RENDERED: MARCH 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001816-ME

S. T. APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CI-00104

M. R. C., A MINOR CHILD; H. C.;
AND J. C. APPELLEES

OPINION
AFFIRMING IN PART AND
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: MOORE, TAYLOR, AND THOMPSON, JUDGES.

MOORE, JUDGE: S. T. appeals the order of the Lee Circuit Court rejecting the amended report of the domestic relations commissioner (DRC) in this child custody case. After a careful review of the record, we affirm in part regarding whether the circuit court may consider an issue for which exceptions to the DRC's

report were not filed; and we reverse in part and remand as to the circuit court's finding that the father was unfit.

I. FACTUAL AND PROCEDURAL BACKGROUND

M. R. C., a minor female child, was born on July 26, 2006. Her mother is H. C. and her father is S. T. The mother and father have never married. The child's maternal grandfather is J. C. During the child's short life, she has been the subject of extensive litigation before the DRC and the circuit court on numerous occasions, culminating in this appeal.

This litigation began approximately one week before the child's first birthday, when her father filed a petition for permanent custody or, alternatively, for visitation. In his petition, the father stated that the child's mother had lost custody of the child pursuant to a temporary removal order and that the child resided with the grandfather, who also had custody of another child of the mother. That child is the half-brother of the child at issue.

An agreed order was entered, giving the father supervised visitation of the child. Another agreed order was later entered, stating that the father and the grandfather would share temporary joint custody of the child. However, the grandfather subsequently moved to suspend visitation or, alternatively, for visitation to be supervised, on the basis that the father had been arrested for driving under the influence (DUI) while the child was in the vehicle with him.[1]

[1] The father contends that the breathalyzer test he took was negative. Regardless, it appears from the record that before stopping the father's vehicle, the officer noticed the vehicle swerving, and the father refused to submit to blood or urine tests.

The Special Domestic Relations Commissioner entered his recommendations, in which he found, *inter alia*, that the father had been stopped by Bluegrass Airport Police in Lexington, Kentucky, at approximately 11:00 p.m. on October 25, 2008, with the child in the car. The father was arrested and charged with DUI -- 2nd offense, endangering the welfare of a minor, driving side to side, possession of an open alcoholic beverage in a motor vehicle, and failure to notify of his address change. The DRC found that, on the night of his arrest, the father had refused blood and urine tests; the father was taken to jail; and the child was placed in the care of the father's sister for that night. The DRC noted that the father had "prior convictions for DUI (2006), Possession of [a] Controlled Substance, 3rd (2005), and other charges."

The DRC stated that "a courtesy worker from the Cabinet [for Families and Children], Nikia Isabelle, conducts regularly scheduled home visits, verifies employment, and conducts random drug screens on the [father]. The [father] has passed the two drug screens given since the arrest." The courtesy worker had been to the father's home and had no problems with his live-in girlfriend. Also, the worker was not concerned about the child's visitation with her father and with those visits being supervised by the father's girlfriend. The DRC found that it was in the child's best interests to continue with the visitation schedule she had at that time with her father and that those visits should be supervised by the father's girlfriend. The DRC ordered the child not to be alone with the father at any time, and the father was ordered not to consume or be under

the influence of alcohol, non-prescribed medication or drugs in the child's presence. The father was also ordered not to drive with the child in the vehicle.

The grandfather objected to the DRC's recommendations, arguing that the girlfriend should not be allowed to supervise the visits because the father changed girlfriends often, and because if the girlfriend left during a visitation period, the grandfather would not know about it. The circuit court rejected the DRC's recommendations, reasoning that the girlfriend could leave the father at any time without the grandfather's knowledge and, even if she stayed with the father, her allegiance would be to the father and not to his child by a former girlfriend. An order was entered, stating that the father's visitation with the child should be supervised by the father's mother.

The DRC entered new recommendations, finding that the father had entered a plea pursuant to *North Carolina v. Alford*,[2] 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), concerning the charges of DUI – 2nd offense and endangering the welfare of a minor, and the father had served thirty days in jail as a result of that plea. The father had participated in a substance abuse assessment, as requested by the Cabinet for Families and Children, and he had completed most of the classes and passed his drug screens as of the time the DRC entered these recommendations. The father was living in a two-bedroom condominium with his fiancée (formerly referred hereinto as his girlfriend). The fiancée was a registered

[2] This type of plea, known as an *Alford* plea, "permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence." *Wilfong v. Commonwealth*, 175 S.W.3d 84, 103 (Ky. App. 2004).

nurse who had previously operated a day care center and was also an approved foster parent when she lived in Ohio, prior to her move to Lexington. The DRC stated that during the child's toilet training, the father and his fiancée noticed that there were inconsistencies between their training methods and those of the grandfather, which resulted in setbacks. Nikia Isabelle, the courtesy worker from the Cabinet, had worked with the father for several months. Mr. Isabella found that the father was attentive to the child's needs and observed nothing inappropriate in his parenting.

