

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000333-ME

J. C., Mother

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY JR., JUDGE
ACTION NO. 08-CI-00451

K. M., Father

APPELLEE

AND

NO. 2009-CA-000373-ME

J. C., Mother

APPELLANT

v. APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE ROBERT DAN MATTINGLY JR., JUDGE
ACTION NO. 08-J-00124

K. M., Father; AND
J. R. S., A Child

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT AND VANMETER, JUDGES; HENRY,¹ SENIOR JUDGE.

VANMETER, JUDGE: These advanced, consolidated appeals stem from orders entered by the Marshall Circuit Court, Family Division, in related child custody and neglect proceedings. For the reasons stated hereafter, we affirm as to each appeal.

J.C. (the mother) and K.M. (the father) are the parents of J.R.S. (the toddler), who was born in February 2007. In December 2007 the mother married T.C. (the mother's husband), and in July 2008 she gave birth to J.R.C. (the infant).

In August 2008 the father filed a dependency petition in the Lyon District Court seeking emergency custody of the toddler, who had been left in the care of the mother's husband when the mother entered a drug treatment program after the infant's birth. At the request of the mother, who resided in Marshall County, the matter was transferred to the Marshall Circuit Court, Family Division. *See* Case No. 08-J-00124-001. During a September 5 pretrial conference, the charge of dependency was amended to a charge of neglect, and the parties were directed temporarily to share joint custody of the toddler pending a formal custody determination. In November the father moved to modify the timesharing arrangements, alleging that the mother had used alcohol to excess while caring for the toddler, and that she had left the toddler unattended in a vehicle while shopping. The mother evidently entered a thirty-day rehabilitation program, and

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

the court awarded temporary sole custody to the father with supervised visitation for the mother.

Meanwhile, the custody action was instigated in September 2008 by the mother's filing of a custody petition in the Marshall Circuit Court, Family Division. *See* Case No. 08-CI-00451. The mother requested the court to award joint custody and name her as the toddler's primary residential custodian.

The family court subsequently determined that the toddler was a neglected child.² On January 21, 2009, the court entered substantially identical orders in the neglect and custody proceedings, finding that it was in the toddler's best interest to award the parties joint custody and designate the father as the primary physical custodian.

Additionally, the January 21 order described the circumstances relating to the mother's 2006 loss of custody of an older child, as well as issues pertaining to the mother's care of the infant. More specifically, after the infant tested positive for opiates at birth, the mother and her husband agreed to receive long term services from the Cabinet for Health and Family Services, Department for Community Based Services (DCBS). DCBS subsequently sought emergency custody of the infant because of concerns about the adequacy of parental supervision and the willingness of the mother's husband to adequately protect a child who might not be his.³ Evidently the mother and her husband later stipulated

² The dispositional hearing subsequently was waived, the case was closed, and a notation was made that the matter thereafter would be addressed in the custody case.

³ Allegations were made that the infant is biracial although the mother and her husband are Caucasian. The toddler's father is African-American, and the mother admitted the infant could

in writing to the mother's drug abuse issues and the inadequate supervision of the infant.

The court noted in the January 21 order that a fact finder must weigh a witness's credibility, and that "if the fact finder believes the witness is not being truthful, even on small issues, then the credibility of the witness is damaged, thereby damaging the whole case." The court addressed the mother's credibility, stating that it was

further tainted by the facts surrounding the conception, birth and paternity of [the infant]. Witnesses have testified that [the infant] clearly appears to be biracial. [The mother] admitted at the January 15, 2009 hearing that [the father] could possibly be the biological father of [the infant]. At the time she conceived the child, she was dating and possibly living with [her husband], but she was not married to [him]. She told [her husband] he was the father of [the infant] and did not tell [her husband] that he might not be [the infant's] father until after the dependency, neglect and abuse action on [the infant] was opened. In Court, she testified that [the infant] had blond hair even though the Court had the opportunity to observe the [infant] when brought into the Courtroom by one of her witnesses.

The trial judge initially stated that he had seen the infant in person and in a photograph, but he later amended his statement to say that the photograph in fact was a picture of the toddler rather than the infant.

