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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000326-ME

J.B. APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE ANGELA JOHNSON, JUDGE
ACTION NO. 08-J-500360-002

CABINET FOR HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENUCKY; K.T.; J.T.;
AND J.T., A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND SMALLWOOD, JUDGES.

ACREE, JUDGE: J.B. (Mother) appeals the Jefferson Family Court's January 12, 2017, order denying her petition for sole custody of one of her two biological children, J.T., and granting permanent custody of both children to J.T.'s paternal grandparents following the death of the children's biological father (Father). In

accordance with *A.C. v. Cabinet for Health and Family Services*, 362 S.W.3d 361 (Ky. App. 2012), counsel for Mother filed an *Anders*[1] brief conceding that no meritorious assignment of error exists to present to this Court. Counsel accompanied the brief with a motion to withdraw, which was passed to this merits panel. After careful review, we grant counsel's motion to withdraw by separate order and affirm the family court's January 12, 2017, order.

FACTS AND PROCEDURE

Mother and Father had two children: E.T., age sixteen, and J.T., age seventeen. The family court became aware of this family when two matters appeared on the court's Dependency, Neglect and Abuse (DNA) docket. The Cabinet had filed a petition alleging educational neglect. Then, Father, with whom Mother shared joint custody, filed a petition for a domestic violence order against Mother. In response to the petitions against Mother, the family court ordered that the children reside primarily with Father. Mother began a treatment plan in which she was ordered to complete a substance abuse evaluation, a psychological evaluation, attend counseling, and submit to random drug screens. Mother was granted supervised visitations through the Cabinet.

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[1] *Anders v. State of California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

The children and Father were spending the summer of 2014 with Grandparents when, tragically, Father was killed in an automobile accident. At the time, Mother was non-compliant with the Cabinet's treatment plan, so the family court granted temporary custody to Father's parents in Michigan, with whom the children were staying when the accident occurred.

In September 2015, after the children had lived with Grandparents for over a year, the family court conducted an in-person interview with them. Because of their age, the court sought to discover the children's wishes and interests regarding custody and visitation. That winter, the family court granted Mother holiday visits with the children in Louisville. In March 2016, Mother filed a petition for return of custody and in May 2016, Grandparents filed a motion seeking permanent custody. Prior to the hearing, Mother and Grandparents agreed that Grandparents would retain custody of E.T. who had adjusted well to residence in Michigan with Grandparents.

The family court held a hearing on December 8, 2016, on the pending motions. After the holidays, on January 12, 2017, the court entered Findings of Fact, Conclusions of Law, and an Order denying return of custody to Mother and granting permanent custody of J.T. to Grandparents. The family court found

Grandparents satisfied the requirements as *de facto* custodians, placing them on an equal footing with Mother. KRS[2] 403.270.

Although, after Father's death, the case had taken a turn away from the DNA issues to become, in effect, a contest for custody between *de facto* custodians and Mother, the family court nevertheless considered KRS 620.023 as guidance for determining the best interests of the children. In particular, the family court noted that the statute expects the court to consider "[a]cts of abuse or neglect as defined in KRS 600.020 toward any child . . . ." KRS 620.023(1)(b). Then the court turned to the best interest factors of KRS 403.270(2).

No findings were made relating to neglect and J.B.'s parental rights were not terminated. The family court stated:

> In this case, the record reflects that the Cabinet placed the children with the [Grandparents] more than two years ago. The Court heard testimony that the [Grandparents] have been the primary caregivers for the children since the placement. This Court finds that the [Grandparents] are de facto custodians in this action.
>
> . . . .
>
> J.T. appears to be physically and mentally healthy outside of being diagnosed with [Attention Deficit Disorder]. Her relationship with [Mother] seems to be bonded though the relationship is not fully developed. J.T.'s relationship with the [Grandparents] is strained due in great part to J.T.'s resentment of the [Grandparent's] rules. Few teenagers enjoy rules placed upon them and it

[2] Kentucky Revised Statutes.

> is common for them to rebel. Otherwise, J.T. is doing well with the [Grandparents]. They have provided a safe and stable living environment and have consistently provided for J.T. [Grandparents] have sought treatment for J.T. so that she may perform better at school. They have encouraged J.T. to become active at school and J.T. does participate at church. [Mother], on the other hand, has on at least one occasion refused to give J.T. her medication. Though she resides with her proclaimed fiancé, she does not appear capable of providing for J.T. financially as she has not secured employment. Moreover, it is unclear whether [Mother] has completed her treatment plan as ordered. Finally, this Court believes it is best for J.T. if she were continue [sic] to enjoy living with her brother, with whom she has lived her entire life. It is in J.T.'s best interest if she were to remain with the [Grandparents].