The DRC noted that "[t]here were allegations of neglect or abuse made against [the grandfather] prior to the time [he] gained custody of [the child]; however, those allegations were investigated by Protection and Permanency and unsubstantiated." Further, "an allegation that [the grandfather] had given a Lortab to [the mother] was investigated and unsubstantiated, due in part to [the mother] recanting her statement to the contrary." The child had resided in the grandfather's household since her birth. The DRC found that the grandfather was "treated occasionally for anxiety and depression. [The grandfather] draws Social Security disability and . . . his wife[] draws SSI." The DRC noted that the mother wanted the child to remain in the grandfather's custody.

The DRC found that the grandfather was the de facto custodian of the child, pursuant to KRS[3] 403.270(1)(a), because the child was under three years old and he had been the primary caretaker of the child for more than six months prior

[3] Kentucky Revised Statute(s).

to the filing of the custody action. The DRC stated that the father's "behavior over the past year suggests an intent to improve his ability to parent his daughter, but that intent has fallen short[,]" due to his convictions for DUI – 2nd offense and endangering the welfare of a minor. Because the father's address had changed multiple times and his employment was sporadic, the DRC found that this instability was not in the child's best interest. However, the DRC noted that the situation could improve and a change in custody could be made if the father would provide a stable home with long-term employment and a clean record. However, pending such a change, the DRC found that it was in the child's best interests for custody to be jointly shared between the father and grandfather as a de facto custodian, with the grandfather designated as the primary residential custodian/parent.

The father filed exceptions to the DRC's recommendations, arguing that the grandfather should not be considered the de facto custodian because the mother continued to reside in the grandfather's home until March 2007, and during that time, the child's crib was in the mother's room, and all three of the adults in the home alternated providing care to the child. The father asserted that testimony was introduced by two witnesses, one of whom was the grandfather's ex-wife who had resided in the home while the mother was living there, and that those witnesses had testified that the mother was the primary person who took care of the child from January 2007 through July 2007, rather than the grandfather.

The father noted in his exceptions to the DRC's recommendations that in March 2007, the mother was arrested for DUI and the child was in the vehicle with the mother. The child was removed from the mother's care and placed in foster care. The mother told social workers that the grandfather had been giving her his medicine, and the Lee County Department of Protection and Permanency alleged that the grandfather hit the mother in her face and that the grandfather had threatened to commit suicide.

The child was then placed by the Cabinet in the grandfather's custody[4] and remained in his custody from March 13, 2007, until July 13, 2007, when the father filed his petition for permanent custody. Thus, the father argued that the DRC improperly found that the grandfather was the child's de facto custodian because the child was placed in the grandfather's custody by the Cabinet, and the grandfather had not had custody of the child for one year or more before the father filed his petition for custody, as required under KRS 403.270(1)(a).

The grandfather also filed exceptions to the DRC's recommendations, in which he alleged that the DRC improperly recommended the parties share joint custody, because the grandfather should have been awarded sole custody. He contended that the father had never maintained a stable home, stable employment, or stable relationships. The grandfather asserted that the DRC erred in

[4] We assume that the allegations regarding the grandfather giving the mother his medicine were the allegations that the mother later recanted, as mentioned previously. We are uncertain regarding the resolution of the claims that the grandfather had hit the mother and the grandfather had suicidal tendencies.

recommending that the parties continue their timesharing schedule because evidence had shown that the child was ill when returned from the father's custody.

The circuit court rejected the DRC's recommendations. Specifically, the court held that the DRC erred in finding that the grandfather was the child's de facto custodian because the grandfather had not had custody of the child for at least one year after the Cabinet placed her in his custody pursuant to KRS 403.270(1)(a) and before the father filed his petition in the present case. The grandfather has not appealed the circuit court's finding that he was not the child's de facto custodian.