The court addressed the confidentiality of the custody proceeding, as it related to both the infant and the toddler, before sealing its order in that proceeding. The court explained that after considering all the circumstances, it

be his child.

disclosed portions of the infant's case to the toddler's father and counsel in keeping with its

discretion to allow the disclosure of otherwise confidential facts for good cause. The Court has taken judicial notice of the pleadings, findings, stipulations and Orders entered in both [the toddler's and the infant's] dependency, neglect and abuse cases before the Marshall Family Court. Family Court was commenced under the premise of one family, one Court and one Judge and it would be an injustice to families and the protection and best interest of children if Family Court did not make its decisions based on all the facts presented to it during all judicial proceedings.

Subsequently, the court denied the mother's motions to alter, amend or vacate the January 21 order but made additional findings of fact. The court agreed with the mother that it lacked jurisdiction to determine the infant's paternity in this proceeding, but it held that it was authorized to address paternity insofar as it related to the mother's credibility as a witness. Further, the court held that it had "every right, if not duty, to make advisory opinions on the record involving the family to help preserve the integrity of the family and to avoid further costly disputes[,]” and that its comments regarding paternity were not improper. The court clarified that in light of the “abundance” of other available evidence, it had given little weight to evidence regarding the mother's oldest child, and it differentiated between the standards applicable to determining a child's best interest in a parental custody dispute, and those applicable to determining whether a child is dependent or neglected. Finally, the court rejected any claim that DCBS

had not substantiated allegations of neglect, noting that DCBS in fact had filed the dependency petition. These consolidated appeals followed.

First, the mother raises several issues relating to the court's finding that the toddler was a neglected child. We affirm as to each.

The record shows that three weeks after the newborn infant tested positive for drugs, the father filed a dependency petition expressing concern about the toddler's safety as the mother had entered a drug treatment program. Several days later, the mother moved to transfer venue to the Marshall Circuit Court, as DCBS already was overseeing an active case which the mother had initiated regarding the infant. Adjudication of the matter was postponed for 45 days, and the charge was amended to neglect. Subsequently, the father alleged that the mother left the toddler unattended in a car, and that she consumed excessive alcohol while caring for the toddler. During the hearing the mother's aunt testified regarding the mother's allegedly negligent care of the toddler after his birth.

KRS 600.020(1)(c) defines an abused or neglected child as including one whose health or welfare is threatened with harm when the child's parent "[e]ngages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including . . . parental incapacity due to alcohol and other drug abuse[.]" A dependent child is "any child, other than an abused or neglected child, who is under improper care, custody, control, or guardianship that is not due to an intentional act of the parent, guardian, or person exercising custodial control or supervision of the child[.]" KRS 600.020(19).

Here, an argument could be made that the mother did not neglect the toddler when she left him in her husband's care to enter a treatment program after the infant's birth. However, the aunt's testimony and other evidence supported a finding that the mother engaged in an ongoing pattern of providing negligent care for the toddler's "immediate and ongoing needs . . . due to alcohol and other drug abuse[.]" KRS 600.020(1)(c). While we recognize that the credibility of the aunt's testimony was challenged by the mother's witnesses, the trial court as the trier of fact determines issues of credibility. CR⁴ 52.01. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Given the substantial evidence adduced, the trial court did not err by permitting the dependency charge to be amended to conform to the evidence presented, or by finding that the toddler was neglected. *See* CR 15.02.

Next, we are not persuaded by the mother's contention that the trial court erred by considering evidence of her prior admission of neglecting her firstborn child. The record shows that before the toddler's birth, the mother's oldest child was placed in his father's primary physical custody after the mother exhibited "mental and emotional instability" related to substance abuse. Evidently the mother's substance abuse issues continued, as she participated in additional treatment programs between the time of the toddler's birth and the hearing. The trial court specifically stated that it did not need to "give a great deal of weight" to evidence regarding the mother's past history of providing care to a child, given the

⁴ Kentucky Rules of Civil Procedure.

“abundance of other evidence” to support the court’s determination of the toddler’s best interest. The trial court did not rely on improper evidence when finding that the toddler was neglected.

