

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001649-ME

CINTHIA KOSOBUD

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 15-CI-00221

THERESA RHODEN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Cinthia Kosobud appeals the Greenup Circuit Court's Order granting continued custody of Kosobud's 13-year-old daughter to her paternal grandmother, Theresa Rhoden. For the reasons stated herein, we affirm.

FACTS

Kosobud (“Mother”) is the mother of a 13-year-old daughter, L.R., and Rhoden (“Grandmother”) is L.R.’s paternal grandmother. The father of L.R., Grandmother’s son, lives in Texas and chooses to have little-to-no contact with L.R.

In October of 2011, Mother was charged with trafficking in a controlled substance and eventually was incarcerated on an amended charge. Grandmother began caring for L.R. in the same month.¹ Boyd District Court granted Grandmother custody of L.R. on February 8, 2012. In July of 2013, Mother was released from prison.

Mother then began a rehab program, received counseling, went to a methadone clinic, graduated from Ashland Community and Technical College, and got an evening job and HUD housing. Mother pays over \$200 per month in child support. She has visited with L.R. since being released from prison. Mother testified to and documented difficulties getting visits with L.R. from Grandmother. To address these difficulties, Mother *pro se* filed for additional visitation in Boyd District Court.

Then, on May 29, 2015, Grandmother filed in the Greenup Circuit Court a Petition for Custody. Mother likewise filed a response requesting custody or, in the alternative, substantial visitation. A hearing was held on September 9,

¹ Mother also had another child, S.R., who died from a terminal illness on March 8, 2014. Grandmother cared for this child as well.

2015. Following the hearing, the trial court entered an Order making the following factual findings and conclusions of law:

Joann Perry, [sic] is a Cabinet worker for The Cabinet for Health and Family Services. She has worked with the Respondent since May 2015. According to Ms. Perry, the Respondent [Mother] has done everything she was supposed to do, per the Cabinet. She has graduated from Ashland Community and Technical College and has established a stable and suitable home. She is employed with Taco Bell. She has passed all her drug screens through Probation and Parole. She can see no reason why any visitation should be supervised.

The Respondent was arrested in October 2011 for trafficking in drugs. According to her, she was also using and abusing drugs. She went to jail on February 8, 2013 and got out of jail on July 2013. During that time the child was with the Petitioner [Grandmother]. The Respondent had two visits with the child in February 2014.

The Respondent completed her degree in December 2014. Further, she completed the program of Partners in Parenting and has gone to Pathways to an outpatient treatment program. The Respondent currently lives in Ashland, Kentucky in HUD housing. She thinks it would be best to have the child live with her. She currently works evenings. She is seeing the child on a regular basis. She is currently paying child support in the amount of \$206.00 per month.

The Respondent went to the Methadone Clinic for 5 months.

The Court interviewed the child, as to her wishes in this matter. The child wants to live with her mother, because she feels the grandmother is too mean to her and she misses her mother.

The Petitioner states the child came to live with her in October 2011, and has had Court Ordered custody since

2012. The Child is getting B's and C's in school. Prior to coming to live with her she was getting D's and F's. The child was cheerleading in middle school and hopes to be cheerleading again. She is currently in the choir. The Petitioner states that prior to June 2014 the mother did not visit very often.

The Petitioner states that the child has been distant toward her since her visits have started with her mother. She does not think it would be in the best interest of the child to let her go live with her mother and she wants to continue to have custody. She is concerned of the possibility of relapses.

According to the Petitioner, her son lives in Texas and has no contact with the child. She denies that she says bad things to the child about her mother. She admits that she has done that in the past.

According to Laura Meade the daughter of Theresa Rhoden, Ms. Rhoden treats [the child] like her own daughter. She states the child appears to be happy and very mature.

Boyd District Court has already granted custody of the child to the Petitioner. The Cabinet recommended that the Respondent receive unsupervised visits. Ms. Rhoden then filed this action in the Greenup County Family Court.

It appears from all the evidence that the Respondent is doing quite well and has done everything that the Cabinet has asked her to do. However, Ms. Rhoden have [sic] custody of [the child] by previous Court Order. Ms. Kosobud has to prove the circumstances has [sic] changed to the extent that it would be in the best interest of the child to now grant her custody. The Court agrees that she should have unsupervised visits, and can see no reason on the evidence why custody would have to be changed, from the Petitioner to the Respondent. The child is doing exceptionally well and is being properly taken care of. The Respondent is just now getting back on her feet and the COURT FINDS at this time it would

be in the best interest of the child to continue custody with Ms. Rhoden, but to allow unsupervised visitation with the Respondent. The COURT HEREBY ORDERS that she shall be allowed to have visitation pursuant to Schedule A of the Greenup County visitation Guidelines.[²]

Mother appeals this order.

STANDARD OF REVIEW

On custody issues, Kentucky Rules of Civil Procedure (CR) 52.01 applies and “[f]indings 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.” *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008). Factual findings are only clearly erroneous if “they are manifestly against the weight of the evidence.” *Id.* (citing *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967)). Appellate review of the custody decisions is first for clear error on the factual findings and second for an abuse of discretion on the legal conclusion. *Frances*, 266 S.W.3d at 756 (citing *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974)). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000) (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)).

