

SUPREME COURT OF GEORGIA

Grove v. Grove

296 Ga. 435 (2015) · No. S14F1887 · Decided January 20, 2015

SUMMARY

The Supreme Court of Georgia affirmed a divorce judgment awarding the paternal grandparents visitation with the minor child as a substitute for the father's visitation schedule. The court held that the wife waived her objection that the grandparents had not intervened and also failed to preserve her challenge to the absence of specific written findings by approving the judgment as to form.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Benham, Justice; All the Justices
JURISDICTION	Georgia
DECIDED	January 20, 2015
DOCKET	S14F1887
DISPOSITION	affirmed
PROCEDURAL POSTURE	Wife appealed a divorce judgment that awarded the paternal grandparents visitation with the parties' child as a substitute for the Husband's visitation schedule.
STANDARD OF REVIEW	Although Wife characterized the visitation challenge as an abuse-of-discretion issue, the Supreme Court resolved both claims on preservation, consent, and estoppel grounds rather than reviewing the merits of the visitation award.
PRECEDENTIAL VALUE	Published Georgia Supreme Court opinion; precedential.
PARTIES	Wife v. Husband

TOPICS

- grandparent rights
- visitation
- preservation of error
- family law procedure
- divorce

PRACTICE AREAS

- family law
- appellate procedure
- civil procedure

QUESTIONS PRESENTED

1. Whether Wife could challenge on appeal the paternal grandparents' visitation award because the grandparents had not filed a petition to intervene.
2. Whether Wife could challenge on appeal the visitation award because the final judgment lacked the specific written findings of fact required by OCGA § 19-7-3 (c).

HOLDINGS

1. Wife waived the intervention objection by failing to raise it in the trial court. Her participation in and acquiescence to litigation of the grandparents' visitation constituted consent to their participation and to the court's authority to award visitation under OCGA § 9-11-15 (b).
2. Wife was estopped from asserting that the judgment was deficient for lack of written findings of fact because she approved the order as to form and did not object to the omission in the trial court.

KEY QUOTATIONS

“Wife waived this ground for appeal, however, by not raising the issue below.” (296 Ga. at 436)

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” (296 Ga. at 437)

“After approving the form of the order, a party cannot complain of the court’s failure to include findings of fact and conclusions of law.” (296 Ga. at 439)

FACTUAL BACKGROUND

The parties agreed that Wife would have primary physical custody of their two-year-old child and that Husband's visitation would be supervised because of Husband's substance-abuse problems and residence in a rehabilitation facility. The parties and counsel addressed Wife's concerns about the paternal grandparents' visitation, including supervision, notice, contact with Husband, and unpaid child support. Counsel for both parties agreed to prepare a parenting plan, and counsel signed a plan awarding the grandparents visitation as a substitute for Husband's visitation schedule.

PROCEDURAL HISTORY

At the final divorce hearing, the parties agreed to all divorce, property-settlement, custody, and other issues except the Husband's visitation. The trial court adopted a parenting plan signed by counsel that awarded the paternal grandparents substitute visitation and incorporated that plan into the final judgment. Wife did not object below to the grandparents' failure to intervene or to the absence of written findings of fact and had approved the judgment as to form.

DISPOSITION

affirmed

CASES CITED

- Francis v. Francis, 279 Ga. 248, 248-249 (611 SE2d 45) (2005)
- Rude v. Rude, 241 Ga. 454 (1), 455 (246 SE2d 311) (1978)
- Hunter v. Carter, 226 Ga. App. 251, 252-253 (485 SE2d 827) (1997)
- Gant v. Gant, 254 Ga. 239, 240 (3) (327 SE2d 723) (1985)
- Hargett v. Dickey, 304 Ga. App. 387 (2) (696 SE2d 335) (2010)

OPINION

BENHAM, J.

In the Supreme Court of Georgia Decided: January 20, 2015 S14F1887. GROVE v. GROVE. BENHAM, Justice. Appellant is the Wife in this divorce case. At the final hearing in the case, the parties, through counsel, indicated they had reached an agreement to all terms of the divorce, property settlement, and child custody issues, and that the only matter the parties were submitting to the court for final resolution was the issue of appellee Husband's visitation with respect to the two-year old child of the marriage.

The parties agreed that Wife would have primary physical custody of the child, and the failure to arrive at an agreement about visitation arose from the fact that Husband had substance abuse problems and was, at that time, living in a residential rehabilitation facility for treatment. Further, the record reflects Wife had concerns about Husband's ability to ensure the child's safety during his visits with her.

Counsel for Wife stated that he understood the paternal grandparents would like visitation with the child, and informed the trial judge that Wife had several concerns. First, Wife was concerned about whether the grandparents would be able to prevent improper conduct by Husband while the child was visiting the grandparents.

Second, Wife had been permitting the paternal grandparents to visit the child but complained that she needed greater advance notice of their visits than they were currently providing her. Third, Wife expressed concern about the grandparents' taking the child to visit Husband at his drug rehabilitation facility.

