RENDERED: APRIL 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001074-ME

TREENA FRENCH — APPELLANT

v.

APPEAL FROM CARTER CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 09-CI-00249

CHARLES M. FRENCH, II — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Treena French appeals from a judgment of the Carter Circuit Court awarding custody of her children to her ex-husband, Charles French. On appeal Treena argues that the trial court erred by finding she waived her superior custody right toward one of the children who was not Charles's biological child. Upon a review of the record, we affirm in part, reverse in part, and remand to the Carter Circuit Court for additional findings.

History

Treena French and Charles French were married on November 13, 2007. On June 25, 2009, Treena filed a petition for dissolution of the marriage which stated that the parties had separated on June 2, 2009 and that two children, C.F. and M.M., ages 5 and 6, were born of the marriage.[1] Treena also filed a motion for temporary custody of the children on that same date, alleging that Charles had obtained custody of the children through an emergency protective order which had since been dismissed by the court.[2] Charles also filed a motion for temporary custody of the children, alleging that he was the biological father of both C.F. and M.M, that Treena had a history of drug abuse, and that Treena did not have stable housing for the children as her last known address was the Grayson Lake Campground.

The motions were heard by the trial court on July 7, 2009, and the court granted temporary custody to Charles and visitation to Treena. Thereafter, Treena was incarcerated for violation of a Domestic Violence Order ("DVO"), and the court temporarily suspended her visitation with the children. Visitation resumed after the parties reached an agreed order regarding visitation which was entered by the court on August 4, 2009. Treena was subsequently charged with driving while under the influence ("DUI") and the trial court entered an order,

[1] Apparently Treena and Charles cohabitated for a significant period of time before the marriage, and both children were born before the marriage.

[2] It appears to this Court that the order was actually an emergency custody order ("ECO") rather than an emergency protective order ("EPO"). Apparently, Charles sought and received temporary, emergency custody of the children after they were discovered living at a primitive campground with Treena and her boyfriend where they had been living off of canned goods for several days.

upon Charles's motion, to prohibit Treena from transporting the children during her scheduled visitation times.

The matter came on for final hearing on December 9, 2009, and jurisdictional proof was taken for the dissolution. Although Treena had previously represented to the court through her pleadings that M.M. was a child of the marriage, she testified at the hearing that M.M. was the biological son of another man. The court thereafter entered a decree of dissolution, but reserved the issues of custody and child support for a later date so as to allow time for the biological father to be joined in the case.[3]

Charles then filed a motion requesting that the court adjudicate him as a *de facto* custodian. Charles swore out an affidavit which he attached to his motion, stating that he had been the primary caregiver for M.M. for nearly his entire life (including the preceding one-year period), that he had been the primary financial provider for M.M. for the preceding one-year period, and that he had claimed M.M. as his own son since birth. In addition, Jose Renya ("Renya"), M.M.'s biological father, entered an appearance in the case and a waiver of notice.[4] Attached thereto was an agreement between Renya and Charles that, if Charles was declared a *de facto* custodian, he would forbear seeking child support from Renya for M.M. in exchange for Renya agreeing not to seek visitation or institute custody

[3] M.M. was returned to Treena's temporary custody after the hearing as the court had not been informed prior to this point that M.M. was not a child of the marriage and that Charles was a nonparent.

[4] As neither child was born during the marriage, there was no presumption that Charles was the father.

proceedings regarding M.M. Renya did not participate any further in the proceedings.

At the final hearing held on March 24, 2010, both parties were present and represented by counsel.[5] The trial court found that Charles was not a *de facto* custodian at the hearing because step-parents cannot gain *de facto* custodian status where both parents are living in the home and caring for the child. After taking testimony in the hearing, the court interviewed the children, who both expressed a desire to live with both parents. On April 8, 2010, the trial court entered its findings of fact and conclusions of law. Therein, the court found that Charles was not M.M.'s father, but that Charles had raised M.M. as his own son. The court also made findings about Treena. The court found that Treena drove the children during visitation in violation of the court's order. The court also found that Treena had admitted to the unauthorized use of prescription drugs and that she was currently charged with eight counts of third-degree unlawful transaction with a minor.[6] Finally, the court found that Treena had an outstanding DVO which she had violated and that she had been held in contempt for the violation of an EPO. The court noted that each of these things had occurred during the pendency of this case alone.

