RENDERED: JULY 30, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002348-MR

W.C.M. AND M.A.M — APPELLANTS

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 98-AD-00002

COMMONWEALTH OF KENTUCKY,
CABINET FOR FAMILIES AND CHILDREN,
C.M.H., J.H., AND C.R.H., A CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; KNOX AND McANULTY, JUDGES.

KNOX, JUDGE. This is an appeal from a judgment by the Caldwell Circuit Court denying appellants permanent custody of their three-year old grandson. For the reasons set forth hereinafter, we affirm the decision of the trial court.

C.R.H., born August 13, 1995, is the second of four children born to the appellees, C.M.H and J.H. When he was approximately three months old, C.R.H. was diagnosed with non-accidental head injuries and hospitalized. Based on the severity of the injuries and his father's confession to the abuse, C.R.H was removed from the home of C.M.H. and J.H. and placed in the

legal custody of the Cabinet for Families and Children (Cabinet) from December 5, 1995, until June 3, 1996, when he was returned to his parent's home. J.H. was convicted of assaulting his son and sentenced to thirty (30) days in jail. During the initial removal, the Cabinet placed C.R.H in the home of appellants, his maternal grandparents, W.C.M. and M.A.M. from February 1996 until his return to his parent's home in June 1996.

On April 14, 1997 the Cabinet was informed that C.R.H. was at his babysitter's house with serious bruises on his face and body. After confirmation of the injuries, C.R.H. was removed from his parent's home. In addition, his two sisters, R.H. (age 4) and T.H., (age 1) were also removed from the home at that time. (The fourth child, C.H., was not born until May, 1998). J.H. was again convicted of assaulting his son. Following this second removal, on April 14, 1997, the three children were placed with appellants. Due to the crowded conditions in the appellants' home and because of an existing attachment between R.H. and her paternal grandmother, R.H. was later moved to the paternal grandmother's home. C.R.H and T.H. were removed from the appellants' home and placed in foster care after approximately six months because of a continuing problem with head lice infestation in the appellants' home. The appellants continued to visit C.R.H. at his foster home by informal arrangements with C.M.H. and the paternal grandmother.

Because of the seriousness of the attacks on C.R.H. by J.H. and the refusal by C.M.H. to leave her husband for C.R.H.'s protection, the Cabinet moved in March 1998 to terminate the parental rights of J.H. and C.M.H. to C.R.H. Appellants moved to

intervene in the termination on June 5, 1998, seeking permanent custody of C.R.H. and his eventual adoption. On June 24, 1998, the motion to intervene was granted over the Cabinet's objection. Following a hearing, the trial court entered its Findings, Final Order and Judgment on August 18, 1998. The Order terminated the parental rights of J.H. and C.M.H. to their son, C.R.H. J.H. and C.M.H. did not appeal the termination of their parental rights, nor does any party dispute the correctness of that decision. The Final Order also denied the appellants' petition for permanent custody of C.R.H., effectively terminating their rights to C.R.H. as well. The appellants appeal that portion of the Order denying their request for permanent custody of C.R.H.

The overriding consideration in any custody determination is the best interests of the child. Squires v. Squires, Ky., 854 S.W.2d 765, 768 (1993); Ky. Rev. Stat. (KRS) 403.270. The standard is not altered merely because the party seeking custody is a grandparent. In determining that which is in the best interests of the child, the trial judge is given broad discretion and allowed to use "his own common sense, his experience in life, and the common experience of mankind" in reaching a decision. Krug v. Krug, 647 S.W.2d 790, 793 (1983).

In support of its decision to deny the appellants custody, the trial court made the following findings: (1) C.R.H. would suffer negative psychological harm by growing up in a home where he would have future contact with his biological parents, (2) the appellants cannot realistically handle the added burden of raising C.R.H. financially or otherwise; and, (3) granting the appellants custody of C.R.H. would be tantamount to maintaining

the status quo and not in C.R.H.'s best interest. This Court will not set aside findings of fact unless clearly erroneous, and we shall give due regard to the opportunity of the trial court to judge the credibility of the witnesses. Kentucky Rules of Civil Procedure 52.01; Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986).

