UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1185

September Term, 2016

DONALD SWAIN et al.

v.

AILEEN BAKER

Graeff,
Kehoe,
Rodowsky, Lawrence F.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Rodowsky, J.

Filed: March 15, 2017

This appeal is taken from a Visitation Order entered July 28, 2016, by the Circuit Court for Montgomery County, pertaining to the minor daughter of Blake Price and Justin Swain, who were never married. The minor child has been in the sole physical and legal custody of the paternal grandfather, Donald Swain, and his husband, William Loy, collectively, "the appellants," since October 2014. The appellee, Aileen Baker, is the paternal grandmother who was awarded supervised visitation under the order on appeal.

The appellants present the following questions for our review:

> "1. Did the trial court commit reversible error in utilizing the wrong standard in awarding third party visitation with the minor child?
>
> "2. Was the trial court's award of visitation erroneous because (A) the court did not find exceptional circumstances or unfitness on the part of the custodial grandparents, and (B) on the merits, the conclusion reached by the trial court, in contravention of existing law, is clearly wrong because the court failed to focus its inquiry and analysis on the crucial question, namely what would serve the best interests of the minor child?"

The appellants' argument is that appellee's application for visitation should have been denied as a matter of law for failure to satisfy the threshold requirements established in *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007). Appellee appeared pro se in the circuit court and filed no brief in this Court. The circuit court rejected appellants' argument, as do we for the reasons hereinafter set forth.

Factual and Procedural Background

The child was born on January 8, 2014. At that time, her biological father, Justin Swain (Justin), was thirty years old and her mother, Blake Price (Blake), was nineteen. From birth until July 2014, the child and her parents lived with the appellee in the latter's apartment in Hagerstown. Inconsistent employment and quarrelling of the parents at least contributed to the instability of the

arrangement which resulted in appellant Swain from time to time temporarily caring for the child. In July, Justin asked his father to take the child until the parents were able to take care of her.

Appellant grandfather was fifty-two years old when the child was born. He and the appellee were twice married to each other, but have not lived together since Justin was two years old. Appellant Swain has a highly responsible and well compensated position with a federal agency. In August 2013, he married the co-appellant who also holds a position with a federal agency. From July 2014 to the close of the record, the child has been raised by the appellants, who initially petitioned for custody of the child in April 2014.

When the child began living with the appellants in their home in Montgomery Village, appellee would visit the child there during Justin's alternating weekend visits.

On October 6, 2014, the biological parents and the appellants consented to an order which provided, in pertinent part,

> "that Defendant BLAKE PRICE, the biological mother of the minor child, and Defendant JUSTIN SWAIN, the biological father of the minor child, … *hereby consent to the Plaintiffs, DONALD SWAIN and WILLIAM LOY having the physical and legal custody of the minor child*[.]"

(Emphasis added). The consent order did not contain any provisions regarding visitation, either with respect to the biological parents or the appellee.

Notwithstanding the lack of an express provision, visitation continued by the biological parents on alternating weekends, at the appellants' home and while the appellants were present. The appellee would sometimes visit at the same time as her son.

The situation deteriorated rapidly in approximately February 2015 **w**hen a dispute arose over who had contributed the majority of the child's support in 2014 and could claim her as a

dependent for the 2014 tax year. Ultimately, both the appellee and the appellants claimed the child on their respective tax returns, thus triggering an audit. At that point, the appellants informed the appellee that she was no longer welcome at their home and the appellee's visitation with the minor child was abruptly halted.

On May 15, 2015, the appellee filed a petition to modify visitation[1] claiming in part:

> "At the time the parties consented to the [October 6, 2014] order, it was understood between my son and his father, [Donald Swain,] that our son would be able to have access to his daughter. As a result, our son did not seek court ordered visitation. I assumed that I would be able to see my granddaughter during my son's visits. However, [Donald Swain] has refused to allow me any access with our granddaughter unless the visits occur in his home or if he leaves the home with me."

