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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001659-ME
AND
NO. 2003-CA-002000-ME

S.R.B. APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
CIVIL ACTION NO. 03-CI-00271

COMMONWEALTH OF KENTUCKY;
J.R.;
AND S.R. APPELLEES

AND NO. 2003-CA-002496-ME

S.B.
AND M.B. APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
CIVIL ACTION NO. 03-CI-00842

J.R.
AND S.R.R. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: On November 10, 2003, the McCracken Family Court awarded permanent custody of S.S.R.[1] and C.N.R.[2] (collectively, "the children"), the minor children of the Appellant S.R.B.,[3] to Appellant's half-brother, J.R., and his wife, S.R., (collectively, "the custodians") on the grounds that Appellant is an unfit mother and that it would be in the best interest of the children that the custodians have permanent custody.

Appellant appeals from that order, as well as two earlier orders of the McCracken Circuit Court: the July 14, 2003, order dismissing Appellant's petition for immediate entitlement to custody of the children and the August 19, 2003, order denying Appellant's motion for reconsideration of the order dismissing the immediate entitlement petition. These three appeals have been combined for consideration in this opinion.

Because the findings of the Family Court are not clearly erroneous and it did not abuse its discretion, we affirm its order granting permanent custody of the children to the custodians. The resolution of a petition for immediate entitlement to custody has no preclusive effect over the

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[1] S.S.R. was born May 13, 1997. Because this opinion addresses allegations of parental unfitness and child abuse, we shall use initials in place of names to protect the identities of the parents and children involved.

[2] C.N.R. was born April 20, 1999.

[3] In 2003-CA-002496, S.R.B. is referred to as simply S.B.

resolution of a subsequent petition for permanent custody. Consequently, our disposition of the case concerning the grant of permanent custody renders the issue of Appellant's earlier petition for immediate entitlement to custody moot.

S.S.R. and C.N.R. are the children of the marriage of Appellant S.R.B. and her former husband, H.R. On July 5, 2000, Appellant entrusted her children to the care of the custodians because she required immediate treatment for mental illness.[4] Soon after that, the custodians filed a petition in the McCracken Family Court asserting, via Kentucky Revised Statutes (KRS) Chapter 620, that S.S.R. and C.N.R. were abused and neglected children. At the hearing on that matter, Appellant and H.R. admitted that they had physically and mentally abused the children. They also admitted that an emergency existed; and they were temporarily unable to care for the children, Appellant because of mental illness and H.R. because of substance abuse. The custodians[5] were awarded emergency custody of the children by the Family Court's July 17, 2000, order and later awarded temporary custody on August 24, 2000. The children have lived

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[4] Appellant voluntarily admitted herself to Lourdes Hospital for psychiatric treatment on July 5, 2000, where she remained until July 13, 2000. Appellant then entered the hospital's partial hospitalization program (a transitional, outpatient program involving daily, intensive psychotherapy) for twelve more days.

[5] At the time J.R. and S.R were first awarded temporary custody of the children, they were not yet married but lived together. They later married in 2002.

with the custodians since July 5, 2000. But Appellant has regularly exercised supervised visitation with the children. She also paid child support until approximately 2003.[6]

The custodians' first petition for permanent custody, based solely on de facto custodianship, was dismissed on November 18, 2002, because the Family Court ruled that they were not de facto custodians. On March 10, 2003, Appellant filed a petition for immediate entitlement to custody of the children under KRS 620.110 in McCracken Family Court. After a brief hearing on May 1, 2003, the Family Court transferred Appellant's petition for immediate entitlement to the McCracken Circuit Court because it appeared to be, essentially, an appeal of the Family Court's temporary custody order. The Circuit Court then dismissed Appellant's petition for immediate entitlement on the grounds that "K.R.S. 620.110 does not provide a remedy or an appeal to the Circuit Court for the modification of a temporary custody order." The Appellant filed a timely motion for reconsideration with the Circuit Court which was dismissed. She also filed a timely appeal of the Circuit Court's order dismissing her petition for immediate entitlement and a separate appeal of its order denying her motion for reconsideration. The custodians then filed a second petition for permanent custody,

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[6] At that time, the Family Court agreed to modify Appellant's child support obligation because of a reduction in her work schedule; but the custodians agreed to waive child support altogether.

this petition based on the ground of parental unfitness. Appellant also filed her own petition for permanent custody. On November 10, 2003, the Family Court awarded permanent custody of the children to the custodians on the grounds that Appellant is an unfit mother[7] and that it is in the best interest of the children.[8] The Appellant filed a timely appeal of this order as well.