The appellants' first argument on appeal is that insufficient evidence was submitted to support the trial court's finding that the child would suffer negative psychological harm by growing up in a home where he would still be in some contact with his biological parents. We disagree.

The trial court's finding relating to psychological harm is supported by the testimony of Joan Daub, the ongoing case worker from the Cabinet for Family and Children assigned to the C.R.H. case. Ms. Daub testified that one of her major concerns was that the appellants would not protect C.R.H. She also testified that over time the appellants would possibly leave C.R.H. alone with J.H. for short periods of time thinking that he would be fine. Ms. Daub further expressed concern over the fact that M.A.M. never related any feelings of anger over what J.H. had done to C.R.H. While we acknowledge that Ms. Daub is not an expert in the field of psychiatry or psychology, she nevertheless is a professional social worker with substantial experience and training. Moreover, as the case-worker assigned to C.R.H., she had personal interaction with the parties involved. Hence Ms. Daub's testimony is, alone, evidence sufficiently substantial to support the trial court's findings. In addition, in regard to a trial court's custody decision, "[i]t does not take a child

psychologist or a social worker to recognize that exposure of children to neglect or abuse in many forms is likely to affect them adversely." Krug v. Krug, 647 S.W.2d at 793.

The appellants' second argument that it would be in the best interests of C.R.H. to be placed with the appellants if there is no evidence of potential harm from some future contact with the birth parents, is dispensed with by the rationale above. There is in fact abundant evidence of potential harm.

A Family Services clinician interviewed J.H. after the second beating. She testified that J.H. had abused C.R.H. because, instead of playing with J.H., the child would always sleep when J.H. was left alone to babysit. This angered J.H. so much that he hit the child. We believe this testimony serves as evidence that there is a risk of potential harm to C.R.H. if he has further contact with his biological father.

C.M.H. testified that she does not believe that her husband beat C.R.H. even though he twice confessed to the abuse and was twice convicted of the assaults. This testimony discloses that C.M.H. is more concerned about her continued relationship with her husband than with the safety of her children and in our view supports the trial court's conclusion that C.M.H.'s presence would have a negative psychological effect on C.R.H.'s well-being.

Further testimony in support of the trial court's decision is provided by appellants themselves. W.C.M.'s testimony raises doubt as to whether he would be willing or able to prevent future unsupervised contact between C.R.H. and his father. In addition, M.A.M.'s testimony portrays an attitude

towards J.H.'s physical abuse of her grandson that causes this Court to question whether she understands how serious C.R.H.'s injuries were. In our view the appellants' testimony supports the trial court's finding that custody being granted to appellants would be tantamount to maintaining the status quo.

It has already been shown that there is a substantial risk that the appellants would permit continuing contact between C.R.H. and his abusive parents. Evidence was presented to the trial court regarding the appellants' financial situation. While poverty alone is not a bar to custody, there were also other circumstances that were considered by the trial court. Factors such as the size of the appellants' home, the presence of a special-needs child of their own, and a prolonged infestation of head lice all add to the difficulties that the appellants would face in raising C.R.H. in their home. Appellants are biological family members and they have shown that they are "good and well meaning people", but when these concerns are balanced against the best interests of the child, then the child's best opportunity for a normal and healthy life must always prevail.

While it is true that grandparents can sue for visitation of their grandchildren over the opposition of a custodial parent under Baker v. Perkins, Ky. App., 774 S.W.2d 129 (1989); Ky. Rev. Stat. (KRS) 405.021, this is not a visitation case and it is unclear how Baker and/or the statute would apply to the present facts. Also, visitation under Baker still has to be proven to be in the best interests of the child and if C.R.H. is placed for adoption then a trial court may decide that a clean break with his past would be in the best interests of the child.

Based upon the foregoing, we cannot say that the trial court abused its discretion in denying custody to the appellants.

The judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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