RENDERED: AUGUST 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001541-ME

THEODOSIA ADAMS — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 11-CI-00313

CHRIS COOK — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Theodosia Adams appeals from an order entered by the Family Court Division of the Scott Circuit Court on August 15, 2011, dismissing her motion to be named *de facto* custodian[1] of C.L.W.,[2] her then four-year-old great niece. Based upon the record provided to us, we see no error and affirm.

FACTS

[1] Kentucky Revised Statutes (KRS) 403.270.

[2] Pursuant to Court policy, the child will be referred to by her initials only to protect her identity.

C.L.W. was born March 13, 2007, to Rachel Wright and Chris Cook. At about three months of age,[3] she began living with Adams, her paternal great aunt, although not as the result of any legal action. Wright has expressed no interest in caring for the child. For about a year, Cook has been exercising visitation with his daughter and paying child support to Wright. There are references in the record to Cook having twice been charged with flagrant non-support.

THE NEGLECT ACTION

This case began on July 14, 2010, when a petition was filed in juvenile court alleging C.L.W.[4] was at risk of being neglected by Wright due to Wright having tested positive for oxycodone during the birth of another child. Wright did not appear at any of the hearings provided for our review. No allegation of neglect was made against Cook.

Adams was not a party to the neglect action although she attended some hearings. According to an affidavit signed by Adams, Cindy Bryant, the child's maternal grandmother, acquired legal custody of C.L.W. in July of 2010 and Cook was awarded visitation every other weekend. Adams maintains, and

[3] Portions of the records of both the civil custody case and the juvenile neglect case have been provided for our review. However, at least two hearings in the custody case were omitted from the designation of record and therefore, are unavailable to us. Thus, the statement of the facts is reconstructed from information gleaned from hearings in the neglect case and relies heavily upon Adams's petitions for temporary custody and custody.

[4] C.L.W. has three siblings. Each is the child of a different father. All four children were named in simultaneous actions in juvenile court. The written records of the cases of the siblings are not before us, but all four children were discussed during the recorded hearings included in the record on appeal.

Bryant confirmed at a hearing, though not under oath, that while Bryant had legal custody of C.L.W., the child was actually living in Adams's home where Adams was her primary caregiver and financial supporter for more than three years.

On November 1, 2010, a disposition hearing order was entered granting custody of C.L.W. to Cook. This order conflicted with the Cabinet's[5] recommendation, signed by the judge, that C.L.W. should remain in Bryant's custody. On March 7, 2011, another conflicting order was entered, this one signed by a special judge, granting sole custody of the child to Cook based on the order entered on November 1, 2010.[6]

Believing the award of custody to Cook was a mistake, and in an attempt to quickly return matters to the *status quo,* on March 18, 2011, Adams filed a motion to intervene in the juvenile case and a verified petition for temporary custody.[7] Both matters were heard on March 28, 2011. The trial court told Adams she lacked standing to move to correct the orders awarding custody to Cook. When no party moved to correct the record, the trial court *sua sponte* rescinded the two orders giving custody to Cook upon determining they had resulted from clerical errors under CR[8] 59 and 60.[9] The trial court also learned at this hearing,

[5] Cabinet for Health and Family Services.

[6] According to the court, no notice of this matter was provided to any party.

[7] According to a memorandum to the court prepared by a court worker, the court stated these documents were styled as a new neglect action, but they bear the same case number.

[8] Kentucky Rules of Civil Procedure.

[9] Custody of C.L.W.'s siblings was awarded to their respective fathers. The court concluded that its case specialist may have inadvertently applied the same order to C.L.W. as was applied to the other children despite the court's intention for C.L.W. to remain in her maternal

for the first time, that while legal custody of C.L.W. had been given to Bryant, the child had actually been living in Adams's home. The trial court characterized this late revelation as a misrepresentation and a fraud upon the trial court and the Cabinet. The guardian *ad litem* recommended that C.L.W. remain in Bryant's custody until the matter could be resolved even though Bryant did not have physical possession of the child and Bryant had admitted to a Cabinet representative that C.L.W. had spent most of her time with Adams.