FAILURE TO FILE BRIEFS

Before discussing the merits, we must address a potential obstacle to appellate review. None of the Appellees——the Commonwealth, J.R., and S.R.——has filed a brief in any of these three voluminous appeals. Ordinarily, when an appellee fails to file a brief, we may accept the appellant's statement of the facts and issues as correct, reverse the judgment if we believe appellant's brief supports such a result, or treat the appellee's failure to file a brief as a confession of error and reverse the judgment without reaching the merits of the case.[9] While the Appellees' failure to file briefs in these

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[7] The Family Court also found that H.R. was an unfit father. However, he has not appealed this decision.

[8] Notably, the Family Court did not terminate Appellant's parental rights. Indeed, it awarded Appellant continued, supervised visitation rights.

[9] Scott v. Scott, 80 S.W.3d 447, 481 (Ky.App. 2002), *overruled on other grounds by* Vibbert v. Vibbert, 144 S.W.3d 292, 294-295

appeals frustrates judicial review, invoking any permissible sanctions for this failure would be "inappropriate in proceedings affecting the custody of infants."[10] Therefore, we will address the merits of these consolidated appeals.

MISSING RECORD

An incomplete record also impedes our review. Appellant specifically designated "[t]estimony given . . . and exhibits tendered in support of [Appellant's] Motion for Return of [Appellant's] Children in McCracken Family Court juvenile case nos[.] 00-J-00323-001 and 00-J—00324-001[11] held on 10-31-02"[12] to be included in the appellate record for 03-CI-00842. Unfortunately, no videotape, audiotape, or other transcript of the October 31, 2002, hearing in the DNA cases was certified by the circuit clerk. The McCracken Circuit Clerk's Office has provided affidavits by three deputy clerks, each of whom avers that she has searched the circuit and district court records but has found "no video recording of a hearing held on October 31,

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(Ky.App. 2004). *See* Kentucky Rules of Civil Procedure (CR) 76.12(8).

[10] Galloway v. Pruitt, 469 S.W.2d 556, 557 (Ky. 1971).

[11] These are the dependency, neglect, and abuse (DNA) cases for each child.

[12] This material from these DNA cases was among the evidence from other related actions involving the children which the Family Court adopted for consideration in 03-CI-00842 in its October 1, 2003, order following a motion by the Appellant.

2002," in 03-J-00323—001, 03-J-00324-001, 03-CI-00842, or 03-CI-00271.

It is an appellant's duty to see that the record is complete on appeal.[13] To the extent that the record is incomplete, the reviewing court must presume that the omitted portions support the trial court's order.[14] In the event that no record is available through no fault of the appellant, the Kentucky Rules of Civil Procedure specify that an appellant may file a narrative statement[15] or bystanders bill.[16] Appellant asserts that her sworn testimony at the September 11, 2003, hearing[17] recalling and relating her testimony at the October 31, 2002, hearing qualifies as a bystanders bill about what occurred at the earlier hearing because it allegedly went unchallenged. We disagree. Appellant has not followed any of the procedural requirements for filing a bystanders bill or a narrative statement.[18] In the absence of any record of the October 31,

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[13] Commonwealth, Dept. of Highways v. Richardson, 424 S.W.2d 601, 603 (Ky. 1968).

[14] *Id.*

[15] CR 75.13.

[16] CR 75.14.

[17] This hearing was conducted as a joint hearing regarding a motion in the DNA cases and Appellant's petition for immediate entitlement to custody of the children.

[18] *See* CR 75.14, CR 75.13.

2002, hearing or a proper narrative statement or bystanders bill, we must presume that the evidence presented during that hearing supports the Family Court's order granting permanent custody of the children to the custodians.[19]

STANDARD OF REVIEW

The right of fit parents to care for and control their own children is a "fundamental, basic and constitutional right."[20] In Moore v. Asente,[21] the Kentucky Supreme Court examined how a nonparent can establish a right or entitlement to custody of a child which is superior to that of the child's parent.[22] The party seeking custody must prove by clear and convincing evidence that he or she is a de facto custodian,[23] that the parent has waived his or her right to superior custody, or that the parent is an unfit custodian. In making the determination that a parent is unfit, the clear and convincing evidence must be sufficient to support an involuntary

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[19] For reasons discussed later, we need not address the merits of the appeals concerning Appellant's petition for immediate entitlement to custody.

