

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000817-ME

SHELIA BOATRIGT KOBRIGER

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 09-CI-00041

HOWARD STARCHER, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

DIXON, JUDGE: Appellant, Shelia Kobriger, appeals from an order of the Bell
Circuit Court awarding custody of her two minor grandchildren to their natural
father, Appellee, Howard Starcher, Jr. Finding no error, we affirm.

¹ Senior Judge David C. Buckingham 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.

Appellee and Amanda Starcher were married in March 2002, and thereafter had a child, Haylee Starcher, born May 19, 2003. The couple divorced in May 2004, but after reconciling in 2006, had a second child, Howard Ivan Starcher, born on May 4, 2007. The couple again separated in January 2008. Apparently, around the same time as the separation, Amanda was diagnosed with a terminal illness and thereafter she and the children moved in with Appellant, Amanda's mother, where they remained until Amanda's death.

Amanda died on January 4, 2009. On January 30, 2009, Appellant filed a petition in the Bell Circuit Court for permanent custody of Haylee and Howard. The petition pled in the alternative that either Appellant was the *de facto* custodian of the children and it was in their best interest to reside with her or that Appellee was an "unfit" parent. Following an evidentiary hearing on April 1, 2009, wherein numerous witnesses testified, the trial court entered an order granting permanent custody to Appellee. This appeal ensued. Additional facts are set forth as necessary.

Appellant argues that the trial court erred by refusing to award her permanent custody of Haylee and Howard because she conclusively proved that (1) it was in the children's best interest to remain with her; (2) she was the *de facto* custodian as defined by KRS 403.270, and (3) Appellee is an unfit parent as defined by KRS 625.090.

In reviewing the trial court's decision, we must determine whether it abused its discretion by awarding custody of the children to their natural father.

Abuse of discretion requires that the decision be arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are “clearly erroneous.” *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, “the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion.” *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Kentucky's appellate courts have recognized not only that "parents of a child have a statutorily granted superior right to its care and custody," *Boatwright v. Walker*, 715 S.W.2d 237, 244 (Ky. App. 1986), but also "that parents have fundamental, basic and constitutionally protected rights to raise their own children." *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989) (*Citing Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). In her brief, Appellant focuses primarily on her belief that it is in Haylee's and Howard's best interest to remain with her. However, the law is well-settled in Kentucky that the best interest standard is not to be utilized in deciding custody between a parent and non-parent absent a finding that the parent is unfit or has waived his or her superior custodial right under KRS 405.020, thus making the non-parent a *de facto*

custodian. *Chandler v. Chandler*, 535 S.W.2d 71 (Ky. 1975); *Jones v. Jones*, 577 S.W.2d 43 (Ky. App. 1979).

In *Greathouse v. Shreve*, 891 S.W.2d 387, 389 (Ky. 1995), our Supreme Court recognized that

KRS 403.270, the “best interests of the child” standard, does not apply in deciding custody between a parent and a non-parent, albeit a grandparent; that KRS 405.020(1) and a trilogy of cases from this Court recognize a parent's superior right to obtain custody of the child vis-à-vis a grandparent unless proved unfit. *McNames v. Corum*, 683 S.W.2d 246 (Ky. 1985); *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989); and *Fitch v. Burns*, 782 S.W.2d 618 (Ky. 1989).

See also Quisenberry v. Quisenberry, 785 S.W.2d 485, 489 (Ky. 1990) (Reiterating the principle in KRS 405.020 “that a court would not award custody to a nonparent over the rights of a parent unless it was first proved that the parent was unfit (‘unsuited to the trust’), even when to do so might be in the best interest of the child.”). Therefore, before Appellant has standing to assert what she believes to be the best interests of the children, she must demonstrate that either she is the *de facto* custodian or that Appellee is unfit.

KRS 403.270, which sets forth the requirements for a *de facto* custodian, permits someone who has acted as a child's primary caregiver to be deemed the *de facto* custodian of the child, thereby allowing him or her to stand on an equal footing with the child's natural parents in matters such as custody determinations. KRS 403.270(1) provides:

(a) As used in this chapter and KRS 405.020, unless the context requires otherwise, “*de facto* custodian” means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department of Community Based Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

(b) A person shall not be a *de facto* custodian until a court determines by clear and convincing evidence that the person meets the definition of *de facto* custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of *de facto* custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

As the trial court noted, the requisite time period was met. However, with respect to the other statutory requirements, the trial court found as follows:

[Appellant] claims that during this period [of Amanda’s illness] she was Haylee’s and Howard’s primary caregiver and financial supporter. The evidence establishes that during this time period Amanda was undergoing aggressive treatment for her illness which often left her debilitated for lengthy periods of time and diminished her capabilities to provide for the daily needs of the children. [Appellant] stepped in as primary caregiver during these times. The evidence also indicates that Amanda enjoyed “good” days . . . during which she was able to care for the children. Most importantly, the record establishes that Amanda never completely relinquished her role as “decision maker” regarding the children.