The trial court stated that under recently adopted FCRPP[10] 31, Adams could not intervene in the juvenile case and a new civil custody action would have to be opened. The trial court told Adams she could file a petition to be named C.L.W.'s *de facto* custodian if she believed she qualified for that status. Cook was also told he could petition the court to award custody to him. Because of the unique posture of the case, the trial court stated custody would revert to Bryant; Cook would retain visitation with the child every other weekend; and any future modification should occur in a civil custody case. The trial court also directed the Cabinet to reinvestigate the placements of all four children because Wright was untrustworthy. Finally, the trial court told Bryant that she was the only entity with legal custody of C.L.W. and while she could place the child with Adams, if she chose to do that, she should consider arranging for Adams to become C.L.W.'s guardian. At the conclusion of the hearing, C.L.W. was returned to Bryant.

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grandmother's custody.

[10] Kentucky's Family Court Rules of Practice and Procedure became effective January 1, 2011.

Adams's motion for temporary custody was heard on April 11, 2011. Although not under oath, Bryant, to whom custody had been restored in March, stated C.L.W. had been with Adams since she was three months old and she believed that was where the child belonged. Cook contradicted Bryant, alleging C.L.W. had not lived with Adams continuously since she was three months old because there were three periods of time in which C.L.W. had lived with him and Rachel for stretches of three to four months at a time. In light of Cook's comments, the trial court urged Cook to participate in Adams's recently filed motion to be named C.L.W.'s *de facto* custodian and her petition to be awarded custody. The trial court clarified that the goal of the juvenile court case was to reunite C.L.W. with her mother while the goal of the new civil custody case was to establish custody with a *de facto* custodian. Adams's counsel neither objected to the court's statement nor argued the cases should be treated as one or otherwise consolidated. When Cook opposed Adams having custody, but did not object to her having visitation, a custody hearing was set for July 22, 2011, with the trial court urging Cook to try to mediate the matter with Adams.

On May 23, 2011, consistent with the trial court's prior advice, an order was entered in the neglect case, by a different judge, appointing Adams as C.L.W.'s guardian and ordering her to "make all decisions as to childs (sic) education, medical and personal care needs, with child to reside with guardian who is to provide for childs (sic) welfare and care." We see no indication this appointment was ever rescinded.

The juvenile cases of C.L.W. and her three siblings were reviewed at a hearing on July 18, 2011. Adams was not a party to the juvenile action, her motion to intervene having been denied, and therefore, was not present in the courtroom during the hearing. Cook had received a summons to attend the review but was absent when the case was called at 9:10 a.m. The Cabinet recommended C.L.W. be permanently placed in Bryant's custody and that her three siblings be placed with their respective fathers. The trial court agreed with the Cabinet's recommendation.

C.L.W.'s case was recalled at 9:58 that same morning. Cook said he had learned of the hearing at just 8:15 that morning and had been delayed by traffic construction. When asked the purpose of an upcoming hearing, Cook said Adams's custody petition was to be heard on Friday, July 22, 2011. He also assured the court that: he was in a position to take custody of C.L.W. that day; he had a home; he had passed several Cabinet visits and drug tests; and, he was exercising visitation with C.L.W. every other weekend and those visits were going well. At that point, the court granted sole custody of C.L.W.[11] to Cook. The trial court then said Adams's custody petition would be heard on Friday, as scheduled, and ordered Adams, in writing, to produce the child at that time.

The Cabinet representative reminded the trial court that the Cabinet had recommended the child remain in Bryant's custody and that the trial court had

[11] The docket sheet reflects Cook was awarded custody of "Rachel Wright," the child's mother, as opposed to C.L.W., the child. We perceive this to be an oversight.

said custody would be determined in the custody case as opposed to the neglect action. The court responded that permanent custody could not be given to Bryant that day because Bryant had allowed Adams to be appointed as C.L.W.'s guardian —unbeknownst to the Cabinet—and any order resulting from the hearing on the custody petition would supercede the order being entered in the neglect action. The judge then questioned how Adams could have been appointed as C.L.W.'s guardian when Bryant had only temporary custody of the child and asked why Adams had not appeared in the neglect action since the trial court could award custody to a non-relative in a juvenile case. The trial court said she had little choice but to grant custody to Cook because Bryant had indicated she did not want the child by allowing Adams to be named as her guardian.

Cook then asked the trial court if he should go ahead and get C.L.W. from Adams that day. He expressed concern that the change in custody would upset the child, especially if the sheriff had to remove her from Adams's home. It was decided the change in custody would be delayed until Friday, unless Adams would give the child to Cook based solely upon his request.