[20] Vinson v. Sorrell, 136 S.W.3d 465, 468 (Ky. 2004).

[21] 110 S.W.3d 336 (Ky. 2003).

[22] *Id.* at 359.

[23] *See* KRS 403.270, 405.020.

termination of parental rights under KRS 625.090.[24] Appropriate factors for consideration are abandonment; evidence of physical injury, emotional harm, or sexual abuse; moral delinquency; mental illness; and, for reasons other than poverty alone, failing to provide essential care for the child.[25] If a finding of unfitness is made, the Family Court then must determine custody pursuant to the best interest of the child standard.[26]

The test is not whether this Court would have decided the matter of custody differently.[27] Instead, the standard of review of a child custody determination is whether the Family Court's findings of fact are clearly erroneous[28] or whether the Family Court abused its discretion.[29] Clear and convincing evidence need not be uncontradicted evidence.[30] "It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people."[31] Findings of fact are

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[24] Boatwright v. Walker, 715 S.W.2d 237, 244 (Ky.App. 1986).

[25] Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989). *See* KRS 625.090.

[26] McNames v. Corum, 683 S.W.2d 246, 247 (Ky. 1985).

[27] Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982).

[28] *Id.*

[29] *Id.*

[30] Rowland v. Holt, 253 Ky. 718, 70 S.W.2d 5, 9 (1934).

[31] *Id.*

clearly erroneous only where they are not supported by substantial evidence in the record.[32]

NOTICE OF HEARING

Appellant asserts that the Family Court deprived her of a full and fair opportunity to be heard on the competing motions for permanent custody. She asserts that she did not have timely notice because she received the Family Court's order *sua sponte* setting the instant case for final hearing only five days before the hearing. She asserts that this short notice was particularly prejudicial because she thought that no hearing would be conducted. During the September 11, 2003, hearing on Appellant's petition for immediate entitlement to custody, the Family Court said it was not going to hear all the evidence again to resolve the matter of permanent custody because the issues have been exhaustively litigated since June 2000. Appellant filed a motion complaining of the short notice; but, notably, she did not seek a continuance to delay this hearing. Instead, she merely sought to have the Family Court consider evidence from other related proceedings concerning the children, which the court agreed to do. The court explained that the purpose of the hearing was simply to make sure that there was nothing further which the parties wanted to add to the already

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[32] V.S. v. Commonwealth, Cabinet for Human Resources, 706 S.W.2d 420, 424 (Ky.App. 1986).

extensive and thorough record. Appellant was personally present at the hearing and represented by counsel. Given these facts, we deem that she has waived any possible error concerning the sufficiency of her notice. Moreover, she has not demonstrated any prejudice. Therefore, we find no deprivation of due process.

RECUSAL

Appellant also asserts that the Family Court judge, the Honorable Cynthia Sanderson, erred by denying her motion for recusal in the action involving the competing petitions for permanent custody. Appellant relies on KRS 26A.015(2)(a), which requires a judge to recuse "[w]here [she] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding." Appellant then cites a series of evidentiary facts, which Judge Sanderson allegedly knew, as grounds for recusal. But only prior knowledge which is derived from an extra-judicial source requires recusal.[33] A judge is not required to recuse based on

[33] Marlowe v. Commonwealth, 709 S.W.2d 424, 427-428 (Ky. 1986). *Cf.* Woods v. Commonwealth, 793 S.W.2d 809, 811-813 (Ky. 1990) (holding that if circuit judge based his finding that a defendant was advised of his Boykin rights when entering a guilty plea in district court on personal knowledge not contained in the record because he was the district judge who took defendant's guilty plea, this would be extra-judicial knowledge requiring recusal).

knowledge gained during the course of earlier participation in the same case.[34] All of Judge Sanderson's alleged knowledge of the case which Appellant has described was gained through her participation in the case and its interrelated cases, such as the DNA cases. This type of knowledge does not require recusal.