While living with [Appellant], Haylee's and Howard's financial needs were met through a variety of providers. Amanda received over \$600.00 per month in social security benefits. Howard Ivan, as previously noted, received over \$600.00 per month in disability benefits. [Appellee] paid child support to Amanda during this time period, in excess of \$6800.00. [Appellant] receives \$988.00 per month in disability benefits and her husband, a non party, receives a similar amount.

[T]he Court cannot find by clear and convincing evidence that [Appellant] was the primary caregiver and financial supporter of the children. Although the Court could possibly find that [Appellant] was the primary caregiver without abusing its discretion, the Court believes it would be a clear abuse of discretion or even clearly erroneous if the Court found that [Appellant] was Haylee's and Howard's primary financial provider. The evidence does not support a finding under a preponderance of the evidence standard, much less by the clear and convincing standard applicable to this case. Accordingly, [Appellant] is not the *de facto* custodian of Haylee and Howard Starcher.

It is undisputed that Appellant served as caregiver for Haylee and Howard, especially during those times when Amanda was physically unable to do so. However, the evidence also establishes that Amanda remained the decision maker and provided care alongside her mother. Further, Amanda provided financial support through her own and Howard's disability benefits, as well as Appellee's child support payments. As noted by a panel of this Court in *Boone v. Ballinger*, 228 S.W.3d 1 (Ky. App. 2007), "it is not enough that a person provides for a child alongside the parent" but rather he must "literally stand in the place of the natural parent." (*Quoting Consalvi v. Cawood*, 63 S.W.3d 195, 198 (Ky. App. 2001)).

Thus, we conclude that the trial court did not abuse its discretion in finding that Appellant did not meet the requirements for *de facto* custodian status.

Nor do we believe that Appellant has shown that Appellee is an unfit parent. KRS 625.090 sets forth the statutory grounds for termination of parental rights, which have been held to be the same grounds for determining if a parent is unfit. *See Forester v. Forester*, 979 S.W.2d 928 (Ky. App. 1998). Initially, KRS 625.090(1) requires the trial court to determine whether the child in question has been previously adjudged as an abused or neglected child, whether the present facts clearly and convincingly warrant such a finding, or whether a parent has been previously convicted of abuse or neglect. Assuming one of the requirements of KRS 625.090(1) is met, the trial court must then find the existence of at least one of the ten following additional grounds enumerated in KRS 625.090(2):

- (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
- (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;
- (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;
- (d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;
- (e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of

providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

(h) That:

1. The parent's parental rights to another child have been involuntarily terminated;
2. The child named in the present termination action was born subsequent to or during the pendency of the previous termination; and
3. The conditions or factors which were the basis for the previous termination finding have not been corrected;

(i) That the parent has been convicted in a criminal proceeding of having caused or contributed to the death of another child as a result of physical or sexual abuse or neglect; or

(j) That the child has been in foster care under the responsibility of the cabinet for fifteen (15) of the most recent twenty-two (22) months preceding the filing of the petition to terminate parental rights.

Herein, the trial court made the following findings of fact with respect to Appellant's claim that Appellee was unfit:

The record in this case is void of any evidence that Haylee and Howard have ever been subjected to neglect

or abuse at the hands of either parent or any other person. The only evidence of abuse was [Appellee's] drug abuse. However, evidence of drug abuse will not support a finding of unfitness absent evidence of abuse or neglect of the children. Additionally, none of the grounds enumerated in KRS 625.090(2) have been established. The only ground suggested by the proof was abandonment for a period greater than ninety days. [Appellee] did not see the children for nearly a year prior to Amanda's death but the evidence indicates that he made numerous efforts to contact the children to no avail. A finding of abandonment requires proof of an evinced and settled purpose to forego all ties in relation to a child. It was never [Appellee's] intention to abandon Haylee or Howard Ivan.

In support of her argument to this Court, Appellant has attached to her brief a letter from Child Protective Services stating that its investigation of Appellee for smoking around Howard resulted in a substantiated instance of neglect based upon Howard's medical conditions. However, we would point out that the incident, reported by Appellant, and the subsequent report, were both dated April 2009, after the trial court's opinion and order. As the information has not been considered by the trial court, we will not review it herein. Nonetheless, Appellee defends that he disputes the incident, has filed an appeal, and is currently awaiting a hearing date. As such, the matter has not been resolved at this point in time.

There was a vast amount of testimony presented by both parties as to Appellee's fitness and ability to parent Haylee and Howard. The trial court was in the best position to evaluate the evidence and judge the credibility of the witnesses. We cannot conclude that the trial court abused its discretion in finding that

Appellee was fit and, as the natural parent of Haylee and Howard, entitled to custody of the children.

The order of the Bell Circuit Court awarding Appellee permanent custody of Haylee Starcher and Howard Ivan Starcher is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey J. Otis
Covington, Kentucky

BRIEF FOR APPELLEE:

Otis Doan, Jr.
Scott Lisenbee
Harlan, Kentucky