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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002095-ME

KEN GUASP — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE SUSAN WESLEY MCCLURE, JUDGE
ACTION NO. 07-CI-00374

JOHN AND REGINIA ALDRIDGE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CLAYTON, JUDGE: This is a dispute over custody of three children. Ken Guasp, the natural father of Michaela Renee Guasp, Daniel Thomas Guasp, and Sidda Leigh Guasp, appeals from a judgment of the Hopkins Circuit Court in which the court awarded custody of the children to their maternal grandparents, John and Reginia Aldridge. On appeal, Ken argues that the evidence did not support the trial court's finding that he is an unfit parent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ken Guasp was married to Erin Elaine Aldridge Guasp Trout, and during the marriage, they had three children. On July 17, 2006, the marriage was dissolved by a decree of dissolution entered by the Hopkins Circuit Court. At that time, Erin was awarded sole custody of the three children. On April 10, 2007, Erin died in an automobile accident, which left Ken as the children's only surviving biological parent. Immediately after Erin's death, the Aldridges refused to allow Ken to have the children.

On April 25, 2007, Ken filed a petition for immediate custody of the children. Thereafter, on April 26, 2007, the family court issued an ex parte order giving Ken sole custody of the children and requiring that physical custody of the children be relinquished to Ken. Then, on May 8, 2007, the Aldridges filed an answer to the petition for immediate custody and claimed, among other things, that they were de facto custodians with equal standing to Ken and it would be in the best interest of the children to stay with them. Later, they amended the answer to state that Ken was an unfit parent and therefore not suitable as a parent.

The court held a hearing on June 13, 2007, and, subsequently, ordered grandparent visitation rights to the Aldridges. Then, in late June, the Aldridges filed a show cause motion because Ken failed to abide by the terms of the visitation schedule. After a hearing on that issue, Ken was found in contempt and sentenced to thirty days in jail, and the Aldridges were given temporary custody of the children. The parties remained in conflict over the issues and, ultimately, the

court set bond for Ken and ordered an evaluation of the children by Dr. Shirley Spence.

Following his release on bond, Ken filed a motion requesting reunification with the children. After a hearing on July 25, 2007, the court ordered that the children remain with the Aldridges but set a visitation schedule for Ken. The parties continued to contest numerous legal issues. On the issue of jurisdiction, the court ruled on July 27, 2007, that it did have jurisdiction. Next, on August 30, 2007, it entered findings of fact, conclusions of law, and an order, which found that the Aldridges were not de facto custodians. Ken continued to move for the return of the children and the Aldridges continued to contest. In due course, on January 17, 2008, the court entered orders that Ken have temporary custody of the children.

The litigation over custody of the children persisted. Eventually, the court held a hearing about grandparent visitation on June 30, 2008, and, thereafter, entered an order granting grandparent visitation. Finally, on May 18, 2009, the court conducted another hearing to determine the custody of the children. On October 8, 2009, the court entered a final order and judgment holding that Ken is an unfit parent and awarding custody of the three children to the Aldridges. It is from this order that Ken now appeals.

ISSUE

Ken argues that the trial court misapplied Kentucky Revised Statutes (KRS) 405.020 and controlling case law because it failed to find a number of

elements that must be present before a finding of unfitness. He maintains that his parental unfitness was not established. The Aldridges assert not only that Ken is an unfit parent but also that it serves the best interest of the children that they be awarded custody.

STANDARD OF REVIEW

The standard of review in cases such as this is that we are only entitled to set aside the trial court's findings if those findings are clearly erroneous. As stated in Kentucky Rules of Civil Procedure (CR) 52.01, "[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." Hence, the dispositive question that we must answer is whether the trial court's findings of fact are clearly erroneous or not supported by substantial evidence. "The test of substantiality of evidence is whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), citing *Blankenship v. Lloyd Blankenship Coal Company, Inc.*, 463 S.W.2d 62 (Ky. 1970).