The DRC entered amended recommendations, finding that the father was self-employed and sporadically working as a consultant in the satellite television industry because he had previously worked installing satellite dishes before he was laid off in November 2008. The DRC noted that pursuant to *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989), before the court can consider awarding custody to a non-parent who is not the de facto custodian, the court must find that the parent is unfit by clear and convincing evidence. The DRC in this case found that

> the evidence is simply not clear and convincing by any means that the [father] is unfit under this standard. Yes, he was charged with DUI and convicted, and he had the child in the car at a late hour, but this one occasion does not make him unfit as contemplated in *Collinsworth* and that line of cases.

Thus, the DRC concluded that it would be in the child's best interests for custody to be granted to the father, with the grandfather granted visitation under a standard visitation schedule.

The grandfather filed exceptions to the DRC's recommendations, alleging that the matter had been remanded to the DRC for a determination regarding the "fitness" of the parties. The grandfather further complained that the DRC entered such recommendations without first holding a hearing on the parties' fitness and therefore the matter should again be remanded to the DRC to hold a hearing on that issue.

The circuit court again rejected the DRC's recommendations, after agreeing with the DRC that another hearing "would not yield any meaningful new evidence on the question of fitness." The court noted that on the night the father received his DUI, the child was

> out of bed near midnight, riding through a heavily-traveled area of Lexington, in a vehicle driven by or occupied by[5] an individual who was under the influence of alcohol. [The father] testified that he had a good support system with his sister, his mother, and his fiancée, and that at least one of those three individuals is available to care for [the child] whenever he needs a babysitter. [The father's sister] testified that she was at home at the time of [the father's] arrest and prior thereto and would have been available to babysit, and both she and [the father] testified that she was called to come to the scene to pick up [the child] when he was arrested. It concerns the Court that [the father] would not take advantage of a willing babysitter but would instead

[5] The circuit court noted that the father contended he was driving his drunken cousin somewhere and when the cousin exited the vehicle a few minutes before the father was arrested, the cousin had left behind his open container of alcohol.

choose to drive under the influence with [the child] in the car (or, at best, to haul a drunk with [the child] in the car). It baffles the Court that [the father] would not take advantage of the opportunity to prove his innocence by submitting to a blood or urine test and possibly avoid jail time altogether, mitigating the trauma to the child, but would instead choose to tell the police officer he had been drinking, send his child home with someone else for at least the night, defy the police officer and refuse tests that could prove his innocence, ultimately spend 30 days in jail, and jeopardize his position in his custody case.

The court continued, noting that although the one DUI arrest was the

only such incident of which it is aware; however, [the father] only had visitation with [the child] approximately 8 days a month at that time and just happened to get arrested on one of those days. The Court is inclined to believe that since this particular needle was found in the haystack, then the haystack must be stiff with needles. [The father] has expressed no remorse and has assumed no responsibility for his arrest but has continued to maintain his innocence. In fact, at the hearing, he even painted himself as a Good Samaritan who had been punished for giving a ride to a family member to prevent the poor lad from driving drunk and getting into trouble himself. The Court has no reason to think that [the father] will work to provide better care and protection for [the child] in the future considering that he cannot admit that he has done anything wrong or that he has a problem with alcohol or substance abuse despite this arrest and other prior drug possession charges and his prior decision to "self-medicate" with drugs and alcohol to deal with depression, all of which he discussed in his testimony at the hearing. [The father] further testified that he has attended classes to address these issues as part of the conditions of probation, but he gave no indication that he had ever sought help on his own or that he even perceived a need for help. [The father] placed [the child] in a life-threatening situation, the same as if he had stopped feeding her, refused her needed medication, or left her outside in the elements. . . . The Court fears that

> awarding sole custody to [the father] would send [the child] to her doom.

The circuit court then found the father was unfit and there was "no reasonable expectation that his ability to provide care and protection for [the child] will improve." The court determined that, pursuant to KRS 403.270, it was in the best interests of the child to be in the custody of the grandfather. The court reasoned that the grandfather had

> provided a home for [the child] and ha[d] been her primary financial supporter since her birth in July 2006. [The father], on the other hand, provided only $50.00 to $100.00 for [the child's] benefit until he was ordered to pay child support by the Court, and he was in arrears approximately $3,000.00 at the time of the hearing. [The grandfather] and his wife . . . assisted the child's mother . . . in caring for her until temporary custody was given to [the grandfather] on March 17, 2007, at which time [the grandfather] became [the child's] primary caregiver. He qualified for kinship care soon after. [The child's] half-brother, with whom she has a close relationship, and [the grandfather's wife's] grandchild also reside in [the grandfather's] home, and [the mother] has expressed her desire that [the child] continue to reside there. [The grandfather] is treated for anxiety and depression and receives Social Security disability benefits. Allegations of neglect or abuse have been made against him on two occasions, but such allegations have been investigated and unsubstantiated by the Lee County Protection and Permanency Office, and social workers have expressed no concerns for [the child's] safety while in [the grandfather's] care.