THE CUSTODY ACTION

On April 4, 2011, as the trial court had suggested, Adams filed a motion to be named C.L.W.'s *de facto* custodian and a petition to be awarded custody. Both documents alleged C.L.W. had lived with Adams for a total of three years and nine months with the knowledge of Cook and Wright. According to

Adams, neither Wright nor Cook was employed, and while both had relationships with the child, neither had been a custodial parent to C.L.W.

In attempting to prove her status as a *de facto* custodian, Adams stated in an affidavit that hers was the only home known by C.L.W. She also asserted she had supplied virtually all of the child's needs including medical care, transportation to her parent's home, and material needs. She also stated she was the only person in the courtroom on March 28, 2011, who knew the unusual spelling of the child's name and the date on which paternity had been established.

Hearings on Adams's quest for custody occurred on July 22, 2011, and again on August 5, 2011, but neither of them was designated for inclusion in the appellate record. While we do not know what transpired at those hearings, Adams identified seven potential witnesses on his witness list and Cook named four on his. On August 8, 2011, a docket sheet for the hearing was entered containing handwritten findings of fact stating:

> Following testimony, undisputed, that father continued to have frequent timeshare with child during which time he would financially provide for child and was primary caregiver[,] Petitioner failed to satisfy time required to be the primary caregiver and financial supporter as times when she had child were interrupted by times with father, mother and grandmother defeating one year and even 6 month rule. Further no testimony that mother waived her superior right[.] [C]ourt takes Judicial Notice that in J case mother continued until recently to work case plan to have child placed w/her.

Thereafter, on August 15, 2011, the trial court entered a final order dismissing Adams's petition for custody. That same day, Adams filed this appeal of that order.

On August 26, 2011, Adams filed a handwritten motion asking for visitation with the child. On September 21, 2011, the trial court entered an order stating:

> Motion by Ms. Adams for visitation is overruled as she was found after a hearing on 8/8/11 not to be a *de facto* custodian and thus has no standing to participate in matters relating to the custody of [C.L.W.].

After thorough review, we affirm.

ANALYSIS

Adams's first allegation of error is that she qualifies as C.L.W.'s *de facto* custodian and the trial court arbitrarily denied her that status. This question presents mixed issues of law and fact. We may disturb a family court's factual findings only if they are clearly erroneous, meaning they are unsupported by substantial evidence. CR 52.01; *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005). We review the family court's interpretation of the law *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky. App. 2006).

To qualify as a *de facto* custodian, Adams had to clearly and convincingly establish that C.L.W. had lived with her for one year or more and that Adams was C.L.W.'s primary caregiver and financial supporter during that time. KRS 403.270(1). As alluded to earlier, our review of this allegation is severely

hampered by the absence of two hearings—one dated July 22, 2011, and the other dated August 5, 2011.[12] Testimony at one or both of these hearings may have established when C.L.W. lived with her parents, her grandmother, and Adams, and who provided for her financial support during those times.[13] There may also have been testimony from the Cabinet about why they opposed Cook having custody since a Cabinet worker was identified for that purpose in a supplemental witness list. Cook may have even testified about why he objected to Adams having custody of his daughter. All of this salient information, if elicited, is unknown to us because Adams did not designate the hearings for inclusion in the appellate record. Thus, we have no testimony whatsoever about when C.L.W. lived with Adams or how much financial support she provided for her. In reviewing the hearings that were provided to us, we note that no one was ever placed under oath. Thus, all we have are affidavits from Adams, Bryant and Wright, none of which have been tested by cross-examination.

"[W]e have consistently and repeatedly held that it is an appellant's responsibility to ensure that the record contains all of the materials necessary for an appellate court to rule upon all the issues raised." *Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky. 2007). Moreover, when the complete record is not before us,

[12] We are further hampered by the unexplained renumbering of the family court record *after* the preparation of Adams's brief. As a result, the page references contained in Adams's brief, the only brief filed in this case, are inaccurate and of little benefit to the Court.

