would be in the child's best interests. In 2011 those statutes were moved to Article 33 of K.S.A. Chapter 23 dealing with third party visitation. K.S.A. 60-1616(b) was recodified as K.S.A. 23-3301, and K.S.A. 38-129 was recodified as K.S.A. 23-3302. The legislative history clearly indicated that this recodification was not intended to make any substantive changes in the recodified statutes.

In 2012 the legislature combined the provisions of K.S.A. 23-3301 and 3302, moving the provisions of K.S.A. 23-3302 into subsections (b) and (c) of K.S.A. 23-3301. The legislative history indicated that this amendment was also intended to be nonsubstantive. However, in *T.N.Y ex rel. A.H. v. E.Y.*, 51 Kan. App. 2d 956, 360 P.3d 433 (2015), the Court of Appeals held that in spite of this fact, the plain language of the statute after the 2012 amendment restricted the district court's authority to grant grandparent visitation rights to divorce proceedings. *T.N.Y.* was a paternity action, not a divorce. But the Court went on to find that treating children whose parents were not married differently than children whose parents were married to one another discriminated on the basis of legitimacy in violation of the Equal Protection Clause of the Fourteenth Amendment. It therefore struck the language in K.S.A. 23-3301(a) limiting the court's authority to grant grandparent visitation rights to actions for divorce.

A year later, another panel of the Court of Appeals decided *Baker v. McCormick*, 52 Kan. App. 2d 899, 380 P.3d 706 (2016). This was an action under the Protection from Abuse Act brought by the maternal grandfather of his grandchildren, the alleged victims. During the course of the action, he and his wife filed a motion asking the court to grant them specific visitation rights with the grandchildren. The paternal grandparents filed a similar motion for visitation rights with one of the children, who was their grandchild. The trial court denied the motion, finding that it was not appropriate in a PFA action, particularly where, as here, the mother was not even a party to the action. The Court of Appeals affirmed this denial, agreeing that grandparent visitation issues are not appropriate in a PFA action and finding that the holding in *T.N.Y.* could not be applied beyond its setting in a paternity case.

Finally, in *Frost v. Kansas Department for Children and Families*, 59 Kan. App. 2d 404, 483 P.3d 1058, *rev. denied* 313 Kan. 1040 (2021), a third panel of the Court of Appeals addressed the issue, this time in an independent action filed by grandparents seeking visitation rights with their grandchildren, who were currently the subject of a CINC action. The district court dismissed the case for lack of jurisdiction, but the Court of Appeals held this to be error, disagreeing with the panel in *T.N.Y.* that the plain language of K.S.A. 23-3301(a) restricted the court's authority to grant grandparent visitation rights to divorce actions and finding that the language of the statutes did not change when they were recodified in 2011 and amended in 2012, and that the authority of the court to grant grandparent visitation rights is the same as prior to the recodification.

The panel in this case considered all of these cases and the history of grandparent visitation statutes in Kansas and concluded that the court did have subject matter jurisdiction in this case. A detailed analysis of its reasoning would unduly extend the length of this case review, but the panel basically agreed with the *Frost* panel, finding its reasoning to be persuasive. Hopefully this will resolve the conflicting panel decisions on this issue. A petition for review has been filed in this case, but not yet acted upon. But the Supreme Court denied a petition for review in *Frost*, so it may be a long shot.

On the merits the Court of Appeals affirmed the trial court's order in a decision that is somewhat unsatisfying, less for its conclusion than for its explanation of it. Perhaps most striking is the absence of almost any specific facts from the opinion. This may be to protect the privacy of the children, but it makes it difficult to ascertain or understand why the Court reached the conclusion that it did. There was no dispute about the fact that Grandmother had a substantial relationship with the children, but the court did not describe it further. It does not even say how old the children were at the time of their father's death.

The dispute appears to have been over whether Mother had an absolute right as a fit parent to determine if and when Grandmother should have visitation with the children, or whether her decision could be overridden by the court if determined to be unreasonable. The court was clearly correct in finding that the latter position accurately reflects the law, but its explanation of why Mother's plan in this case was unreasonable is devoid of almost any factual support. This is perplexing, since it is not apparent on its fact how visitation with a grandmother who has accused the children's mother of killing their father and has apparently alienated his extended family from her is supposed to work or be in the children's best interests. Both the trial court and the Court of Appeals simply emphasize the importance of the children maintaining a relationship with Grandmother and Father's extended family, but that relationship is not described, and it feels like the court is simply operating on a presumption.

The trial court dismissed all of the reasons Mother gave for curtailing visitation with Grandmother that related to Grandmother's behavior prior to Father's death by stating that these issues did not interfere with Grandmother seeing the children at that time, and it accused Mother of selectively using Grandmother's behaviors as a reason to prohibit visits between her and the children, which it characterized as an "arbitrary" denial of visitation since Father's death. But it seems entirely reasonable that these factors could assume a different significance under the changed circumstances here, and there is no explanation for the trial court's conclusion that they did not, which the Court of Appeals appears to have accepted.

The Court of Appeals did note that Grandmother had apologized to Mother for her "transgressions" and promised to abide by Mother's guidelines for the children, and that the trial court believed her, although Mother did not, and it correctly held that it would not redecide the issue of Grandmother's credibility on appeal. But Grandmother's apology, even if sincere, would not seem to be enough, by itself, to make Mother's position unreasonable.

Finally, toward the end of its opinion, the Court of Appeals seems to have shifted from assessing whether the trial court's findings were supported by substantial evidence to making its own assessment of the evidence. Although the trial court was clearly heavily influenced by the GAL's recommendation for limited visitation with therapy, the Court of Appeals went further and stated that it is clear from the GAL's recommendation that he believed Mother's plan was not reasonable, although there is nothing in the opinion to suggest that the trial court itself reached that conclusion. And the Court of Appeals offers no support for it. The fact that the GAL, who was tasked with representing the best interests of the children, determined that a limited visitation plan would be in their best interests does not make Mother's plan, although different, unreasonable. As the Court itself noted earlier in its opinion, the best interests of the children standard alone is an insufficient basis to award grandparent visitation. A court cannot reject a fit parent's visitation plan without finding it to be unreasonable, and the Court of Appeals offers no factual support to support either its conclusion or that of the trial court that Mother's plan under the factual circumstances of this case meets that criterion. Instead, it simply states its independent conclusion that while Mother is clearly a fit parent, her visitation plan is unreasonable under the totality of the circumstances and is not in her children's best interests.

In short, this opinion may be helpful in resolving the questions of subject matter jurisdiction that have plagued grandparent visitation cases in the past decade, but it is unlikely to provide much guidance to attorneys attempting to address the merits of these cases in the future.