The appellee's petition requested visitation "[e]very other weekend from Friday evening at 7 pm until Sunday evening at 7 pm; shared holidays; summer vacation; Winter Break; Spring Break." In their answer, the appellants stated "there has been no material change of circumstances," and that "the schedule requested by [appellee] would not be in the best interests of the minor child." On August 27, 2015, the circuit court ordered the parties to participate in a visitation assessment with a court evaluator.

A hearing before a family magistrate took place December 18, 2015, at which the court evaluator testified.[2] Based almost entirely on a personal history of appellee, the evaluator recommended that any visitation by appellee be at the discretion of the appellants. That personal

[1]The circuit court had granted appellee's intervention in the matter on May 7, 2015.

[2]The biological parents were not present at the hearing and had not participated in the visitation assessment despite the evaluator's attempts to contact them.

history is reviewed, *infra*. The magistrate directed preparation of a transcript for review by a judge and set the matter for a modification hearing on February 17, 2016.

At the February 17, 2016 hearing, counsel for the appellants opened by stating their position. It

> "is that they have no issue with Ms. Baker having supervised visitation with … the child …, but they have grave concerns about Ms. Baker as a custodian in an unsupervised, and certainly, in an overnight capacity, as will be borne out by the testimony presented today."

The evaluator again testified. She confirmed that appellee's visitation had stopped with the tax dispute. Appellants insisted, she said, on visits being supervised, but there was no agreement on a supervisor. Absent supervision, appellants feared that appellee would abscond with the child, based on a past incident that appellant Swain had described to the evaluator. The witness could not recall if she had confronted appellee with that accusation. The evaluator thought that it was important for appellee to be involved with the child. The judge recognized that the evaluator had recommended supervised visitation at the discretion of the appellants.

Justin testified. He had no address. For the past three and one-half months he had been "couch surfing." In his opinion, his mother was fit to have overnight visitation with his child.

Blake testified. She felt that appellee was fit to have overnight, weekend visitation.

Appellee testified. She asked for visitation once a month, from a Friday to a Sunday. Since July 2015, she has been employed in Rockville, forty hours per week, handling accounts payable. As of February 17, 2016, in the period following appellee's exclusion from appellants' home, appellee had seen the child on three occasions, at an evaluator session in the courthouse, at Christmas, and at a party in a restaurant for the child's second birthday. Appellee would like to

build a relationship with her granddaughter "because she doesn't really have any other, like besides her mother, female influence. You know, the other [maternal] grandparents don't really, they're not really in [the child's] life."

Appellee's personal history was developed through testimony of the parties and witnesses. After appellant Swain and appellee were divorced for the second time, appellee married David Baker. They had been divorced for sixteen years as of February 17, 2016. Two daughters were born of that marriage, age twenty-eight and twenty-six in 2016. Appellee says Baker cheated. She admits taking the two girls "for like 24 hours or whatever" and returned them. Baker got custody of the girls.

Thereafter, appellee had a relationship with Christopher Wallace, with whom she lived from June 2007 to the summer of 2013. Christopher was divorced from Sandra. When Christopher and Sandra tried to reconcile, they had to get a court order to get appellee out of Christopher's house. Sandra testified that appellee began stalking her. Protective orders were sought. Sandra and appellee aired their dispute on an episode of the Dr. Phil show that was carried on Valentine's Day, 2013. Currently, appellee is on probation until September 2018, on a conviction for what the court below called "harassment."

Appellee also admitted that, when Blake was living with her, she assisted Blake in falsifying a pre-employment drug test. She explained that "[w]e needed to be able to pay the bills in support."

Appellant Swain testified. He said, "But you know, I, I don't have an objection to Ms. Baker having a supervised visitation, third-party supervised visitation[.]" He is "adamantly"

opposed, however, to overnight stays and the visits should be somewhere outside of the appellants' house. Appellant Loy's position is the same.

On the day of the hearing, the court signed an order requiring all parties to attend the Supervised Visitation Program and setting a review hearing for July 7, 2016. Six supervised visits were conducted between February 28 and May 8, 2016. The supervisor's reports simply record observations but make no recommendation.