[13] In her brief, Adams claims she was the sole witness in the "truncated" custody hearing and was not allowed to complete her testimony.

we must assume the omitted record supports the decision of the trial court. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). Thus, we have no choice but to assume the trial court's findings are supported by the record. We likewise have no basis upon which to say the family court erred in its application of KRS 403.270(1) which governs *de facto* custodianship. Based upon the partial record presented to us, we must agree with the family court that Adams did not clearly and convincingly establish she was C.L.W.'s primary caregiver and financial supporter for one year or more. Adams's assertions that she met the statutory criteria in her petition and in her affidavit are simply insufficient reason for us to reverse the decision of the family court. Therefore, we affirm the conclusion that Adams did not qualify as a *de facto* custodian.

Adams's next argument is that the family court abruptly ended the hearing on July 22, 2011, and prevented her from offering additional evidence by avowal. We make no comment on this allegation because we do not have the recorded hearing before us and must assume the omitted portion of the record supports the family court's action. *Thompson.*

Adams's next argument is that Wright, in an affidavit signed on July 28, 2011, and filed the next day, waived her superior custodial right as a parent in favor of Adams and therefore, Adams had standing to challenge Cook for custody. We disagree.

Numerous Kentucky cases have recognized that parents have a fundamental, basic, and constitutional right to raise, care for, and control their own

children. *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010) (citing *Davis v. Collinsworth*, 771 S.W.2d 329, 330 (Ky. 1989)). Had Adams, a nonparent, been named a *de facto* custodian, she would have acquired standing[14] to challenge Cook, C.L.W.'s biological father, for custody. Even though she did not qualify as a *de facto* custodian, Adams could still seek custody by clearly and convincingly proving that Cook was an unfit parent, or that he had waived his superior right to custody. *Mullins,* at 579. There being no allegation that Wright or Cook was unfit, to prevail, Adams had to clearly and convincingly prove Cook had waived his superior right to custody of his daughter. *Greathouse v. Shreve,* 891 S.W.2d 387, 390 (Ky. 1995).

Adams argues she proved Wright waived her parental rights in a notarized affidavit filed with the court on July 29, 2011, a week after the hearing had occurred on July 22, 2011. In that affidavit Wright stated:

> I understand the Court questioned whether [Cook], or I had placed [C.L.W.] with Adams intending Adams to be a parent to her. We did not at the very beginning. But, within a few months, I did. [Cook] showed no interest either way. Adams has always been considerate of [Cook] and me, but she has raised [C.L.W.]. I probably made more of a conscious decision about Adams having

[14] Standing means "a party has a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy." *Kraus v. Kentucky State Senate,* 872 S.W.2d 433, 439 (Ky. 1993). It is defined by Black's Law Dictionary 1413 (7th Ed. 1999) as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." A person with a "a real and substantial interest in the subject matter of the litigation" has standing. *Stevens v. Stevens*, 798 S.W.2d 136, 139 (Ky. 1990) (citing *Rose v. Council for Better Education, Inc*., 790 S.W.2d 186, 202 (Ky. 1989)). Whether a party has standing is dependent upon the facts of each case. *Id*.

> become [C.L.W.'s] home and like a parent to her than [Cook], because [Cook] never showed serious interest in [C.L.W.]. I can say under oath that only a few months after [C.L.W.] went to live with Adams, I knew that was [C.L.W.'s] home and where she needed to stay. [C.L.W.] and Adams have bonded and are as close as any child and parent.

Submission of Wright's[15] post-hearing affidavit may have been Adams's attempt to shore up her proof if Wright did not attend the custody hearing and subject herself to cross-examination. Nevertheless, Adams argues the trial court had to accept Wright's affidavit as proof of her waiver of her superior custodial right in favor of Adams. Again, we disagree.

First, in the written findings entered on August 8, 2011, the trial court stated there was "no testimony" that Wright had waived her superior rights. Without the record of the hearing before us, we must take that finding as accurate. *Thompson.* Furthermore, the time for Adams to present her proof of Wright's waiver was during the hearing, not a week later by way of a cold affidavit that Adams now claims cannot be challenged. We recognize that the trial court may have allowed the parties to supplement the record with additional proof after the hearing, but we have no evidence of that occurring. Moreover, such leeway would be inconsistent with Adams's allegation that the trial court halted the hearing before its conclusion and denied her request to offer evidence by avowal.