Moreover, regardless of conflicting evidence, the weight of the evidence or the fact that the reviewing court would have reached a contrary finding, as stated in CR 52.01, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." These tasks, 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." *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005). In addition, appellate courts should not disturb trial court findings that are supported by substantial evidence. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. 1998). With this standard in mind, we will now review the case at hand.

ANALYSIS

Child custody disputes between a surviving parent and a nonparent are governed by KRS 405.020(1), which provides that "[if] either of the parents dies, the survivor, if suited to the trust, shall have the custody, nurture, and education of the children who are under the age of eighteen." Thus, the surviving parent has a superior right to custody over the nonparent so long as the surviving parent is "suited to the trust." Furthermore, 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 an exception 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. *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989). Therein, the Kentucky Supreme Court stated:

> 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, emotional 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. at 330. In a later case, our Court clarified that even if clear and convincing evidence of current unfitness on the basis of failure to provide parental care and protection is presented, the trial court must further find, before granting permanent custody to a nonparent, that there is no reasonable expectation that the parent will improve and be able to provide appropriate care and protection. *Forester v. Forester*, 979 S.W.2d 928, 930 (Ky. App. 1998).

Further elucidation of the *Davis* factors was given by the Kentucky Supreme Court in an unreported opinion, *Knight v. Young*, 2010 WL 252246 (Ky. 2010)(2007-CA-001850-MR).[1] The Court explained that not every factor listed in *Davis* must be found in order to find a parent not "suited to trust." It noted that *Davis* does not explicitly require that a finding must be reached on each factor but merely listed the types of evidence that can show unfitness.

Here, the court found, by clear and convincing evidence, that Ken inflicted or allowed to be inflicted emotional harm upon the children; that Ken's moral delinquency was established by clear and convincing evidence; that Ken, prior to Erin's death, had abandoned the children; and that Ken, for reasons other than poverty alone, failed to provide essential care for the children and that there is no reasonable expectation that his ability to provide care will improve. Further, the court noted that it did not find that it had been established by clear and convincing evidence that Ken suffered from a mental or emotional illness. After making its

[1] CR 76.28 allows unpublished cases to be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.

findings, the court painstakingly outlines the evidence that it relied on to make its findings. In so doing, the court explains that it is not enumerating all the evidence it considered nor all the evidence that support the findings but rather the evidence the court found compelling as well as clear and convincing. We need not agree with each finding by the court in determining whether the evidence overall was clear and convincing.

Ken addresses each finding by the court and opines that none of the evidence is clear and convincing and, therefore, the court's decision is clearly erroneous. We are not persuaded by Ken's reasoning. Merely reciting that the evidence is not clear and convincing does not make it so. And Ken's contention that the court did not meet the *Forrester* mandate that the trial court must find, by clear and convincing evidence, that there is no reasonable expectation that the natural parent will improve his or her ability to parent the children in the future is not accurate. The trial court clearly states in its opinion that "[t]he Court also finds that, for reasons other than poverty alone, Ken has failed to provide the essential emotional and physical care for the children due to his alcohol use and abuse and further that his ability to provide this care will improve in the foreseeable future." Notwithstanding Ken's strong objection to whether this issue was proven by clear and convincing evidence, we can only say, given the trial court's discretion in such matters, nothing provided by Ken shows that the trial court's conclusion was clearly erroneous. This case and its tragic consequences have a lengthy and

persuasive history of Ken's lack of progress in meeting the needs of his children. We cannot say that the trial court's findings in this regard were clearly erroneous.

CONCLUSION

The record for this case is voluminous and contentious. We observe the trial court did an admirable job of sorting through the evidence and determining that Ken was not fit to parent these children and that it was in the best interest of the children to be in the custody of the maternal grandparents. We concur with the trial court's carefully written, well-researched, and thoughtful opinion that awarded custody of the children to the maternal grandparents. Regardless of our agreement with the trial court's assessment of the situation, given our standard of review wherein we are only entitled to set aside the trial court's findings if those findings are clearly erroneous, we clearly have no choice but to affirm the decision of the Hopkins Circuit Court.

ALL CONCUR.

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