RENDERED: FEBRUARY 27, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000760-ME

L.W., MOTHER — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 08-CI-00032

M.P., FATHER, AND
L.L., GRANDMOTHER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: This is an appeal from an order granting a paternal grandmother custody of her granddaughter, K.W.[1] The trial court found that K.W.'s parents voluntarily waived their superior right to custody and that it would be in the best interest of the child for L.L., (hereinafter Grandmother), to have custody. L.W., (hereinafter Mother), argues that the trial court erred in finding that she waived her superior right to custody and asks us to return custody of K.W.

[1] Since the child in this case is a minor, all the parties will be identified by their initials.

to her. We find that Mother did not voluntarily waive her superior right to custody, but we will affirm the trial court on other grounds.[2]

This matter began when the Cabinet for Families and Children, (hereinafter the Cabinet), received a report that K.W. was being neglected. At the time, K.W. was in the sole custody of her parents. In July of 2006, instead of removing the child to a foster home, the Cabinet and parents decided to place K.W. with Grandmother until such time that the Cabinet felt Mother and M.P., (hereinafter Father), could regain custody.

K.W. remained with Grandmother for close to a year. During that year, Mother and Father separated and Mother moved to Ohio to live with her mother. In June of 2007, Mother tried to take K.W. with her to Ohio. The Cabinet then filed a Dependency, Neglect and Abuse Petition, which resulted in an Emergency Custody Order granting Grandmother custody.[3]

A hearing was held on October 8, 2007, in which the lower court placed K.W. in the temporary custody of the Cabinet. The Cabinet then placed the child back with Grandmother. During this hearing, the Cabinet worker testified that Mother was progressing nicely. The only concern the Cabinet had was that Mother continue to not use drugs and complete some random drug testing. The

[2] *See O'Neal v. O'Neal*, 122 S.W.3d 588 (Ky. App 2002); *Commonwealth Natural Resources and Environment Protection Cabinet v. Neace*, 14 S.W.3d 15 (Ky. 2000), for case law allowing an appellate court to affirm on an alternate theory not relied upon by the trial court.

[3] Up until this time, all action between the Cabinet and parents had been done by agreement and no action had been taken via the court system.

Cabinet worker believed if this would happen, Mother could regain custody in December.

A review hearing was held in December. The Cabinet worker again testified that things were going well. There had been supervised visits twice a week which went well. Also, unsupervised visits had begun which were also going well. However, at the time of this hearing, Mother, had not completed the required number of drug tests. The court decided to split custody time between Grandmother and Mother. Each was to have the child for half the week. This arrangement would remain in effect until Mother completed the drug testing.

On January 14, 2008, Grandmother filed a petition seeking custody of K.W. alleging that she had become the de facto custodian. In order for a nonparent to have standing to try and gain custody of a child, one of three factors must be met: the nonparent must be deemed a "de facto custodian" as defined in Kentucky Revised Statute (KRS) 403.270; the nonparent must prove the parent is unfit; or the nonparent must prove the parent has waived his or her right to superior custody. *Moore v. Asente*, 110 S.W.3d 336, 359-360 (Ky. 2003). Then the court considers which parent or nonparent with standing should get custody in accordance with the child's best interest. *Id.* at 360.

KRS 403.270 states:

> (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.

The case of *Moore v. Asente*, *supra*, discusses the other two options for standing:

> "Custody contests between a parent and a nonparent who does not fall within the statutory rule on 'de facto' custodians are determined under a standard requiring the nonparent 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."
>
> 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. Only after making such a threshold showing would the court determine custody in accordance with the child's best interest. Under the second exception, however, if a waiver has been shown by clear and convincing evidence, the trial court shall determine custody between the parent and nonparent based on the best interest of the child. "Waiver requires proof of a 'knowing and

> voluntary surrender or relinquishment of a known right.'" However, waiver may be implied "by a party's decisive, unequivocal conduct reasonably inferring the intent to waive," as long as "statements and supporting circumstances [are] equivalent to an express waiver." (Citations omitted).

Id. at 359-360.

In the case at bar, the lower court found that K.W.'s parents waived their right to superior custody. It based the finding on the fact Mother and Father placed K.W. with Grandmother for close to a year. As to Mother specifically, the lower court found Mother's history of drug use and her inability to complete drug testing support this finding. It also held that K.W. is flourishing where she is, is involved in many extracurricular activities, loves the school she is attending, and has a stable home with Grandmother. Accordingly, the lower court found Grandmother had standing to seek custody and that in the best interests of the child, Grandmother was to have custody. Mother and Father were allowed supervised visitation after they completed drug testing. This appeal followed.

Mother argues that there was no evidence that she waived her right to superior custody. We agree. "A waiver of the parent's superior right to custody requires statements and circumstances equivalent to an express waiver . . . . Waiver requires that there must be some statement or action that unequivocally waives the right to superior custody." *Diaz v. Morales*, 51 S.W.3d 451, 454 (Ky. App. 2001). Because waiver of a parent's superior right to custody is a right with "both constitutional and statutory underpinnings, proof of waiver must be clear and

convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof." *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004).