Appellant also asserts that Judge Sanderson was required to recuse because Appellant had filed a judicial complaint against her. The Kentucky courts have not specifically addressed whether a judge is required to recuse from a pending case whenever a party files a judicial complaint against that judge. The general rule is that a judge, under these circumstances, is not automatically disqualified because "to hold otherwise would invite the filing of a misconduct complaint solely to obtain a judge's disqualification and would invite judge shopping."[35] We need not decide whether to adopt this rule, however, because we cannot review this issue. Because the alleged judicial complaint is not part of the record, we have no way of knowing when or if such a complaint was made. Also, Appellant does not indicate how this issue was preserved for appellate review. Her motion to recuse makes no mention of a judicial complaint, and she does not direct us to anywhere in the record where this issue was raised before the

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[34] Marlowe, *supra*.

[35] 46 Am.Jur. 2d Judges § 155 (2004) (citations omitted).

Family Court. If she means to suggest that Judge Sanderson had a duty to recuse *sua sponte* based on the alleged judicial complaint, Appellant at least needs to show that the judge had notice of the filing of the judicial complaint. Again, she makes no such showing. Due to Appellant's failure to provide an adequate record and failure to show how this issue was preserved at the trial court level, this issue of recusal is unreviewable.

FINDINGS OF FACT: SEXUAL ABUSE

One basis for awarding custody to a nonparent over a parent is a finding that the parent is an unfit custodian.[36] In the instant case, the Family Court determined that Appellant is an unfit mother. Appellant challenges this determination by asserting that it is based, in part, on erroneous factual findings. Specifically, she challenges the following factual findings: "[Appellant] sexually abused [S.S.R.] by touching her private body parts inappropriately. These acts of abuse were acknowledged by the parents and were substantiated by an investigator for the Cabinet for Families and Children." Appellant denies that she ever sexually abused S.S.R. or that she or H.R. admitted to her doing so.[37] The only evidence in the

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[36] Davis, 771 S.W.2d at 330.

[37] Appellant also asserts that she was not properly notified by the Cabinet for Families and Children that a sexual abuse claim had been substantiated against her. The parties stipulated in the final hearing on permanent custody that Appellant intended to appeal this

available record supporting the allegation of sexual abuse is hearing testimony by Cabinet for Families and Children (Cabinet) social worker Leslie Thorn that Cabinet social worker Stacey Allbritten and Detective Jim Smith of the McCracken County Sheriff's Department "substantiated" the sexual abuse allegation against Appellant. However, the Kentucky Supreme Court has held that "a social worker's 'professional determination' that an allegation of abuse is 'substantiated' is nothing more than improper opinion testimony."[38]

If the appellate record were complete, we would have to conclude that the Family Court erred in its factual findings that Appellant sexually abused S.S.R. and that she and H.R. acknowledged this sexual abuse. However, the incomplete record caused by the missing transcript of the October 31, 2002, hearing changes the situation. As previously noted, where the appellate record is incomplete, we must presume that the missing record supports the trial court's findings. Therefore, we must assume that the evidence presented during the October 31, 2002, hearing supports the Family Court's findings that Appellant

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ruling of the Cabinet, as well as the issue of her alleged lack of notice. We need not address those issues here as they are collateral to the matter at hand.

[38] Jordan v. Commonwealth, 74 S.W.3d 263, 269 (Ky. 2002) (quotation marks in original). *See also*, Prater v. Cabinet for Human Resources, 954 S.W.2d 954, 958-959 (Ky. 1997).

sexually abused S.S.R. and that she and H.R. acknowledged this abuse.

FINDINGS OF FACT: PHYSICAL ABUSE AND EMOTIONAL HARM

Even if there were no findings concerning sexual abuse, there is ample evidence in the record to support the Family Court's determination that Appellant is an unfit mother. We may affirm the trial court for any reason supported by the record.[39] Appellant does not challenge the Family Court's findings concerning her physical abuse of S.S.R., including hitting her with a belt, slapping her so hard that bruises formed, pulling on her arms, and locking her in a closet. Although the Family Court made no specific findings of fact to this effect, the record also establishes that Appellant subjected the children to mental abuse and emotional harm by yelling at them; cursing at them; flying into rages; and, once, by holding a man at knifepoint in front of the children, as described below. This evidence supports the Family Court's findings of fact concerning physical and emotional abuse and emotional harm caused by Appellant, and we must assume that the missing record further supports these findings of fact.

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[39] Kentucky Farm Bureau Mut. Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky.App. 1991).