Much of the July 7, 2016 hearing involved appellants' claim for support for the child and support orders in favor of appellants and against Justin and Blake were entered. There was, in essence, no new evidence relevant to visitation by appellee. Appellants, however, presented the court with a motion to deny appellee visitation, as a matter of law, for lack of any evidence of "parental" unfitness.

The court ruled on July 21. It awarded visitation to appellee and necessarily denied appellants' last minute motion.

Specifically, the court, in relevant part, ordered:

- Appellee's request for overnight visitation was denied.
- Appellee was awarded daytime supervised visitation, once each month, on either Saturday or Sunday of the second full weekend, for a maximum of four hours, in a public place.
- Visits are to be when neither parent is scheduled to visit and neither parent is to be present during appellee's visits.

This appeal followed.

Discussion

Appellants submit that the order under appeal violates the rules established in the grandparent visitation case of *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007). There, minor children were being well raised by their biological parents who opposed any visitation by the maternal grandparents. The circuit court granted some visitation, applying the grandparent visitation statute, Maryland Code (1984, 2012 Repl. Vol.), § 9-102 of the Family Law Article.[3] This Court affirmed. *Koshko v. Haining*, 168 Md. App. 556, 897 A.2d 866 (2006). The Court of Appeals, reversing, held that the grandparent visitation statute had been unconstitutionally applied to the Koshkos who were "invested with the fundamental right of parents generally to direct and control the upbringing of their children[.]" 398 Md. at 422, 921 A.2d at 181-82.

"As a natural incident of possessing this fundamental liberty interest, the Koshkos are also entitled to the long-settled presumption that a parent's decision regarding the custody or visitation of his or her child with third parties is in the child's best interest." *Id.* at 423, 921 A.2d at 182. In that case, based on the parent's decision, the presumption was that grandparent visitation was not in the best interest of the children. But, the statute facially authorized grandparent visitation on a finding of best interest.

[3]That statute provides:

"An equity court may:

"(1) consider a petition for reasonable visitation of a grandchild by a grandparent; and

"(2) if the court finds it to be in the best interests of the child, grant visitation rights to the grandparents."

"To preserve fundamental parental liberty interests," the Court of Appeals required, to overcome the presumption, "a threshold showing of either parental unfitness or exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children[.]" *Id.* at 441, 921 A.2d at 192-93. Thus, where the parents' decision is against grandparent visitation, "there must be a finding of either parental unfitness or exceptional circumstances demonstrating the current or future detriment to the child, absent visitation from his or her grandparents, as a prerequisite to application of the best interest analysis [under the statute]." *Id.* at 444-45, 921 A.2d at 195.

Here, the appellants attempt to bring themselves within *Koshko*. They submit that they are de facto parents. Consequently, they say, the circuit court "erroneously granted a third-party visitation with the minor child over the objection of the custodians and proceeded directly to a best interest analysis without making a preliminary finding of parental unfitness or exceptional circumstances." Brief of Appellants at 16. The argument is legally incorrect and factually unsupported.

The circuit court held that *Koshko* did not apply to this case because the appellants are not the biological parents of the child. That conclusion is supported by the rationale of *Koshko*. It is a substantive due process case which confirms the "fundamental right of parents generally to direct and control the upbringing of their children[.]" 398 Md. at 422, 921 A.2d at 181-82. "This liberty interest provides the constitutional context which looms over any judicial rumination on the question of custody or visitation." *Id.* at 423, 921 A.2d at 182. Interference with that fundamental right caused the statute to be unconstitutionally applied to the Koshkos. That liberty interest is based on biological parenthood, unlike appellants' standing which is based on a court order.

Even if appellants are to be treated the same as biological parents for the purposes of *Koshko*, their argument fails because they recognized and testified that some supervised visitation would be appropriate. The order appealed from essentially tracks every feature that appellants requested for supervised visitation by appellee. In the analytical framework of the *Koshko* opinion, appellants' decision gave rise to a presumption that supervised visitation with appellee would be in the best interest of the child. Accordingly, there was no need to overcome a presumption adverse to visitation by producing evidence of custodial/"parental" unfitness or of extraordinary circumstances.

For these reason, we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED.

COSTS TO BE PAID BY THE APPELLANTS.