(R. at 124). Mother appealed this order of the family court on the basis that it amounted to a termination of her parental rights.

FILING OF *ANDERS* BRIEF

We first must attempt to clarify Mother's counsel's confusion. The case of *A.C. v. Cabinet for Health and Family Services* answered in the affirmative "the question whether Kentucky will apply the principles and procedures of . . . *Anders v. California* to appeals *from orders terminating parental rights*." 362 S.W.3d 361, 364 (Ky. App. 2012) (emphasis added). This case did not terminate Mother's parental rights. Counsel's confusion may be explained by the fact that the placement with grandparents of children who are subjects of a DNA proceeding typically is not predicated upon a finding that the grandparents were *de*

facto custodians. Instead, grandparent placement often follows the determination that a parent is unfit. *See*, *e.g.*, *Glodo v. Evans*, 474 S.W.3d 550, 552 (Ky. App. 2015). Mother was not found unfit.

Furthermore, even when an appeal is based on termination of parental rights, "we urge restraint in filing *Anders* briefs." *A.C.*, 362 S.W.3d at 372. Additionally, *A.C.* addresses the "dilemma [faced by *court-appointed* counsel] of having to diligently represent the indigent client who wants to appeal while still complying with counsel's other ethical duties as a member of the Bar." *Id.* at 368. Counsel did not face that dilemma because, unlike court-appointed counsel, Mother's counsel could have terminated the relationship before the appeal.

And, if Mother's rights had been terminated as counsel appears to have believed, an *Anders* brief would have been inappropriate because the family court made no findings to support the legal conclusion that Mother was unfit. That error alone would have been enough to reverse the family court if Mother had been found unfit. But even worse, counsel identifies, without arguing, three grounds for challenging the award of permanent custody to the *de facto* custodians.

The bottom line is that this case did not call for the filing of an *Anders* brief. We caution counsel to refrain from similar future mistakes of this nature. Nevertheless, we have taken the unusual step of considering the identified errors as though fully presented.

STANDARD OF REVIEW

This Court's standard of review of a family court's award of child custody, even one that starts as a dependency, neglect and abuse action, is limited to whether the factual findings of the lower court are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. Whether the findings are clearly erroneous depends on whether there is substantial evidence in the record to support them. *Id.*; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). If the findings are supported by substantial evidence, then appellate review is limited to whether the facts support the legal conclusions made by the family court. The legal conclusions are reviewed *de novo*. *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003).

ANALYSIS

The family court resolves the issue of permanent custody for J.T., the parties having already agreed that Grandparents would have custody of E.T. Mother identifies three reasons why the award of permanent custody to Grandparents should be reversed: (1) J.T.'s wishes that she be placed in the custody of Mother were not honored (KRS 403.270(2)(b)); (2) the interaction and interrelationship between J.T. and Grandparents was not positive (KRS 403.270(2)(c)); and (3) because the Cabinet did not provide reunification services that would better prepare Mother for a return of J.T.'s custody, the award of

permanent custody to Grandparents was premature (KRS 625.090(4)). We are unpersuaded by these arguments.

The first two arguments – J.T.'s wishes and her interrelationship with Grandparents – are factors to be considered in the family court's determination of J.T.'s best interests. Our examination of the record and the family court's order make it clear to us that evidence regarding these factors was fully presented and satisfactorily considered by the family court. But that evidence was outweighed by substantial countervailing evidence. Grandparents have been involved with J.T. since her birth, even potty training her. She lived with them for the previous two years. They "have provided structure and nurturing[,]" engaged in "creative methods of discipline" tailored to her proclivities, and cared for her medical needs. J.T. has played an active role in church, singing in the choir and teaching Sunday school." Academically, J.T. "is thriving . . . making mostly B's." Grandparents are both college educated, have a stable relationship, and live in a home large enough that J.T. has her own room. The evidence is clear and convincing that permanent custody with Grandparents is in J.T.'s best interests.

Mother's last argument relates to the treatment plan implemented pursuant to the DNA case. Although Mother suggests the case worker failed to adequately communicate, the family court was not persuaded, nor are we. The lion's share of responsibility for working the treatment plan was Mother's and the

fault in any failure thereof was hers as well. In the end, this argument, even if persuasive, would only affect a determination under Chapter 625 for involuntary termination. Because no such order was entered, it had no impact on the family court's order granting permanent custody.

CONCLUSION

Based on the foregoing analysis, we affirm the January 12, 2017, order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bethanni E. Forbush-Moss
Louisville, Kentucky

NO BRIEF FILED FOR APPELLEE