ANALYSIS

² Pursuant to the Greenup Circuit Court’s Local Rules, Schedule A visitation guidelines are liberal and include no less than: (1) alternate weekends from Friday at 5:30 p.m. through Sunday at 6:00 p.m.; (2) one evening each week, from Wednesday at 5:30 to 9:00 p.m.; (3) multiple holidays; (4) one-half day on the child’s birthday; and (5) four weeks of vacation. http://courts.ky.gov/Local_Rules_of_Practice/C20LOCALRULES.pdf.

On appeal, Mother claims the trial court erred because she, as L.R.'s natural parent, has a superior right to custody of her child. *See Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Walker v. Blair*, 382 S.W.3d 862, 870 (Ky. 2012); *Temple v. Temple*, 298 S.W.3d 466 (Ky. App. 2009); Kentucky Revised Statutes (KRS) 405.020. While Mother admits she was addicted to drugs and lost custody of L.R. due to her drug use and incarceration, she states she never intended to permanently relinquish custody of L.R. to Grandmother. Mother also claims the trial court erred by not fully crediting L.R.'s testimony.

As to the first allegation of error, we find no abuse of discretion. Mother lost custody of L.R. when she was in prison and in the throes of her drug use. Grandmother was awarded legal custody. Thus, by operation of KRS 403.340, the Greenup Family Court could not modify Grandmother's custody decree unless it found "that a change has occurred in the circumstances of the child or h[er] custodian, and that the modification is necessary to serve the best interests of the child." KRS 403.340(3). While the trial court in the instant case found a change in circumstances of the child – notably, the mother/daughter relationship was more fully developed now that Mother is out of prison, has a job, is off drugs, and is visiting with L.R. – it found that a custody modification was not in the best interests of the child.

Based on the evidence adduced at the hearing, we cannot say this conclusion is an abuse of discretion. L.R. has been living with Grandmother for

four years. Her grades have improved. Her standard of living has improved. She is involved in school sports. And she is able to interact with Mother and have unsupervised visits while still being able to return to the stable home she has had for the last four years.

We find Mother's argument unavailing that her superior right to custody of her child trumps Grandmother's. The cases Mother cites involve initial custody or visitation issues. Here, it is undisputed that Mother rightfully lost custody of L.R. due to Mother's drug use and incarceration. Grandmother now has custody, and modification thereof is only pursuant to KRS 403.340. Thus, we find the trial court did not abuse its discretion by finding it was in the child's best interests to remain in Grandmother's custody.

Regarding Mother's second allegation of error – that the trial court did not fully credit L.R.'s testimony – we likewise find no abuse of discretion. We have reviewed the hearing in the instant case and note that L.R. repeatedly emphasized that she desired to live with her mother and not her grandmother. L.R. testified that her grandmother was “mean” and “talks about my mom a lot, and I don't like that.” Other than these vague statements and one example of an argument L.R. and Grandmother had during a meal, L.R. admitted she was doing well in school, she is involved in cheerleading and choir, and that her grandfather is “nice” toward her.

Even though L.R. expressed her desire to live with Mother, the trial court still had to consider other factors, such as the supportive environment

Grandmother provided for L.R. and how well L.R. was doing at school. *See, e.g., Dowell v. Dowell*, 490 S.W.2d 478, 479-480 (Ky. 1973). While this case is admittedly a close call, we cannot say the trial court abused its discretion. When a trial court is given discretion, it is “empowered to make a decision – of *its* choosing – that falls within a range of permissible decisions.” *Miller v. Eldridge*, 146 S.W.3d 909, 915 (Ky. 2004) (quoting *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001)). Thus, even if we or other adjudicators might have reached a different result given the instant facts, we cannot say that this decision is one that falls outside of the wide range of permissible decisions. We affirm the trial court’s order.

CONCLUSION

This case presented a difficult decision about whether to fully reunite a mother and child, or whether to continue to have the grandmother care for a child for whom she has been caring for half a decade. We are mindful that Mother placed Grandmother and child in this predicament by using drugs and committing crimes. Grandmother answered the call admirably and has provided a stable, nurturing home for L.R., as is evident by L.R.’s success in school. Mother appears to have turned her life around, and she continues to work toward reuniting with the child she lost due to drugs and illegal activities.

In this Commonwealth, and as a society, we wish that all parents who have lost custody of their children due to crimes and drugs would follow in Mother’s footsteps. We hope that Mother stays on the road to recovery and,

through her increased visitation with her daughter, deepens and matures their relationship. We also hope Mother continues to be a valuable, hard-working member of society.

That said, the trial court herein had a difficult decision to make regarding the child's best interests. Both reunification with Mother and continued custody with Grandmother appear to be good outcomes for the child. Thus, we cannot say the trial court abused its discretion in the instant case. Therefore, we affirm the Greenup Family Court's Order.

ALL CONCUR

BRIEF FOR APPELLANT:

Tracy D. Frye
Russell, Kentucky

BRIEF FOR APPELLEE:

Rhonda M. Copley
Ashland, Kentucky