RENDERED: AUGUST 19, 2011; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001400-ME

ERIC POWELL — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 07-CI-00077

IDA HOGAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND WINE, JUDGES.

WINE, JUDGE: Eric Powell appeals from a judgment by the Lee Circuit Court granting sole custody of his minor children to their maternal grandmother, Ida Hogan ("Hogan"), and awarding supervised visitation to him. The trial court found that, even though Hogan was not a *de facto* custodian of the minor children,

Powell was unfit to exercise custody. On appeal, Powell argues that the evidence does not support the trial court's finding that he is an unfit parent. After reviewing the record, the applicable law, and the arguments of the parties, we affirm the Lee Circuit Court.

B.H. (born April 2, 1998) and A.H. (born May 4, 2001) were born out of wedlock to Powell and Rebecca, Hogan's daughter. On June 5, 2007, Hogan filed a Petition in the Lee Circuit Court seeking custody of Powell's minor children, as well as a third child, H.H. (born April 29, 1996).[1] Hogan brought this action pursuant to Kentucky Revised Statute ("KRS") 403.270 claiming that, as primary caregiver and financial supporter of the children, she is a *de facto* custodian. On July 3, 2007, Powell filed an answer seeking sole custody of his children. Hogan was awarded temporary custody of the children on July 16, 2007. Since that time, Powell has had supervised visitation with the children every other weekend. Powell's mother, Kathy Watkins, was ordered to be present during all visitations.

Rebecca, the mother of all three children, died in an automobile accident on December 17, 2006. All three children sustained serious injuries in the accident which required surgical treatment and follow-up care. Prior to the accident, the children lived with Rebecca, Powell, and their grandmother in Lee County. During this time prior to the accident, Powell would leave intermittently

[1] H.H. was named in the Petition as Powell was believed at that time to be the father of all three children. Subsequent paternity testing revealed that Powell is not the father of H.H. and, accordingly, he has no standing to seek custody of H.H.

and live elsewhere. Hogan, who worked in Lexington, would stay several nights each week in Lexington for work, and spend the rest of the week at her home in Lee County.

After the children were discharged from the hospital, Hogan and all three children stayed at the home of Powell's mother, Kathy Watkins, while repairs were being made to Hogan's home. Although the children lived with Powell at his mother's residence, he failed to take the children to mandatory medical check-ups. The Cabinet for Health and Family Services ("the Cabinet") filed negligence complaints against Powell for his failure to provide proper medical care for the children following the accident. On motion of the County Attorney, the Lee District Court dismissed these complaints upon Powell agreeing to follow a case plan. The Cabinet contends that Powell has failed to complete his case plan and has failed to communicate with the Cabinet.

After the death of their mother, the children qualified to receive Social Security benefits. Powell received their checks for approximately six months. Hogan asserts that Powell used this money to purchase a new truck, which Powell denies.

With the exception of the brief time period following the accident, all three children have resided in Hogan's home in Lee County their entire lives. Hogan has financially supported the children and has provided food, shelter, clothing, and other necessities. Although she continues to travel to Lexington for work each day, Hogan no longer stays overnight. Rather, she returns to her home

in Lee County each night to care for the children. Hogan claims that at no time has Powell ever paid any child support or offered any financial assistance for the support of his children. Powell testified he has never been ordered to pay child support. Despite the fact that Powell has earned enough income to support his children, he has failed to do so.

Powell has violated court orders which directed all of his visits with the children to be supervised by his mother. He even instructed his children not to tell Hogan or anyone else that his mother, Ms. Watkins, was not present for the visits. Contrary to court orders, Powell's girlfriend, Heather Coomer, was present during visitations. Coomer's own children were removed from her custody because of her substance abuse, drug addiction, and neglect of her children. Powell disclosed to his own children that he would eventually gain custody of them and that they could then be a family with Coomer. A child born out of wedlock to Powell and Coomer was also removed from Coomer's care as it was born addicted to drugs. It appears Powell has taken no action to seek custody of that child.

Throughout these proceedings, Powell has denied using drugs. However, several witnesses testified seeing Powell intoxicated or under the influence on numerous occasions, including in the presence of his children. In addition, in 2000, he was convicted for possession of marijuana, as well as for felony criminal mischief for spray painting vehicles belonging to Hogan and her daughter, Jennifer Smith. In addition, between 2000 and 2004, Powell was

convicted of the offenses of shoplifting, speeding, driving without insurance, carrying a concealed deadly weapon (pocketknife), and multiple offenses of operating a motor vehicle on a suspended or revoked license.