FINDINGS OF FACT: MENTAL ILLNESS

The Family Court's determination that Appellant is an unfit mother is also supported by the Family Court's finding that Appellant "has a long history of mental illness with numerous hospitalizations due to symptoms of that illness, including thoughts of harming her children, her husband, and [herself]." One ground for terminating parental rights under KRS 625.090 or awarding custody to a nonparent[40] is "mental illness as defined by KRS 202A.011(9) . . . as certified by a qualified mental health professional, which renders the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time."[41] KRS 202A.011(9) defines a mentally ill person as "a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of the person's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors."

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[40] Davis, 771 S.W.2d at 330.

[41] KRS 625.090(3)(a).

Appellant does not dispute the fact that she has been diagnosed as mentally ill within the meaning of KRS 625.090(3)(a) and 202A.011(9) by qualified health professionals on more than one occasion. When she was approximately 17, she was admitted to Rivendell Psychiatric Hospital for pulling a knife on her mother.[42] There, she was diagnosed as a paranoid schizophrenic. Then, on July 5, 2000,[43] she admitted herself to the psychiatric unit of Lourdes Hospital. Her symptoms included excessive crying, panic attacks, mood swings, severe depression,[44] and concern over her inability to deal with an abusive relationship or to care properly for the children.[45] She also heard voices telling her to harm the children or herself. Appellant was diagnosed as suffering from bipolar affective disorder and post-traumatic stress disorder (PTSD)[46] and having borderline personality

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[42] The exact date or length of this hospitalization is not in the record.

[43] This is when Appellant first entrusted the custodians with the children.

[44] Appellant had stopped taking prescription anti-depressant medication.

[45] Appellant was described as very candid and remorseful about her abuse and neglect of the children.

[46] The trauma triggering the post-traumatic stress was identified as a combination of factors: she was sexually abused as a young child by a man; her mother severely physically and verbally abused her; and her then-husband, H.R., physically abused her and the children.

disorder traits.[47] Appellant's hospitalization on this occasion was, again, precipitated by an act of violence. Immediately before she was hospitalized in July 2000, she held a knife to the throat of a man in her home because she said he had abused her and she was enraged. The man called her name repeatedly to make her take the knife away; but, due to her mental illness, Appellant felt as if she could not hear him or could not recognize her own name. He finally got her attention by pointing out that the children were watching. She then threw him out of the house. She has no memory of what happened to the children, who were then 1 and 3, after that.[48] Appellant was treated at Lourdes and after her release with lithium[49] and psychotherapy.

In approximately late May 2001, Appellant suffered a relapse and was voluntarily admitted into Western State Hospital for mental illness on May 30, 2001.[50] For about a week or so

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[47] Psychiatrist Dr. Thomas Greisamer, who treated Appellant while at Lourdes Hospital and periodically after her release from Western State Hospital, described characteristics of borderline personality disorder as follows: a tendency toward chaotic personal relationships, fear of abandonment, poor self-esteem, and the occasional loss of reality. The main treatment is psychotherapy.

[48] This corresponds with testimony that the children were frequently dirty, hungry, and unsupervised while they lived with Appellant and H.R.

[49] Lithium is used to regulate bipolar affective disorder.

[50] Dr. Greisamer speculates that Appellant's relapse may have been due to a change ordered by another physician in the dosage of her lithium.

before she was hospitalized, Appellant felt that her thoughts were racing uncontrollably and that she might explode. She heard so many voices in her head that people speaking to her sounded muffled. More ominously, she felt the urge to physically hurt M.B., her current husband with whom she was then living, for no reason. She also began flying into rages and destroying household objects. And she would also hide in closets from M.B. for hours at a time for no apparent reason. Despite his awareness of her history of serious mental illness, M.B. just thought that Appellant seemed a little "jittery." She told M.B. that she needed her medication changed. However, there is evidence that Appellant made no move to go to the hospital until the custodians persuaded her to do so. Even then, M.B. recommended that she not make any hasty decisions about going to the hospital. However, he now admits that she should have been admitted to the hospital for an adjustment of her medication. While at Western State Hospital, Appellant's medication was changed; and, afterward, she received additional therapy and counseling. There is no evidence that she has had a relapse requiring hospitalization since Appellant was released from Western State on June 12, 2001.