The trial court concluded as a matter of law that Charles could not be a *de facto* custodian to M.M. because he was not the primary caregiver of M.M.

[5] Although Charles is now proceeding *pro se* in the current appeal.

[6] The charges for unlawful transaction with a minor did not involve C.F. or M.M., but involved Treena's child by a previous marriage who did not live with Charles and Treena. Apparently this older child had been previously removed by the court and placed with the child's paternal grandparent.

prior to the parties' divorce as required by Kentucky Revised Statute ("KRS") 403.270 and interpreted by *Consalvi v. Cawod*, 63 S.W.3d 195 (Ky. App. 2001), *abrogated on other grounds by Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). However, the trial court concluded that while Charles was not a *de facto* custodian, he had standing to challenge custody as a nonparent because Treena was unfit as a parent and had waived her superior right to custody.

As to its finding of unfitness, the court noted that Treena had been charged with eight counts of unlawful transaction with a minor, had admitted to the unlawful use of prescription drugs, had pled guilty to a DUI, had violated court orders, and had been held in contempt, all during the pendency of the action. As to its finding of waiver, the court noted that, while M.M. was removed from Treena's care in July of 2009 by emergency custody order, Treena did not inform the court of M.M.'s true parentage or attempt to regain custody of M.M. until March of 2010.

Based upon its findings of waiver and unfitness, the court applied a best-interests analysis and awarded custody of the children to Charles. Treena was granted supervised visitation with the children. While the court noted that both parties had checkered pasts, including criminal histories and histories of domestic violence, it found that Charles had not engaged in the same sort of behavior that Treena had.

Treena filed a motion to alter, amend, or vacate the judgment and moved for additional findings concerning the custody determination, order of

supervised visitation, and various other issues. The court granted Treena's motion as to two issues not relevant to this appeal regarding child support and corporal punishment, but denied it on all other grounds.

Treena now appeals from same. On appeal, she argues: (1) that the trial court clearly erred by finding that she was unfit and that she had waived her superior right to custody with respect to M.M.; (2) that the trial court erred in its custody award of C.F. to Charles; and (3) that the trial court erred by awarding her supervised visitation with the children.

We first address Treena's claim that the trial court erred by finding she was unfit and had waived her superior right to custody of M.M. In *Consalvi v. Cawod, supra*, we held that a step-parent could not gain *de facto* custodian status where both parent and step-parent had lived in the home and provided care for the children. We concluded that "[i]t is not enough that a person provide for a child alongside the parent", but rather that he "must literally stand in the place of the natural parent." *Id*. at 198.

However, as we acknowledged in the case of *Boone v. Ballinger,* 228 S.W.3d 1 (Ky. App. 2007), although the *de facto* custodian statute does not apply to a step-parent or nonparent who provides for a child alongside the parent, the doctrine of waiver in a child custody dispute is still alive and well in the Commonwealth. *Id*. at 10. As was aptly summarized in *Ballinger, supra*,

> [A] biological parent's interest in his or her child is a powerful one that will not be disturbed "absent a powerful countervailing interest . . ." Indeed, the rights of a parent to the care, custody and companionship of a

> minor child are "far more precious . . . than property rights." [However, d]espite the exalted place that such rights hold, the law also recognizes that there are circumstances where a biological parent's rights are diminished or even forfeited due to his actions (or inaction) or due to legislative policy.