Second, during the hearing on March 28, 2011, the trial court stated it did not trust anything Wright had said and directed the Cabinet to re-investigate all

[15] Wright was named as a respondent in the action below. As such, she was copied on all pleadings. Wright was not listed as a potential witness by either Adams or Cook.

four child placements. The trial court clearly doubted Wright. Perhaps because she was not forthright with the trial court in identifying who was caring for C.L.W.; perhaps because of Wright's continued drug use; maybe because of something said during a hearing that is not included in the appellate record. Regardless of the family court's reasons, judging the credibility of witnesses and weighing the evidence are tasks within its exclusive province. *Moore v. Asente*, 110 S.W.3d 336, 353-4 (Ky. 2003). Thus, we must assume the family court's decision to reject Wright's affidavit was supported by the record. *Thompson.* As a result, we uphold its finding that Wright did not waive her superior parental custodial rights.

Third, we do not believe Wright could waive her superior right to custody but then specify that Adams was to have custody of the child. A waiver "is a voluntary and intentional surrender or relinquishment of a known right," *Greathouse,* 891 S.W.2d at 390 (internal citations omitted) and must be full, complete and without strings.

Fourth, even if Wright waived her superior right to custody of C.L.W., Wright is not the focus of this case. *Greathouse*, detailing a custody dispute that pitted a boy's natural father against his natural mother and maternal grandmother, is instructive. The boy's parents never married and the family lived with the child's maternal grandmother. The father left and then the mother left, leaving the grandmother as the boy's primary caregiver for several years. After turning his life around, the father sought to establish his parental rights through a paternity action.

In support of the grandmother's desire to adopt the boy, the mother signed an affidavit in which she voluntarily terminated her parental rights and stated she believed it was in the boy's best interest to be adopted by his maternal grandmother. The grandmother then amended her complaint to abandon the adoption proceeding and seek joint custody with her daughter and to exclude the natural father from the arrangement. The trial court awarded the mother and grandmother joint custody and gave the father visitation and ordered him to pay child support. In reversing and remanding the trial court, we stated:

> [o]nly if the trial court is persuaded the evidence is clear and convincing *that the natural father waived his superior custodial right* under KRS 405.020, shall custody between the natural father and the maternal grandmother be decided based on what is in the best interests of the child.

Greathouse, 891 S.W.2d at 390 (Emphasis added). Thus, based upon *Greathouse,* it matters not whether Wright waived *her* superior custodial right to C.L.W. To be considered for custody under this exception, Adams had to show *Cook* waived *his* superior custodial right to the child and we have no evidence upon which to conclude he did so. Otherwise, a wily parent could conspire with a nonparent to deprive a biological parent of his constitutional right to custody of his child—a result we deem untenable. Adams has not offered clear and compelling proof that Cook waived his superior custodial right to C.L.W. At the hearings, he indicated he had a presence in his daughter's life and professed his desire to be C.L.W.'s

primary residential custodian. His words were a far cry from the surrender or relinquishment of the superior right to custody required by *Greathouse*.

Finally, Adams asserts the trial court misapplied FCRPP 31 in the neglect action and should have treated the neglect action and the custody case as one. We have been cited no case interpreting FCRPP 31 which requires that "[a]ny new allegation or request for removal after a child has achieved permanency shall be filed as a new action." We question whether the new rule was applicable in this case because it does not appear that permanency had been achieved when the rule change was discussed in the trial court on March 28, 2011. However, during the hearing on Adams's motion to intervene, counsel agreed with the trial court's statement that intervention was no longer allowed under the new family court rules and a new action would have to be initiated. Counsel explained that he filed pleadings in the neglect action just to get the matter before the trial court as quickly as possible in an attempt to return things to the way they were before the entry of the two erroneous orders giving custody of C.L.W. to Cook. Adams cannot change her approach to now argue that intervention was still allowed under the new rule and the trial court erred in requiring the filing of a separate custody case. As has been said before, an appellant may not "feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (overruled on other grounds by *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010)). Thus, this allegation of error in the neglect action is not properly before us.

The result in this case may appear harsh because Adams claims to be the only person caring for and providing for C.L.W., and yet the only person who cannot be entrusted with her custody. Had the complete record been provided to us, our view may have been different. However, based upon the record provided to us, we cannot reach an opposite result. For the foregoing reasons, the order of the Family Division of the Scott Circuit Court denying Adams's motion for *de facto* custodian status is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles M. Perkins Georgetown, Kentucky	No brief filed.