Appellant does not dispute that she has a history of serious mental illness and continues to need medication to treat it. However, she points to the testimony of Dr. Greisamer, who

offers his opinion that she is now well enough to be a fit custodian for the children. She points out that no expert medical testimony to the contrary was presented. However, she cites no authority for the proposition that Appellees are required to produce such evidence so we do not find this to be dispositive. Notwithstanding Dr. Greisamer's testimony, there is substantial evidence to support the Family Court's conclusion that Appellant's mental illness still may impair her ability to care for her children. His opinion seems based, in part, on his belief that Appellant is fully compliant in taking her medication. However, Appellant has a documented history of not taking her medication when she lived with H.R.[51] And Cabinet social worker Peggy Howard testified that Appellant has told her on occasion during home visits that she has run out of medication. M.B. testified that Appellant "almost always" remembers her medication and that he reminds her if she forgets, but he also admitted that his job keeps him away from the house sometimes.

Dr. Greisamer also appeared to be under the impression that Appellant immediately recognized that she was decompensating in May 2001 and promptly admitted herself to a psychiatric hospital entirely of her own initiative. But the

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[51] H.R. encouraged this behavior, however, by disparaging psychiatry and psychology and assuring Appellant that she did not need her medication.

record shows that neither Appellant nor her husband, M.B., took swift, appropriate action until the custodians intervened, approximately one week after symptoms of Appellant’s mental illness manifested. If such a situation arose again, the odds of a mental health professional intervening in a timely fashion are not good because Appellant is not involved in any regular psychotherapy or counseling. She only sees a mental health professional once every three months to get her prescription refilled.

We do not mean to diminish Appellant’s efforts to take charge of her mental illness. The record shows that Appellant’s mental health and parenting skills are greatly improved. But it also shows that she continues to be seriously mentally ill and that she does not have an adequate support system to avert potential mental health crises. Therefore, there is substantial evidence in the record to support a finding that she is an unfit mother because of her severe mental illness.

Regardless of whether we would have reached the same conclusion, we must affirm the Family Court’s determination that Appellant is an unfit mother because there is substantial evidence to support the trial court’s findings of fact on which the determination is based. The Family Court did not abuse its discretion.

BEST INTEREST OF THE CHILDREN

Appellant also challenges the Family Court's determination that it would be in the children's best interest that permanent custody be awarded to the custodians. The primary basis for Appellant's challenge is Dr. Greisamer's opinion that the children should be restored to Appellant. We find it significant that Dr. Greisamer has never met the children or the custodians, much less observed the children interacting with the custodians. So the Family Court was well within its discretion in discounting his opinion on this matter. At the same time, there is strong evidence supporting the Family Court's finding that the children have formed strong bonds, not only with the custodians, with whom they have lived since they were 1 and 3, respectively, but also with the custodian's extended family, including their daughter, S.B.'s sister, and S.B.'s parents. Moreover, there was expert testimony to the effect that interrupting these relationships would be especially traumatic to the children. Both children have been diagnosed with PTSD, which makes it more difficult for them to adjust to a new situation. Both children are special needs children, developmentally-delayed in a variety of areas, especially speech, for which continuing therapy is needed. These developmental delays were not diagnosed nor treated until the children resided with the custodians. There is evidence that

since coming to live with the custodians and receiving appropriate therapies, both children have improved in certain areas, with C.N.R. making particular progress.[52] S.S.R. has also been diagnosed with bipolar affective disorder, for which she is now being treated. There was also evidence presented that the children were aware of the ongoing custody dispute and found it stressful.

We find no abuse of discretion in the Family Court's determination that it is in the best interest of the children that permanent custody be awarded to the custodians. There is substantial evidence to support this decision.

PETITION FOR IMMEDIATE ENTITLEMENT TO CUSTODY

As previously noted, the Family Court transferred Appellant's petition for immediate entitlement to custody of the children under KRS 620.110[53] to the Circuit Court because it deemed it, in essence, an appeal of the Family Court's temporary

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52 Both of the children were once eligible for S.S.I. payments on the basis of their disability due to their combination of developmental delays, but C.N.R. has improved so much that she is no longer considered disabled.

53 KRS 620.110 states as follows:

> Any person aggrieved by the issuance of a temporary removal order may file a petition in Circuit Court for immediate entitlement to custody and a hearing shall be expeditiously held according to the Rules of Civil Procedure. During the pendency of the petition for immediate entitlement the orders of the District Court shall remain in effect.

custody order. The Circuit Court then dismissed the petition on the grounds that "K.R.S. 620.110 does not provide a remedy or an appeal to the Circuit Court for the modification of a Temporary Custody Order."

