

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000743-ME

S.R.

APPELLANT

v.

APPEAL FROM WOODFORD FAMILY COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 09-J-00020

D.N.; J.H.; AND
H.W.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: S.R. (father) appeals from an order of the Woodford
Family Court granting D.N. (stepfather) permanent custody of H.W. (father's
biological child) following dependency, neglect, and abuse proceedings. For the
reasons stated, we conclude that there were no errors and affirm.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 18, 2009, the Department of Community Based Services filed a dependency, neglect, and abuse petition against mother alleging that child had been neglected due to her exposure to substance abuse and domestic violence in mother's home. On March 3, 2009, the family court held a hearing and ordered the appointment of counsel for mother and a *guardian ad litem* for child. Father was not appointed counsel and was ordered not to have unsupervised visits with child. After the hearing, mother was allowed to keep child at her residence but she was not to allow her boyfriend access to her home or children.

On March 6, 2009, the family court issued a show cause order against mother for allowing her boyfriend contact with her children. The family court ordered that mother's three children, including H.W., be placed in the custody of the father of the child's two siblings. On the same day, a second dependency, neglect, and abuse petition was filed against mother for violating the prior order.

After a temporary removal hearing, the family court found that the mother had violated two provisions of its prior order. She had continued living with her boyfriend, who allegedly committed domestic violence against her, and she admitted to improper consumption of prescription medication. The family court ruled that mother could only have supervised visitation with her children. The family court kept the child in the custody of her siblings' father. After an adjudication and disposition hearing, stepfather was granted custody of the child, and, mother was denied contact with her children until she complied with her case plan.

After a notice was provided that the family court was going to consider the issue of the child's permanent custody, a hearing was conducted where evidence was placed in the record regarding the circumstances of the child's care. The family court found that mother had made "no progress on her case plan."

At the hearing, father moved for immediate entitlement to custody of the child. The family court ruled that such motions should be filed in court in Franklin County where the child resided and would not be addressed in the juvenile case. The family court further found that father had failed to comply with setting up a case plan as required by the Department and had no contact with the child prior to her removal from her mother. Following the hearing, pursuant to KRS 620.027, the family court awarded the stepfather permanent custody of the child, and found that the stepfather was the child's *de facto* custodian.

Father contends that the family court abused its discretion. Specifically, he alleges that: Two hearings were held after the statutory time period for such hearing; the family court did not advise him to obtain counsel or appoint counsel for him; the family court failed to address his claim to custody of the child; and the family court erred by finding that stepfather was child's *de facto* custodian, because the record does not support the finding. Thus, he argues that the family court's order must be reversed.

We observe that a family court's findings of fact shall not be set aside unless they are clearly erroneous and, thus, not supported by substantial evidence.

Cabinet for Health and Family Services v. A.G.G., 190 S.W.3d 338, 342 (Ky.

2006). Substantial evidence is evidence that is sufficiently probative to induce belief in the mind of a reasonable person and due regard must be given to the family court to weigh the evidence. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003). Further, a family court has broad discretion in matters relating to determining the custody of children and its decision will not be reversed absent abuse of discretion. *Futrell v. Futrell*, 346 S.W.2d 39 (Ky. 1961).

In this case, father alleges that two of the dependency, abuse, and neglect hearings were held beyond the time period required by statute. However, father did not present this argument to the family court and has not indicated how this argument was preserved. When a litigant makes an allegation to an appellate court, it is fundamental that the claim must be first presented to the family court. *Richardson v. Rees*, 283 S.W.3d 257, 265 (Ky.App. 2009). Thus, an “issue not raised in the [family] court may not be presented for the first time on appeal.” *Keeton v. Lexington Truck Sales, Inc.*, 275 S.W.3d 723, 726 (Ky.App. 2008). Thus, we will not address father’s allegation regarding the delayed hearings.

Father’s allegation that he was not advised to obtain counsel or was not appointed counsel was also not preserved. Father has not cited to this Court where he preserved this issue, and he and his counsel did not bring this matter to the family court’s attention at the March 25, 2010, hearing. Regardless, KRS 620.100(1)(b) provides that “[t]he court shall appoint separate counsel for the parent who exercises custodial control or supervision if the parent is unable to afford counsel pursuant to KRS Chapter 31.” Here, father has not established that

he had custody or supervision of child. Therefore, we fail to see how father's allegation constitutes error.

Father's contention that the family court failed to address his claim to custody of the child is incorrect. The family court directly addressed his claim at the final hearing and stated that father must file for permanent custody outside of the juvenile case. The family court further informed father that child resided with stepfather in Franklin County where he should bring his action. Additionally, the family court found that father failed to comply with setting up a case plan with the Department and had no contact with the child prior to removal.

Under KRS 620.140(1)(c), family courts are authorized to award custody of an abused or neglected child to an "adult relative, other person, or child-caring facility or child-placing agency, taking into consideration the wishes of the parent or other person exercising custodial control or supervision." In this case, stepfather, the father of the child's two siblings, had temporary custody of the child for the entire year before the permanent custody hearing and this case. Child's mother had not complied with the family court's order and failed to appear at the final hearing.

Additionally, a case worker testified that father neither contacted nor requested the services of the Cabinet for Health and Family Services. At the hearing, father did not state a single step that he took to establish a case plan. After considering the child's wishes, her interaction with her siblings, her adjustment to her home and school, and after reasonable efforts were made to work with the

child's parents, the family court found that it was in the child's best interest to be placed in the stepfather's permanent custody. Thus, we conclude that the family court's custody award was not an abuse of discretion.

We further note that the family court properly stated the procedural steps that should be taken to obtain permanent custody pursuant to KRS 403.270 *et seq.* As stated in *S.R. v. J.N.*, 307 S.W.3d 631 (Ky.App. 2010), dependency, neglect, and abuse proceedings were not intended to be a substitute for full civil custody hearings under KRS 403. *Id.* at 637. In this case, the family court told father to bring an action for full permanent custody in the Franklin Family Court. We believe the Woodford Family Court's directive reflects proper procedure. *Id.*

Father's allegation that the family court erred by finding that stepfather was the child's *de facto* custodian must fail. KRS 403.270(1)(a) provides the following:

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 for 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.

In this case, the child was greater than three years of age at the time of the proceedings and the stepfather was the child's primary caregiver, financial supporter, and resided with her for over a year before the designation. By order entered on March 6, 2009, the stepfather had custody of the child and maintained custody for the year preceding the order. Additionally, as provided by the record, including a report from the Cabinet filed June 9, 2009, stepfather provided for the care and rearing of the child. Therefore, we conclude that the family court's finding was supported by substantial evidence.

Father next contends that the family court failed to properly consider him as a permanent custodian of his biological child. We disagree.

The family court properly determined that this matter was limited to a custody determination related to the underlying dependency, neglect, and abuse petition. There was no pre-removal custody award to father and he had no contact with his child prior to her removal from mother. Father sought a permanent custody award pursuant to KRS 403.270 *et seq.* in a dependency, neglect, and abuse proceeding under KRS 620. This tactic is not appropriate and father should have brought the matter under KRS 403.270 *et seq.* for a full proceeding on the issue of child custody. Therefore, the family court committed no error.

For the foregoing reasons, the order of the Woodford Family Court is affirmed.

LAMBERT, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS.

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