Finally, Wife wanted the unpaid child support to be paid in full before either Husband or the paternal grandparents were permitted visitation. All of the issues raised by Wife were addressed at the hearing, including a stipulation that Husband's visitation with the child must be supervised by a third party.

The judge then asked if the parties would be able to draw up a parenting plan that addressed the issues resolved at the hearing, and counsel for both parents answered affirmatively. A parenting plan that awarded visitation rights to the paternal grandparents was signed by counsel to each party, and it was attached to and became a part of the final judgment and decree of divorce.

The terms of the final judgment also contained an award of visitation to the grandparents. Both the parenting plan and the final judgment 2 provide that the paternal grandparents may exercise visitation with the child as a substitute for the father.

The signature of Wife's counsel indicates he approved the final judgment as to form. On appeal, Wife challenges the order's grant of visitation rights to the paternal grandparents. 1. OCGA § 19-7-3 (c) grants to grandparents of a minor child the right to seek visitation rights "[u]pon the filing of an original action or upon intervention in an existing proceeding" such as a divorce action where the custody of the child is at issue.

From the transcript of the hearing on the visitation issue, it appears the parties had already agreed and stipulated that the mother would have full custody. They further stipulated that all the father's visits would be supervised by a third party. Wife claims the court, sua sponte, inserted into the final decree the provision that the grandparents could exercise visitation with the minor child as a substitute for the father's supervised visitation schedule.

Wife complains that this order permits the grandparents to take Husband's visitation turns even on major holidays such as Christmas and Thanksgiving. Wife argues the trial court erred by granting these visitation rights to the paternal grandparents even though they did not file a petition to intervene in the divorce action. 3 Wife waived this ground for appeal, however, by not raising the issue below.

See *Francis v. Francis*, 279 Ga. 248, 248-249 (611 SE2d 45) (2005). The only objection to the grandparents' visitation raised at the hearing at which visitation was addressed was Wife's request for timely advance notice by the grandparents before scheduling a visit. This concern was resolved by discussion at the hearing and reflected in the parenting plan adopted by the trial court, which grants the grandparents the right to exercise visitation with the minor child as a substitute for the Husband's visitation schedule, and stipulates the Husband is required to give no less than forty-eight hours' advance notice of his intent to exercise his visitation privileges.

The hearing transcript reflects that Wife and her counsel, as well as the paternal grandparents, were present at the hearing, yet Wife made no objection to granting the grandparents visitation rights on the ground that they had failed to intervene in the action, or any other ground. Pursuant to OCGA § 9-11-15 (b): "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Here, Wife effectively acquiesced and consented to the grandparents' participation in the 4 proceeding as well as the court's authority to make an award of visitation rights to them even though they did not file a pleading to intervene in the action.

See *Rude v. Rude*, 241 Ga. 454 (1) (246 SE2d 311) (1978) (applying this rule of the Civil Practice Act to hold, in a divorce proceeding, that the husband's failure to raise the objection that the wife's

pleadings did not include a specific prayer for attorney fees, while permitting the court to litigate the matter, served as consent to the court's authority to make such an award).

2. OCGA § 19-7-3 (c) further provides that a grant of visitation rights to any grandparent may be made "if the court finds the health or welfare of the child would be harmed unless such visitation is granted, and if the best interest of the child would be served by such visitation.

The court shall make specific written findings of fact in support of its rulings." Wife asserts the final judgment should be reversed for abuse of discretion because it grants visitation rights to the paternal grandparents without making the required written findings of fact. Wife contends the facts of this case are nearly indistinguishable from those in *Hunter v. Carter*, 226 Ga. App.

251 (485 SE2d 827) (1997), in which the Court of Appeals reversed the grant of grandparent visitation rights because the evidence did not support the trial court's finding that the minor child would be harmed if the grandparents were denied visitation rights.

In fact, this case is highly distinguishable from *Hunter* in that here, Wife, through her counsel, approved the final judgment as to form and raised no objection to the trial court's failure to make findings of fact, whereas in *Hunter*, the child's mother and stepfather, who was attempting to adopt his wife's child, opposed the grandparents in the trial court proceeding and presented evidence that required the reversal of the judgment granting visitation rights, along with its findings of facts and conclusions of law.

Id. at 252-253. Again, Wife did not preserve this issue for appeal. "After approving the form of the order, a party cannot complain of the court's failure to include findings of fact and conclusions of law." *Rude v. Rude*, supra, 241 Ga. at 455. See also *Gant v. Gant*, 254 Ga. 239, 240 (3) (327 SE2d 723) (1985); *Hargett v. Dickey*, 304 Ga. App. 387 (2) (696 SE2d 335) (2010).

Having approved the order as to form, Wife is estopped from asserting on appeal that the form of the order was deficient because it did not include findings of fact. Judgment affirmed. All the Justices concur. 6