

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001466-ME

JANNA STOCK

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT  
HONORABLE CYNTHIA E. SANDERSON, JUDGE  
ACTION NO. 05-CI-00893

STEVEN MATTHEW BAKER AND KATHY BAKER

APPELLEES

OPINION  
AFFIRMING

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BEFORE: THOMPSON AND VANMETER, JUDGES; PAISLEY,<sup>1</sup> SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Janna Stock appeals from the Findings of Fact and Order of the McCracken Family Court entered on April 6, 2006, and its subsequent order denying her motion to alter, amend or vacate. The family court found that Janna was unfit to be the custodian of her daughter, Olivia, due to her history of drug abuse. The court awarded joint custody to the child's natural father, Steven Matthew Baker, and her

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<sup>1</sup> Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

paternal grandmother, Kathy Baker. Janna argues that the court erred in granting Kathy the same status as a parent in making its custody determination.

Steven Matthew Baker (“Matthew”) and Janna Stock are the parents of Olivia Sky Baker, who was born on December 17, 2002. The couple lived together for about one year after Olivia’s birth. Matthew’s parents then purchased a mobile home for the couple to live in, but they separated shortly afterwards and Janna moved in with a friend. Kathy Baker, Matthew’s mother, frequently looked after Olivia. Janna’s use of illegal drugs worsened during this period, and eventually, in August 2005, Kathy sought emergency custody of Olivia. Following a hearing, Janna entered into an agreed order granting temporary custody of Olivia to Kathy on October 6, 2005.

Meanwhile, on August 12, 2005, Matthew had filed a petition to gain permanent custody of Olivia. Kathy filed a motion to intervene in this custody action, and an intervening complaint. The motion was granted by an order entered November 22, 2005.

The custody hearing was held on February 6, 2006. Evidence was presented that Matthew had a history of criminal activity. At the time of the hearing, he was on probation following a conviction for the felony of receiving stolen property, and was facing new felony charges of burglary in the first degree and assault in the fourth degree. Janna, on the other hand, admitted to a history of serious drug abuse. She testified that she had used cocaine for four years, and had been addicted to methamphetamine. Janna admitted that she had lied about the extent of her drug use at

the emergency removal hearing, and that she had failed several drug tests. Kathy described how on one occasion Janna had come to her house and slept through an entire weekend and on another occasion had “crashed” to the point where Kathy was unable to wake her up. Testimony from one of Janna’s neighbors indicated that there was a lot of partying at her house, that her electricity had been cut off on two occasions, and that Olivia sometimes refused to answer the door when Kathy or Matthew came to the house to see Olivia. Janna also testified, however, that she had completed a drug rehabilitation program in September, 2005, and had tested negative for drug use since that time.

As to Kathy’s role in Olivia’s life, evidence was adduced that Kathy had been the child’s primary caregiver since her birth, and that Kathy had eventually quit her job in order to devote more time to looking after Olivia.

The family court found that Kathy had not looked after Olivia for sufficiently long periods to qualify as a de facto custodian under Kentucky Revised Statutes (KRS) 403.270(1), which requires a residency period of six months or more. After expressing serious concerns about Janna’s history of drug use, the court awarded joint custody to Matthew and Kathy, based upon Matthew’s agreement to waive his superior right to custody. Janna was granted standard, unsupervised visitation privileges. In its order denying Janna’s subsequent motion to alter, amend or vacate, the court explicitly stated that it had found Janna an unfit custodian for Olivia.

Janna argues that because Kathy did not qualify as a de facto custodian, she colluded with Matthew in order to circumvent the statutory scheme which provides that

parents have a superior right to custody of their children. She argues that Kathy was improperly allowed to assume the same status as a parent in the custody determination. She also disputes the court's finding that she was an unfit custodian for Olivia.

Janna is correct that Kathy could have attained equal status to Janna and Matthew in the custody dispute if she had qualified as a de facto custodian. *See* KRS 403.270(1). When a custody dispute arises between a parent and a nonparent who does **not** meet the legal definition of a de facto custodian, however, the nonparent may still acquire equal status if he or she is able

to 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*, 110 S.W.3d 336, 359 (Ky. 2003).

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 parental rights by the state. *Id.* at 360.

The type of evidence that is necessary to show unfitness on the part of the mother in this custody battle with a third party is: (1) evidence of inflicting or allowing to be inflicted physical injury, emotion 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.

*Id.*, n. 100.

Under the statutory scheme governing the termination of parental rights, KRS 625.090 (1) provides that a circuit court may involuntarily terminate parental rights only if it finds by clear and convincing evidence that the child is abused or neglected, and that termination would be in the child’s best interest. KRS 600.020(1)(c) defines an “abused or neglected child” as one whose health or welfare is harmed or threatened with harm when his parent “[e]ngages 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[.]”

Next, under KRS 625.090(2), the court must also find by clear and convincing evidence the existence of one or more of several grounds, including the following:

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child’s well-being and **that there is no reasonable expectation of significant improvement in the parent’s conduct in the immediately foreseeable future**, considering the age of the child[.](emphasis supplied.)

Janna has argued that the court failed to acknowledge the improvements she has made in her lifestyle, such as her completion of the rehabilitation program and her testimony that she had been drug-free for several months, and had instead based its decision solely on her past conduct. She cites in support of her argument our opinion in *Forester v. Forester*, where we stated that

where lack of ability to provide parental care and protection is the basis for involuntary termination, the trial court must find that there is no reasonable expectation of improvement in parental care and protection as required by KRS 625.090(2)(d).

979 S.W.2d 928, 930 (Ky.App. 1998).

But Janna's testimony that she had completed the rehabilitation program and been drug-free for several months had to be balanced against the evidence offered about the pattern of her behavior in the past. Janna's abuse of drugs began even before Olivia's birth, and continued throughout the child's life, with no evidence that Janna had made serious efforts to stop this destructive behavior until she entered the rehabilitation program in the fall of 2005. Janna consistently relinquished her child care responsibilities to Kathy. At the emergency custody hearing, Janna lied about the seriousness of her drug use, and failed a drug test just days after she had lost custody of Olivia in the emergency proceedings. The court expressed its concerns about Janna's usage of methamphetamine, which it described as "one of the most highly addictive drugs known to mankind." Although the court is directed by the statute to consider the possibility of reasonable improvement on the parent's part, it also had to consider the evidence of Janna's years of drug abuse and addiction and her consequent neglect of Olivia.

Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses because judging the credibility of witnesses and

weighing evidence are tasks within the exclusive province of the trial court.

*Vinson v. Vinson*, 136 S.W.3d 465, 470 (Ky. 2004)(citations and quotation marks omitted).

There was substantial evidence, based on Janna’s prior behavior, to support the finding that there was no reasonable expectation of a significant improvement in Janna’s conduct. The court did not err in concluding that Janna had relinquished her superior right to custody.

A second exception to the parental entitlement to custody “arises if the parent has waived his or her superior right to custody.” *Moore*, 110 S.W.3d at 359. It is undisputed that Matthew’s waiver of his superior right to custody in favor of his mother was both knowing and voluntary. After determining that Janna was unfit, and that Matthew had waived his right, the court was free to determine custody in accordance with the child’s best interest. *Id.* at 360.

For the foregoing reasons, the findings of fact and order of the McCracken Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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