This matter was tried before a special Domestic Relations Commissioner ("DRC") on August 26-27, 2009. The DRC filed its recommended Findings of Fact, Conclusions of Law, and Decree of Custody on October 9, 2009, finding Hogan not to be a *de facto* custodian but recommending that she be granted sole custody of the children and Powell granted every other weekend supervised visitation with them. Further, the DRC recommended that Powell pay child support according to the Kentucky Child Support Guidelines. After a review of the video proceedings from trial, a Guardian *Ad Litem* ("GAL") concurred with the DRC's findings and recommendations. Powell filed objections to the DRC's report on October 21, 2009, arguing the DRC's findings were not supported by clear and convincing evidence. Hogan filed her Response on October 26, 2009. On June 25, 2010, the trial court entered an order adopting the recommendations of the DRC. It is from this Order that Powell appeals.

The circuit court's findings of fact will not be disturbed unless they are clearly erroneous, bearing in mind that the lower court was in the best position to weigh the evidence and assess witness credibility. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rule of Civil Procedure ("CR")

52.01. Thus, the dispositive question on review is whether the trial court's findings of fact are clearly erroneous or not supported by substantial evidence. Substantial evidence is evidence, taken alone or in light of all evidence, which has "sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), *citing Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62 (Ky. 1970).

> A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007).

The Courts of the Commonwealth have consistently recognized not only that "parents of a child have a statutorily granted superior right to its care and custody", but also "that parents have fundamental, basic and constitutionally protected rights to raise their own children." *Moore v. Asente* at 358. In a custody dispute between a parent and a non-parent, KRS 403.270(1)(b) provides that a non-parent who qualifies as a *de facto* custodian is entitled to the same standing that is given to each parent in the court's custody determination. KRS 405.020(4) provides, in part, that "if either parent dies and at the time of death a child is in the custody of a *de facto* custodian, as defined in KRS 403.270, the court shall award custody to the

de facto custodian if the court determines that the best interests of the child will be served by that award of custody." Hogan did not appeal or file a cross appeal from the trial court's decision that she did not qualify as a *de facto* custodian. Even if she had, as both children are over the age of three, Hogan must qualify as a *de facto* custodian by establishing by clear and convincing evidence that she was the primary caregiver and financial supporter for the children, and that the children have resided with her for more than a year. KRS 403.270(1)(a). While there is substantial evidence that Hogan has done more than her share of parenting and providing support for the children, there is no clear and convincing evidence that she meets the statutory threshold as defined in KRS 403.270. Kentucky law is clear that the *de facto* period does not commence so long as the children are not residing in her home. The record fails to establish that the children resided with Hogan for one year prior to the filing of her petition for custody on June 5, 2007. After the motor vehicle accident on December 17, 2006, the children lived with Powell and his mother for a period of time. As Hogan did not meet the one-year time requirement set forth in KRS 403.270(1)(a), the court's determination that she does not qualify as a *de facto* custodian was proper.

Child custody disputes between a surviving parent and a non-parent (who does not fall within the statutory rule on *de facto* custodians) are governed by KRS 405.020(1), which provides that, "[i]f either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen (18)." Hence, the surviving parent has a

superior right to custody over the non-parent so long as the surviving parent is "suited to the trust". The non-parent must "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." *Moore v. Asente* at 359. Only the first of these two exceptions is applicable in the present case as the facts of this case do not support a waiver. "Under the first exception, the nonparent must first show by clear and convincing evidence that the parent has engaged in conduct similar to activity that could result in the termination of parent rights by the state. Only after making such a threshold showing would the court determine custody in accordance with the child's best interest." *Id.* at 360. "[T]he natural parent has the superior right of custody which must prevail unless the natural parent is not suitable, fit, or capable of making reasonably adequate provisions for the child's well-being." *Berry v. Berry*, 386 S.W.2d 951, 952 (Ky. 1965). Accordingly, we first review the trial court's order to determine whether a finding of unfitness was made with respect to Powell and whether such finding was supported by substantial evidence.

The Kentucky Supreme Court has outlined the type of evidence which would support a finding of unfitness on the part of the parent in a custody battle with a third party. Specifically, (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). (Further explanation of the *Davis* factors was given by the Kentucky Supreme Court in an unreported opinion, *Knight v. Young*, 2010 WL 252246, 2007-CA-001850-MR). In *Knight*, the Court stated that not every factor listed in *Davis* is an example of evidence that tends to demonstrate unfitness. Additionally, in a later case, the Court clarified that even if evidence supports a finding of current unfitness, the trial court should further find before granting permanent custody to a non-parent by clear and convincing evidence, that there is no reasonable expectation that the biological parent will improve and be able to provide appropriate care and protection. *Forester v. Forester*, 979 S.W.2d 928, 930 (Ky. App. 1998).

Here, the circuit court found by clear and convincing evidence that Powell is unfit according to the aforementioned factors. The DRC's recommended Findings outline several reasons for the ultimate recommendation that Powell be declared an unfit parent, all of which were ultimately adopted and expanded upon by the trial court in its order confirming same. Powell failed for reasons other than poverty alone to provide essential care for the children. First, Powell failed to seek proper medical treatment for the children following their release from the hospital. Social Worker Crystal Nobel testified she received documents from the University of Kentucky Medical Center showing the children had missed "several appointments" with health care providers. The neglect action was dismissed, despite the Cabinet's objection on the record, based on Powell's agreement to follow a case

plan. However, the record indicates Powell failed to complete any part of the case plan.