"[A] reviewing court is entitled to set aside the trial court's findings when those findings are clearly erroneous. To determine whether findings are clearly erroneous, reviewing courts must focus on whether those findings are supported by substantial evidence." *Id.* at 470. (Citations omitted).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable men." 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 the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence. (Citations omitted).

Moore at 354.

In *Moore v. Asente*, *supra*, the Kentucky Supreme Court set forth factors for courts to consider when determining whether parents have relinquished custody in such a manner as to give a nonparent standing:

> In determining whether parents have relinquished "physical custody" in a manner that confers standing upon a nonparent, Kentucky trial courts - like other courts that have addressed this issue - should consider,

> among other factors: (1) how possession of the child was acquired by the nonparent, especially the intent of the parents at the time of their relinquishment of the child to the nonparent; (2) the nature and duration of the possession by the nonparent; (3) the age of the child when possession was acquired by the nonparent and the child's age when the parents sought the child's return; (4) any visits by the parents during the nonparent's possession of the child; (5) any financial support by the parents during the child's stay with the nonparent; (6) the length of time between the relinquishment and the parent's efforts to secure the child's return; and (7) what efforts the parents made to secure the child's return. Although we recognize that these factors cannot be applied mechanically as a formula to generate a conclusive answer as to the nonparent's standing, we believe these factors are useful analytical tools. We further recognize that although factors (1) and (2) will usually have the most importance, the other factors may also impact upon the determination.

Id. at 358-359.

When we look at these factors, it is clear that there was no substantial evidence in the record to support a finding that Mother had given up her right to superior custody. K.W. was placed with Grandmother by agreement between the Cabinet and the parents. At all times, it was the intent of Mother to regain custody of K.W. As testified to in the numerous hearings, Mother had completed most of the Cabinet's reunification plan and the only thing holding up reunification was the lack of sufficient drug testing. Also, Mother constantly visited K.W., albeit under the supervision of the Cabinet. From the time that K.W. went to live with Grandmother until the filing of this action seeking custody, Mother actively tried to

regain custody. The Cabinet workers who testified were adamant that the return of K.W. to Mother was possible.

We do not believe that an express waiver of parental rights was evidenced here. While K.W. may have resided with Grandmother for close to a year, Mother was never absent from her daughter's life and visited her every chance she got. In the case of *Diaz v. Morales*, *supra*, Rosa Morales gave birth to her daughter while in prison. The father's name was Santiago Romero. At Rosa's request, the daughter was placed with Cathy Diaz, who was the live-in girlfriend of Lazaro Romero, Santiago's brother. After Rosa's release from prison, Social Services discussed what needed to be done for her to regain custody. Rosa did little to complete these requirements. However, Rosa did visit the child two times a month and even gave Cathy child support. Six years later, Rosa and Santiago sought custody of the child. The trial court and a previous panel of this Court found Rosa did not waive her right to superior custody because there was no statement or action that unequivocally waived the right.

As evidenced from the *Diaz* case, the right to superior custody is a hard one to waive. As such, we find that there was not substantial evidence that Mother waived her right to superior custody and the trial court was clearly erroneous in finding such. However, we do find that the trial court correctly granted custody to Grandmother but for a different reason.

We find that Grandmother was a de facto custodian pursuant to KRS 403.270. Since July, 2006, Grandmother has been the primary caregiver for, and

financial supporter of, K.W. During this time period, Mother only had limited supervised visitation with K.W. and did not provide any financial support. In fact, Grandmother's petition for custody asserted that she should be deemed the de facto custodian. It is unclear why the lower court did not use de facto custodianship as the basis for Grandmother's standing. There is clear and convincing evidence in the record to find Grandmother to be the de facto custodian of K.W. The time requirement of KRS 403.270 that the child reside with the de facto custodian is met here.

Further, the lower court's granting of custody to Grandmother because it would be in the best interest of the child was proper. KRS 403.270(2) states:

> The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:
>
> > (a) The wishes of the child's parent or parents, and any de facto custodian, as to his custody;
> >
> > (b) The wishes of the child as to his custodian;
> >
> > (c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
> >
> > (d) The child's adjustment to his home, school, and community;
> >
> > (e) The mental and physical health of all individuals involved;
> >
> > (f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

> (g) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;
>
> (h) The intent of the parent or parents in placing the child with a de facto custodian; and
>
> (i) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.

Here, K.W. has been flourishing with Grandmother. Further, the lower court found that because of Mother's history of drug use, lack of compliance regarding drug testing, and her propensity to run around "with men of savory [sic] character and known drug users," K.W.'s interests would best be served by Grandmother continuing as the child's custodian. We agree. There is substantial evidence that it is in K.W.'s best interest to remain with Grandmother.

Accordingly, we affirm the granting of custody to Grandmother because she was the de facto custodian of K.W. and it would be in the best interest of K.W. to currently remain with Grandmother.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles L. Douglas, Jr.
Greenup, Kentucky

BRIEF FOR APPELLEES:

No Brief for Appellees