Therefore, the circuit court awarded sole custody to the grandfather, and the father's current visitation schedule was ordered to continue, with the restriction that he should not consume or be under the influence of alcohol or

illegal drugs during his visitation; he should not permit individuals of ill repute or who are under the influence of alcohol or illegal drugs to be around the child during his visitation; and his visitation should be supervised by his own mother. The child's mother was permitted to visit with the child whenever the grandfather agreed, with that visitation to be supervised by the grandfather. The father was ordered to continue to pay child support as previously ordered.

The father now appeals, contending that: (a) the circuit court abused its discretion when it reversed the DRC's finding on an issue for which no specific exceptions were filed; and (b) the circuit court erred in finding him unfit with no reasonable expectation of improvement.

II. ANALYSIS

A. CLAIM REGARDING REVERSAL IN THE ABSENCE OF SPECIFIC EXCEPTIONS

We first address the father's allegation that the circuit court abused its discretion when it reversed the DRC's finding on an issue for which no specific exceptions were filed. The Kentucky Supreme Court has noted that, pursuant to CR[6] 53.06(2),

> within ten days after notice of the filing of the [DRC's] report, any party may serve written objections and have a hearing thereon before the circuit court. With respect to the report, the court may adopt, modify or reject it, in whole or in part, and may receive further evidence or may recommit it with instructions. In sum, the trial court has the broadest possible discretion with respect to the use it makes of reports of domestic relations commissioners. . . . [Kentucky case law has] confirmed

[6] Kentucky Rule of Civil Procedure.

> the right of the trial court to re-evaluate the evidence and reach a different conclusion than the commissioner.
>
> . . . In general, a party who desires to object to a report must do so as provided in CR 53.06(2) or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report. . . . Ordinarily, appellate courts review only the orders or judgments of lower courts, and pursuant to CR 46, a party must make "known to the court the action which he desires the court to take or his objection to the action of the court." If we should merely apply the provisions of CR 52.03, . . . and authorize review of questions of sufficiency of evidence without requiring objections to the commissioner's report, appeals would be taken from trial court judgments adopting commissioner's reports without the trial court ever having been apprised of any disagreement with the report.
>
> . . . [However, where the trial court considers untimely objections], no sound policy prevents appellate review.

Eiland v. Ferrell, 937 S.W.2d 713, 716-17 (Ky. 1997).

In the present case, the father contends that the circuit court erred in permitting the grandfather to file exceptions twenty-two days after the DRC's report was entered. The father also asserts that, unlike the *Eiland* case, the exceptions filed in this case did not challenge the sufficiency of the DRC's finding regarding the father's fitness as a parent, but rather, the exceptions only "requested the opportunity to present additional evidence on the issue of fitness."

Pursuant to *Eiland*, the circuit court has broad discretion in the use it makes of a DRC's report and in the consideration of exceptions filed late. The circuit court is also permitted to modify any part of the DRC's report or re-evaluate the evidence and reach a different conclusion than the commissioner. Accordingly,

although the grandfather did not file a specific objection to the DRC's recommendation that the father was not unfit, based on *Eiland*'s holding, the circuit court did not abuse its discretion when it re-evaluated the evidence. While *Eiland* and subsequent cases reviewing the role of the DRC appear in many respects to have superseded CR 52.03, this is the status of the law. Therefore, given the very broad discretion of the circuit court in relation to reviewing recommendations from the DRC, the circuit court did not err when it considered the issue of the father's fitness, even if the grandfather's exceptions did not address that issue and even though the exceptions were filed late.

B. CLAIM REGARDING FINDING OF UNFITNESS

The father also contends that the circuit court erred in finding him to be an unfit parent with no reasonable expectation of improvement. We may "set aside the trial court's findings when those findings are clearly erroneous." *Vinson v. Sorrell*, 136 S.W.3d 465, 470 (Ky. 2004). "To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence." *Id*.

> "[S]ubstantial evidence" is [e]vidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men. Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses because judging the credibility of witnesses and weighing evidence are tasks within the exclusive

> province of the trial court. Thus, [m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal, and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Id. (internal quotation marks omitted).