Additionally, Powell has failed to provide financial assistance for the children. With the exception of the time period during which the children stayed with Powell's mother, Hogan has provided the primary financial support for the children. Powell testified that he provides for the children only when they are with him and that he would provide assistance to Hogan if she so requested. Though Hogan has never pursued court-ordered child support, and Powell has never been ordered to pay child support, Powell has never made any attempt to care for his children financially. Powell has a job and testified that he is capable of financially supporting the children. However, he has relied exclusively on Hogan to provide a home, clothing, food, and all other necessities for his children. The DRC's October 9, 2009, Decree of Custody dictated that Powell should pay child support to Hogan in accordance with the Kentucky Child Support Guidelines. However, Powell has failed to make any such payments. Furthermore, while denied by Powell, Hogan alleges that Powell used the children's social security benefit checks to purchase a truck.

Next, Powell failed to follow a court order which required that visitation with the children be supervised by his mother at all times. On one occasion, the children were in Powell's care at a public pay lake where Powell's girlfriend, Coomer, was present. Neither Powell nor his mother denies that Powell's mother was not present during this visitation. The children advised the court that they

were told by Powell not to tell their grandmother (Hogan) about the trip to the lake or they would get in trouble. Additionally, Powell's mother testified that she and her son violated this court order on other occasions when the children went places with Powell in her absence. Furthermore, evidence was presented that Powell has left the children in the care of Coomer on several occasions. Powell contends that any interaction between Coomer and his children occurred prior to Coomer's own children being removed from her. However, this does not dispose of the fact that Coomer has a history of substance abuse and that she exhibited behavior warranting the termination of her parental rights.

Powell has moral delinquency evidence in his checkered legal history. The DRC found that Powell exhibited moral delinquency by his continued drug use while denying a substance abuse problem; his relationship with a woman who has a substance abuse problem and whose children were removed from her custody; and by his own criminal record. There was testimony by several witnesses, including a 911 dispatcher and a store clerk, that Powell has been under the influence of intoxicating substances in the presence of his children. Powell makes unsubstantiated claims that, while on probation, he has not failed any administered drug testing. In 2000, Powell was convicted of marijuana possession, and between 2000 and 2004, he was convicted of various misdemeanor criminal offenses, including shoplifting, speeding, reckless driving, driving without insurance, carrying a concealed deadly weapon (pocketknife), and operating a motor vehicle

on a suspended or revoked license. Powell was convicted of felony criminal mischief for the damage to Hogan's property.

Powell has further exhibited moral delinquency in that he has requested of the children that they not divulge certain information such as unsupervised visitations which violate the court's orders. The DRC found Powell has made no sign of any improvement.

Given the totality of the evidence and the facts as presented, it is clear that Powell has not provided a meaningful level of care or support to his minor children. For reasons other than poverty alone, he has failed to provide essential financial and physical care for the children, and there is no reasonable expectation that his ability to provide care will improve. He has exhibited moral delinquency through drug use, violations of court orders, his association with Coomer, failure to medically care for the children, and his criminal record. It is in the children's best interest to remain in a stable home where they have lived most of their lives with a family member with whom they have established strong bonds.

Finally, we address Powell's challenge to the court's jurisdiction to consider the custody petition because Hogan lacked standing as a non-parent who was not a *de facto* custodian. We are unable to determine from the record, nor does Powell cite to where this issue was preserved. Since the repeal of KRS 403.420(4)(b), the scope of non-parents that may bring suit has diminished, leaving only those who can establish that a natural parent is unfit or has waived his/her superior right to custody. *Boone v. Ballinger*, 228 S.W.3d 1, 10 (Ky. App. 2007). In *Harrison v.*

Leach, 323 S.W.3d 702 (Ky. 2010), the Kentucky Supreme Court noted the father failed to challenge the grandparents' standing before the trial court. The Court concluded that a challenge to a party's standing may be waived if not timely raised. Because we conclude Powell failed to raise the issue before the trial court, we decline to consider the standing challenge at this time.

Having reviewed the record, we are of the opinion that substantial evidence was presented to the trial court which demonstrated that Powell is unsuited to the trust to have custody of his two minor children. Notwithstanding Powell's strong objection to whether this issue was proven by clear and convincing evidence, given the trial court's discretion in such matters, Powell has provided no evidence which shows the trial court's conclusions were clearly erroneous. Therefore, we affirm the Lee Circuit Court's order of June 25, 2010.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth H. Davis
James E. Davis
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE:

Kendall Robinson
Booneville, Kentucky