Id. at 6 (*internal citations omitted*). Indeed, our courts have recognized such special circumstances in which a nonparent may seek custody of a child against a natural parent. In *Moore v. Asente, supra*, the Supreme Court stated that:

> Custody contests between a parent and a nonparent who does not fall within the statutory rule on "de facto" custodians are determined under a standard requiring the nonparent to prove that the case falls within one of two exceptions to parental entitlement to custody. One exception to the parent's superior right to custody arises if the parent is shown to be "unfit" by clear and convincing evidence. A second exception arises if the parent has waived his or her superior right to custody.

110 S.W.3d at 359, *quoting* 16 L. Graham & J. Keller, *Kentucky Practice-Domestic Relations Law* §21.26 (2003).

In the case of *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004), where a grandparent sought custody of a grandchild who had resided with him for a period of time due to the mother's drug problem, the Supreme Court laid out several factors to be considered in determining whether a parent has waived superior custody right to a biological child: (1) how long the child has been away from the parent; (2) the circumstances of the separation; (3) the age of the child when the nonparent assumed care; (4) the time elapsed before the parent sought to claim the child; and (5) the frequency and nature of any contact between the parent and the child during separation. *Id*. at 470. However, as the Supreme Court has recently

clarified, the factors set forth in *Vinson, supra*, are not exhaustive. *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010). The *Picklesimer* Court noted that such factors should merely be used as a guide and that child custody cases must be determined on a "case-by-case" basis. Specifically, the Court noted that separation was not a necessary factor. The Court found that "there can be a waiver of some part of custody rights" when a parent demonstrates "an intent to co-parent a child with a nonparent." *Id*.

In the present case, Treena demonstrated an intent to co-parent M.M. with Charles from the time of his birth. In addition, when Charles filed an ECO for temporary emergency custody of M.M. as his biological child, Treena did not come forward to dispute that M.M. was Charles's biological child. Indeed, in Treena's own pleadings before the trial court, she represented that M.M. was a child of the marriage. Moreover, although M.M. was removed from her care in July of 2009, by emergency custody order, Treena did not inform the court of M.M.'s true parentage or attempt to regain custody of him until March of 2010. Thus, we find that there was substantial evidence to support the trial court's conclusion that Treena had waived her superior custody right to M.M. Hence, we affirm the trial court's finding of waiver.

We next address Treena's argument that the trial court's finding of unfitness was not supported by clear and convincing evidence. The standard for unfitness in a custody battle between a parent and a nonparent is whether "the parent has engaged in conduct similar to activity that could result in the

termination of parental rights by the state." *Moore v. Asente*, 110 S.W.3d at 360, *citing* 16 L. Graham & J. Keller, *Kentucky Practice-Domestic Relations Law* §21.26 (2003), *and Fitch v. Burns*, 782 S.W.2d 618, 620 (Ky. 1989). The Supreme Court has noted that the type of evidence which would support such a finding 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.

Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989). In the present case, although there was no evidence that Treena inflicted physical injury or emotional harm, there was significant evidence of moral delinquency. Indeed, during the pendency of this case alone, Treena pled guilty to a DUI, was held in contempt of court, violated an EPO, violated court orders, and was charged with eight counts of third-degree unlawful transaction with a minor. Further, there was evidence of abandonment for a period of time as Treena left M.M. in Charles's care for eight months after the ECO, all the while knowing that M.M. was not Charles's biological child. Finally, the court noted that "[e]mergency custody itself was granted because of serious concerns about the welfare of the children while in [Treena's] possession." As previously mentioned, after her separation from Charles, Treena took the two young boys, M.M. and C.F., and lived with them and her boyfriend in a primitive campground. Accordingly, we find that the trial court's determination of unfitness was supported by substantial evidence.

Moreover, we note that the trial court need not have made findings of both unfitness and waiver, as either would have been sufficient to place Charles on equal footing with Treena as a parent. Hence, we affirm the trial court's finding that Treena was not "suited to the trust." *See, e.g., Raddish v. Raddish*, 652 S.W.2d 668 (Ky. 1983).

