RENDERED: AUGUST 14, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001817-MR

FLORA RIGGS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANOR M. GARBER, JUDGE
ACTION NO. 13-CI-501868

ALICIA STALLCUP APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND TAYLOR, JUDGES.

D. LAMBERT, JUDGE: This matter arises out of a custody dispute between the Appellant (hereinafter, "Riggs") and Appellee (hereinafter, "Stallcup") over Stallcup's biological child (hereinafter, J.R.). Riggs is the paternal grandmother of J.R. Charles W. Riggs, III, the biological father of J.R., had maintained sole custody of J.R. from July 25, 2011, when Stallcup was in treatment for substance

abuse, until May 27, 2013, when Charles Riggs died. A few weeks prior to his death, Stallcup filed a motion for change of custody and parenting schedule on May 2, 2013.

On June 17, 2013, Stallcup was awarded custody of J.R., and on June 26, 2013, Riggs filed a motion to set aside that order. Riggs had already filed a petition for sole custody of J.R. on June 18, 2013. On July 1, 2013, Riggs and Stallcup signed an agreed parenting schedule, allowing Riggs to have weekly visitation with J.R. The trial court heard testimony in regards to Riggs' petition for custody on August 29, 2013.

The trial court found that Riggs did not meet the requirements of a de facto custodian and therefore lacked standing to challenge the custody of J.R. as against his biological mother. The court found that while Riggs did have regular contact with J.R. while her son Charles Riggs had custody, she was not J.R.'s primary caregiver, and at no time did Charles Riggs relinquish his parental duties to Riggs, even though J.R. would stay with her on some weekends. While Riggs may have purchased clothes and shoes for J.R., she did not provide his primary financial support for one year or longer. The trial court found that regardless of whether Riggs believed she could provide a more stable home environment for J.R., Stallcup was J.R.'s biological mother, and Stallcup had not been found to be an unfit parent.[1] Therefore, because Riggs could not qualify as a de facto

[1] The trial court noted that at the time of the hearing, Stallcup had been clean and sober for over a year, was receiving counseling, had stable housing and gainful employment.

custodian under KRS[2] 403.270(1), the trial court lacked the authority to grant her custody of J.R. and her petition for sole custody of J.R. was denied.[3]

Under Kentucky Civil Rule (CR) 52.01, if an action is tried upon the facts without a jury or with an advisory jury, the court shall find that the facts and those 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." CR 52.01. When the trial court is responsible for making findings of fact, those findings will only be disturbed if they are clearly erroneous. CR 52.01 (see also *Cherry vs. Cherry*, 634 S.W.2d 423, 424 (Ky. 1982)). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Sherfy v. Sherfy*, 74. S.W.3d 777, 782 (Ky. App. 2002). Further, substantial evidence is defined as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. *Stanford Health & Rehab Ctr. v. Brock*. 334 S.W.3d 883 (Ky. App. 2010). Further, if the trial court's findings of fact are supported by substantial evidence, and they apply the law correctly, then "a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion," which requires that the trial court's ruling is unreasonable or unfair. *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005).

[2] Kentucky Revised Statutes

[3] The court stressed that it believed it to be in J.R.'s best interest to have regular, liberal visitation with Riggs.

As to family law cases specifically, because the family court "is in the best position to evaluate the testimony and to weigh the evidence, the appellate court should not substitute its own opinion for that of the family court." *Id.* Furthermore, when the testimony before the trial court is conflicting, we will not substitute our decision for the trial court's judgment, as the family court, in their broad discretion, "may choose to believe or disbelieve any part of it." *Bailey v. Bailey*. 231 S.W.3d 793, 796 (Ky. App. 2007).

Appellant asserts that the trial court erred in determining that she was not a de facto custodian pursuant to KRS 403.270. Under KRS 403.270(1):

> (1) (a) 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.
>
> (b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

KRS 403.270(1). Here, the trial court found that Riggs' relationship with J.R. while J.R. was in the custody of his father did not qualify her as a de facto custodian under the law. As stated, the trial court is the finder of fact and we shall not substitute our judgment for that of the trial court, as they are in the position to weigh the facts and consider the credibility of the witnesses. Here, the trial court found that Riggs merely let J.R. stay with her some weekends and she purchased him some clothing and shoes, and from the record provided, it appears that there were few other facts presented as to how Riggs would have qualified as a de facto custodian.[4] These facts are simply not enough to establish her as the "primary caregiver" as required by KRS 403.270(1). Therefore, we cannot find error in the trial court's finding that Riggs did not quality as a de facto custodian, as it appears that the court's findings were supported by substantial evidence.