"[A] natural parent is entitled to custody over a non-parent unless it is demonstrated that the natural parent (1) is unsuitable to have custody, (2) is harmful to the child, (3) has contracted to give his child away, or (4) is clearly estopped to claim custody." *Forester v. Forester*, 979 S.W.2d 928, 929 (Ky. App. 1998). "The United States Supreme Court has recognized fundamental, basic and constitutionally protected rights of parents to raise their own children; and, that an attack by third persons seeking to abrogate that right must show unfitness by 'clear and convincing evidence.'" *Id*. (quoting *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)). "[A] natural parent's superior right to the child's care and custody can be abrogated in an action involving a non-parent seeking custody [only] by a showing of unfitness sufficient to support an involuntary termination of parental rights." *Id*. (internal quotation marks omitted).

> [T]he evidence necessary to show unfitness of a parent when a third party seeks custody includes: (1) evidence of inflicting or allowing to be inflicted physical injury, emotional harm, or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.

Id.

In the present case, the circuit court did not specify which of these five factors was the basis for its finding that the father was unfit. Rather, the circuit court stated that its finding was based on the fact that the father was convicted of a DUI and endangering the welfare of a child. The court also based its unfitness finding on the fact that on the evening the father was arrested on those charges, he was driving with her in a heavily traveled area of Lexington near midnight. The circuit court begrudged the fact that the father entered an *Alford* plea to the charges against him, as is evident from the court's finding that the father "expressed no remorse and has assumed no responsibility for his arrest but has continued to maintain his innocence," and from the court's note that it has "no reason to think that [the father] will work to provide better care and protection for [the child] in the future considering that he cannot admit that he has done anything wrong."

None of these findings would constitute physical, emotional, or sexual abuse; abandonment; emotional or mental illness; or failure to provide essential care for the child. Consequently, we can only assume that the circuit court found that the aforementioned facts rendered the father morally delinquent and used that factor as its basis for finding him unfit.

Regarding the court's determination that the father had assumed no responsibility for his actions and refused to admit wrongdoing, the court essentially used the fact that the father entered an *Alford* plea to the charges as a reason to find him morally delinquent and, therefore, unfit. However, the mere fact that a parent

has entered an *Alford* plea does not render that parent unfit. Further, it is improper for the court to deny a person his fundamental constitutional right to parent simply because that person chose to exercise his due process rights by maintaining his innocence in a criminal proceeding. The circuit court's role in this case was to examine the parental fitness of the father, not the integrity of his *Alford* plea in the criminal proceedings.

The circuit court's note that the father was driving the child through a heavily traveled area of Lexington late at night likewise cannot serve as a basis for finding him morally delinquent and, therefore, unfit to parent the child. The court also found that the father's convictions for DUI and endangering the welfare of the child (due to the fact that the child was in the vehicle when he was arrested for the DUI) rendered him unfit to parent. Although we do not condone the father's actions on which these convictions were based and find this conduct absolutely deplorable, this single instance of poor judgment--wherein fortunately the child suffered no harm--is insufficient to show, by clear and convincing evidence, that the father is an unfit parent. If every parent who made a mistake lost their fundamental constitutional right to parent their children, nearly every child in the Commonwealth would be a ward of the State. The circuit court, in this case, overreacted to the father's convictions and appeared to base its finding that he was an unfit parent partially on the court's own supposition that, because he committed those crimes, he must have committed others of which the court was not aware. In fact, the court stated that it was "inclined to believe that since this particular needle

was found in the haystack, then the haystack must be stiff with needles."

However,

> [t]he rights of litigants in courts of justice are not determined by guesswork, surmise, or speculation. There must either be direct evidence authorizing a finding of fact, or a network of circumstantial evidence, based upon facts which will authorize a finding by a court or a juror without indulgence in mere speculation or surmise.

Magness' Adm'x v. Hutchinson, 274 Ky. 226, 117 S.W.2d 1041, 1043 (Ky. 1938) (internal quotation marks omitted). Therefore, the court improperly used its own speculation as a basis for finding the father unfit, and the court's other findings are insufficient to meet the high standard for declaring a parent unfit by clear and convincing evidence. Therefore, the circuit court erred in finding the father unfit based on the facts before it at that time.

Accordingly, the order of the Lee Circuit Court is affirmed in part regarding whether the circuit court could review an issue for which specific exceptions to the DRC's report were not filed and for which the exceptions that were filed were untimely. However, the order of the Lee Circuit Court is reversed in part concerning the determination that the father was unfit. The case is remanded for proceedings regarding custody and visitation that is consistent with this opinion.

THOMPSON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

Melissa C. Howard
Jackson, Kentucky

BRIEF FOR APPELLEE J.C.:

Charnel M. Burton
Booneville, Kentucky