Contrary to both courts' assumptions, a petition for immediate entitlement to custody under KRS 620.110 is not an appeal of a temporary custody order. It is an original action. There have been no cases construing KRS 620.110 since its enactment,[54] and the legislative history provides no guidance to the statute's construction.[55] But in determining legislative intention, courts may look to the act as a whole, the laws of the state in force at the time of its passage, and to such other prior or contemporaneous facts and circumstances as may throw light on the General Assembly's intention.[56] The General Assembly is presumed to have knowledge of existing laws and their construction.[57] Generally, words and phrases shall be construed according to the common meaning and usage.[58] But words

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[54] Enact. Act. 1986 ch. 423, § 72, effective July 1, 1987.

[55] The statute was passed as one section of an act entitled "An Act related to the Kentucky Unified Juvenile Code," a large, omnibus act containing over 280 sections. The section of the Act which became KRS 620.110 was never amended.

[56] Kinser Sheet Metal, Inc. v. Morse, 566 S.W.2d 179, 181 (Ky.App. 1978).

[57] Baker v. White, 251 Ky. 691, 65 S.W.2d 1022, 1024 (1933).

[58] KRS 446.080(4).

which have acquired particular meaning in the law as terms of art must be construed according to that meaning.[59] Examining the common law in existence when KRS 620.110 was enacted makes it clear that the statute merely codified the common law right for immediate entitlement as described in Galloway v. Pruitt.[60] The statute employs not only the same term of art for the common law cause of action but sets forth the same procedures.[61]

Historically, a common law petition for immediate entitlement was an original action "in the nature of habeas corpus."[62] Since the statutory petition for immediate entitlement under KRS 620.110 merely codified the existing common law, it, too, is an original action. Therefore, the Family Court and Circuit Court both erred in treating Appellant's petition for immediate entitlement pursuant to KRS 620.110 as an appeal of the temporary custody order.

But any error in the treatment of the Appellant's immediate entitlement to custody is moot. A common law petition for immediate entitlement to custody had no preclusive effect in a later action to determine long-term or permanent custody; a

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[59] Revenue Cabinet v. JRS Data Systems, Inc., 738 S.W.2d 828, 829 (Ky.App. 1987), KRS 446.080(4).

[60] 469 S.W.2d 556, 558-559 (Ky. 1971).

[61] *Compare Id.* and KRS 620.110.

[62] Moore v. Dawson, 531 S.W.2d 259, 262 (Ky. 1975).

court would be free later to award long-term or permanent custody to another party.[63] The same holds true for a petition under KRS 620.110. Therefore, even if Appellant had been awarded custody of the children through her petition for immediate entitlement, the Family Court could still have awarded permanent custody to the custodians. Our disposition of the Family Court's order awarding permanent custody to the custodians on the grounds that Appellant is an unfit mother renders Appellant's earlier petition for immediate entitlement to custody moot.[64] Therefore, we need not address the merits of this appeal related to this petition.

CONCLUSION

There is substantial evidence in the record to support Appellant's parental unfitness, including but not limited to evidence of physical and mental abuse, emotional harm, neglect, and mental illness. There is also sufficient evidence to support the fact that it is in the best interest of the children that permanent custody be awarded to the custodians, J.R. and

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[63] Galloway, 469 S.W.2d at 557-559. *See also* Dake v. Timmons, 283 S.W.2d 378, 379-380 (Ky. 1955) (relying on modified habeas corpus proceedings to deal with immediate physical custody of a child, a procedure which preceded the common law petition for immediate entitlement to custody).

[64] A different result might be required if the physical custody of the children were a factor in the decision to award permanent custody to the custodians, as it might be if it were based on a finding that the custodians were de facto custodians.

S.R., with whom they have bonded and with whom they have resided since July 2000. Therefore, we affirm the Family Court's November 10, 2003, order awarding permanent custody of the children to the custodians. Because our disposition makes the issue of Appellant's earlier petition for immediate entitlement to custody under KRS 620.110 moot, we also affirm the Circuit Court's July 14, 2003, order dismissing Appellant's petition for immediate entitlement and its August 19, 2003, order dismissing Appellant's motion for reconsideration.

KNOPF, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Lisa A. DeRenard Benton, Kentucky	NO BRIEF FOR APPELLEES