The mother next asserts that the trial court erred by stating that DCBS did not testify that neglect was unsubstantiated. More specifically, the mother alleged below that DCBS investigated “all incidents” regarding the toddler and “did NOT substantiate any neglect or abuse by” the mother. She further argued that the court “impermissibly substituted its judgment for that of social services even though Social Services was in a better position to evaluate the situations brought to its attention[.]” However, regardless of whether DCBS substantiated specific instances of alleged neglect, the trial court was not foreclosed from judicially determining that the mother’s ongoing care of the toddler was neglectful as a result of substance abuse and a related “pattern of conduct.” KRS 600.020(1)(c). Further, when addressing custodial rights between parents, the trial court was not obligated to find the existence of dependency, neglect or abuse before making a determination of the child’s best interest.

Next, the mother contends that the trial court erred by relying on the unfavorable testimony of her aunt rather than on the testimony of the witnesses who discredited the aunt. However, a finder of fact may “choose to believe or disbelieve any part of the evidence presented to it[,]” and the findings of fact will not be set aside on appeal unless clearly erroneous. *K.R.L. v. P.A.C.*, 210 S.W.3d

183, 187 (Ky.App. 2006). *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). The court did not err in this regard.

The mother next asserts that the trial court erred by allegedly failing to consider a social worker's recommendation that the toddler should live with the mother, and that it abused its discretion by failing to name her as the toddler's primary physical custodian. However, a social worker's recommendation as to whether a parent is capable of providing adequate care for a child differs from a trial court's determination of which one of two capable parents should be named as a child's primary physical custodian in furtherance of a child's best interest. In light of the evidence adduced below regarding both parents, the trial court did not abuse its discretion by naming the father as the primary residential custodian.

Next, the mother asserts that the record does not show whether the father complied with a court directive to complete a program of parenting classes. In response, the father admits his noncompliance but asserts that his attorney was not provided with a copy of the court order, that he and his counsel did not timely realize his need to complete the program, and that he understood that the trial court ultimately waived the requirement in order to proceed with the hearing below. The record shows that the underlying order permitted but did not require the trial court to impose any one of several possible sanctions upon a party who failed or refused to attend the parenting program. The trial court did not abuse its discretion by failing to impose such sanctions.

Finally, the mother raises several issues relating to the infant. She alleges that the court made legal determinations and issued an advisory opinion regarding the infant's paternity even though the infant was not the subject of the underlying action, and that the court improperly breached the confidentiality which should be afforded to the infant's juvenile case. We disagree.

As noted above, the mother admitted to the trial court that although she had advised her husband that the infant was his child, the infant's biological father in fact could be the toddler's father, who was a party to the proceedings. Certainly, evidence regarding the mother's neglect of the infant was relevant to the issue of whether the toddler also was neglected while in the mother's care and to the determination of the toddler's best interests. Although the trial court commented on the father's right to choose to pursue a paternity action regarding the infant, nothing in the record suggests that the trial court made any finding of paternity. Indeed, neither the infant nor the infant's legal father, i.e., the mother's husband, was a party to the proceedings below. Moreover, nothing in the record contradicts the trial court's statement that it considered the issue of paternity only insofar as it related to the issue of the mother's credibility. The mother's contention that the trial court erroneously determined paternity simply lacks merit.

The mother also alleges that a social worker engaged in improper ex parte communication with the trial court by showing a picture of the infant to the court. However, she provided no proof that such improper communication occurred. Further, as noted above, the court stated in its February 17 order that it

in fact had viewed only the photograph of the toddler which was included in the record. Absent any showing of ex parte communication, the mother is not entitled to relief.

Next, we are not persuaded by the mother's claims that the trial court erred by relying on, or allowing the father and his attorney access to details of, the infant's confidential juvenile court records. KRS 610.070(3) provides for the confidentiality of such proceedings as follows:

The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and defense of the case, . . . [and] such persons admitted as the judge shall find have a direct interest in the case . . . may be admitted to the hearing.

Here, the facts involved in the infant's case were intertwined with the issues presented to the court in the instant proceeding. Moreover, the toddler's father and his attorney had "a direct interest in the case," as information relating to the mother's neglect of the infant was clearly relevant to whether the mother also displayed the same neglectful conduct toward the toddler whose custody was in dispute. The trial court did not abuse its discretion by relying on, or permitting the father and his attorney access to the details of, such records.

The orders of the Marshall Circuit Court, Family Division, are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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