We now address Treena's second claim on appeal- that the trial court erred by finding that it would be in C.F.'s best interest to be placed in Charles's custody.[7] In reviewing a child custody determination, we review for clear error. *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. App. 1986). KRS 403.270(2) mandates that the trial courts shall determine custody in accordance with the best interest of the child, giving equal consideration to each parent. KRS 403.270(2) directs the courts to consider all relevant factors, including:

> (a)The wishes of the child's parent or parents . . . as to his custody;
> (b) The wishes of the child as to his custodian;
> (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> (d) The child's adjustment to his home, school, and community;
> (e) The mental and physical health of all individuals involved; [and]
> (f) Information, records, and evidence of domestic violence . . . .

The trial court's judgment below stated that, "[a]fter applying the criteria of KRS 403.270 to the instant case, the Court finds that the best interests of

[7] Although Treena does not mention M.M. in this argument, we assume that she objects to the court's placement of both children with Charles.

[C.F.] would be best served by awarding sole custody of [C.F.] to [Charles]." In so concluding, the court noted that while both parties had prior criminal histories and charges of domestic violence before the present action began, Treena had pled guilty to DUI, been found in contempt, violated an EPO, violated court orders, and been charged with eight counts of third-degree unlawful transaction with a minor during the pendency of the action. The court also noted that there were "serious concerns about the welfare of the children while in [Treena's] possession." However, the trial court did not make specific findings of fact with regard to the individual statutory factors set forth in KRS 403.270. As we have stated before, in the absence of specific findings, we are unable to conduct a meaningful review under the clear error standard set forth in Kentucky Rule of Civil Procedure ("CR") 52.01. *See, e.g.*, *McFarland v. McFarland*, 804 S.W.2d 17, 18 (Ky. App. 1991).

In the present case, the court did not address the children's wishes, the children's interaction with each other or with Treena and Charles, their adjustment to their home and community, or the effect that any domestic violence has had upon them. Although evidence of a parent or custodian's misconduct may be considered by the trial courts when undertaking a best interest analysis, the court must also conclude that such conduct is likely to affect the child adversely. KRS 403.270(3); *Krug v. Krug*, 647 S.W.2d 790, 793 (Ky. 1983). While it may appear somewhat redundant to require specific findings in a case such as the present one, where unfitness has already been found by the court, our case law holds that the court must make specific findings under KRS 403.270(2) in determining the best

interests of the children.[8] CR 52.01; KRS 403.270(2). *See, also, McFarland v. McFarland, supra*.

Thus, we reverse on this ground and remand to the trial court for the court to make specific findings with respect to the statutory factors set forth in KRS 403.270 as to why it is in the best interest of C.F. and M.M. to be placed with Charles.

We now address Treena's last claim on appeal, namely that the trial court erred in awarding her only supervised visitation with the children. KRS 403.320(1) reads as follows:

> A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health.

Further, KRS 403.320(1) requires the court to grant reasonable visitation to the noncustodial parent unless a finding is made that visitation would seriously endanger the child's physical, mental, moral, or emotional health. However, in cases where domestic violence has been found, KRS 403.320(2) applies. KRS 403.320(2) reads as follows:

> If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health.

[8] This issue was preserved for our review by Treena's motion for additional findings.

Thus, KRS 403.320(2) sets forth a different standard in cases where domestic violence is present. In such cases, the trial court may use its discretion in determining visitation, so long as such arrangement would not endanger the child's physical, mental, or emotional health. Thus, KRS 403.320(2) does not require a finding that visitation would seriously endanger the child's physical, mental, or emotional health, but conversely, directs the court to make an arrangement in its discretion which would avoid such endangerment. Accordingly, we affirm on this ground.

In conclusion, we affirm in part, reverse in part, and remand to the trial court for specific findings under KRS 403.270.

ALL CONCUR.

BRIEF FOR APPELLANT:

Malenda S. Haynes
Grayson, Kentucky

NO BRIEF FILED FOR APPELLEE