Riggs also asserts that the trial court erred in finding that Stallcup was not an unfit parent pursuant to KRS 625.090, which states that:

> (1) The Circuit Court may involuntarily terminate all parental rights of a parent of a named child, if the Circuit Court finds from the pleadings and by clear and convincing evidence that:
> (a) 1. The child has been adjudged to be an abused or neglected child, as defined in KRS 600.020(1), by a court of competent jurisdiction;

[4] The only other information this court can find as to Riggs' claims that she would qualify as a de facto custodian was in an affidavit she signed with the court where she asserts that she "assisted in providing clothing, shelter, food, education and monies to with and for my grandson and for his benefit, well over the six month threshold necessary to qualify as JCR's (J.R.'s) defacto [sic] custodian." R. at 22. However, mere assistance in providing necessities does not automatically qualify Riggs as a de facto custodian. She must establish that she was the primary caregiver and primary financial supporter. It is also of note that due to the age of J.R., she would have had to establish that she was such for one year, not six months, as J.R. was clearly over three, as he was born in 2002 and was placed in his father's custody in 2011.

2. The child is found to be an abused or neglected child, as defined in KRS 600.020(1), by the Circuit Court in this proceeding; or
3. The parent has been convicted of a criminal charge relating to the physical or sexual abuse or neglect of any child and that physical or sexual abuse, neglect, or emotional injury to the child named in the present termination action is likely to occur if the parental rights are not terminated; and
(b) Termination would be in the best interest of the child.

KRS 625.090(1). Under KRS 600. 020(1):

(1) "Abused or neglected child" means a child whose health or welfare is harmed or threatened with harm when:
(a) His or her parent, guardian, person in a position of authority or special trust, as defined in KRS 532.045, or other person exercising custodial control or supervision of the child:
1. Inflicts or allows to be inflicted upon the child physical or emotional injury as defined in this section by other than accidental means;
2. Creates or allows to be created a risk of physical or emotional injury as defined in this section to the child by other than accidental means;
3. Engages in a pattern of conduct that renders the parent incapable of caring for the immediate and ongoing needs of the child including, but not limited to, parental incapacity due to alcohol and other drug abuse as defined in KRS 222.005;
4. Continuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child;
5. Commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon the child;
6. Creates or allows to be created a risk that an act of sexual abuse, sexual exploitation, or prostitution will be committed upon the child;
7. Abandons or exploits the child;
8. Does not provide the child with adequate care, supervision, food, clothing, shelter, and education or

> medical care necessary for the child's well-being. A parent or other person exercising custodial control or supervision of the child legitimately practicing the person's religious beliefs shall not be considered a negligent parent solely because of failure to provide specified medical treatment for a child for that reason alone. This exception shall not preclude a court from ordering necessary medical services for a child;
> 9. Fails to make sufficient progress toward identified goals as set forth in the court-approved case plan to allow for the safe return of the child to the parent that results in the child remaining committed to the cabinet and remaining in foster care for fifteen (15) of the most recent twenty-two (22) months; or
>
> (b) A person twenty-one (21) years of age or older commits or allows to be committed an act of sexual abuse, sexual exploitation, or prostitution upon a child less than sixteen (16) years of age.

KRS 600.020(1). It is clear that "natural parents have a fundamental liberty interest in the care, custody, and management of their child, and that interest does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). Without the trial court making a finding that either the parent is unfit or that they knowingly and voluntarily surrendered their parental rights, the parent is entitled to custody. *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004). In order to protect the due process rights of the parent, the court must use a standard of clear and convincing evidence rather than preponderance of the evidence in involuntary termination of parental rights cases. *N.S. v. C and M.S.*, 642 S.W.2d 589 (Ky. 1982). In determining involuntary termination, the trial court has wide discretion. *Cabinet for Health and Family Services v. K.H.*, 423 S.W.3d

204 (Ky. 2014); see also *R. C. R. v. Com. Cabinet for Human Resources*, 988 S.W.2d 36 (Ky. App. 1998) ; *C.H. v. Cabinet for Health and Family Services*, 399 S.W.3d 782 (Ky. App. 2013).

As stated, this court is limited to reviewing whether the trial court's order was clearly erroneous, CR 52.01, and therefore, this court is required "give a great deal of deference to the family court's findings and should not interfere with those findings unless the record is devoid of substantial evidence to support them." *Cabinet for Health and Family Services v. T.N.H.,* 302 S.W.3d 658, 663 (Ky. 2010).

Looking at the findings of the trial court, there is no evidence that the trial court abused its discretion. The trial court acknowledged that Stallcup struggled with drug addiction, but at the time of the hearing, she had been clean and sober for over a year. She was consistently receiving counseling through a methadone clinic and her dosage had been reduced. Stallcup had both gainful employment and stable housing and support of her extended family. Further, the court reiterated that Stallcup could not permit J.R. to have contact with a Henry Allison.[5] There is no evidence to show that the court's findings were clearly erroneous as the facts do not support a finding that Stallcup was an unfit parent pursuant to KRS 625.090. Simply because Stallcup had lost custody of her child in the past does not

[5] Allison is a former boyfriend of Stallcup with substance abuse problems and they share a common child. At the hearing Stallcup testified that Allison did not exercise parenting time with their mutual daughter and she had no recent contact with Allison.

mean that she loses custody of that child forever. In this case, the facts indicate that she had been making strides towards correcting any past mistakes with J.R..

Therefore, finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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