RENDERED: OCTOBER 12, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001807-ME

SEAN NICOLE KILBURN
(now STRONG) APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE CLINT HARRIS, JUDGE
ACTION NO. 14-CI-00064

FRED KILBURN AND
SHELIA KILBURN APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JOHNSON, MAZE AND NICKELL, JUDGES.

NICKELL, JUDGE: Sean Nicole Kilburn (now Strong) ("Mother") has appealed from the amended findings of fact, conclusions of law, and custody decree entered by the Leslie Circuit Court, Family Division, on October 2, 2017, finding Fred

Kilburn and Shelia Kilburn ("Grandparents") were *de facto* custodians of her minor daughter and granting them visitation rights with the child. Following a careful review, we affirm.

The child at the center of the instant controversy was born on July 2, 2012, to Mother and Fred Kilburn, Jr. ("Father"); she is Grandparents' paternal granddaughter. On April 1, 2014, Grandparents filed a verified petition for custody of the child, alleging they were *de facto* custodians pursuant to KRS[1] 403.270(1)(a), having been the primary caregivers and financial supporters of the child for 300 of the prior 365 days, and it would be in the child's best interest to award custody to them. They alleged the child had resided in their home since she was approximately one month old. Father and Grandparents subsequently executed an agreed order sharing joint custody of the child which was entered on June 23, 2014. Father had no further involvement in the proceedings and is not a party to this appeal.[2]

[1] Kentucky Revised Statutes.

[2] On December 22, 2017, this Court *sua sponte* ordered Mother to show cause why this appeal should not be dismissed for failing to name an indispensable party. Following Mother's response, the motion was passed to the panel considering the merits of the appeal for disposition. Mother and Grandparents have included discussion of the matter in their briefs. By separate order entered this date, and based on the specific factual situation before us, we hold Father is not an indispensable party to this appeal. No further discussion of the matter in this Opinion is warranted.

Mother was not served with the custody petition until October 2, 2014. She prepared and mailed a *pro se*[3] answer on October 21, 2014, but same was not filed until October 27, 2014. In the interim, and unbeknownst to Mother, Grandparents moved for default judgment, noticing a hearing for October 27, 2014. Mother did not appear at the hearing. The trial court entered a default judgment that day affirming the statements of fact recited in the custody petition; finding Mother and Father had waived their superior parental and custodial rights, and further demonstrated an intent to co-parent the child with Grandparents; and holding Grandparents were "persons acting as a parent" pursuant to KRS 403.800. Grandparents were awarded temporary custody of the child on November 17, 2014, but custody was returned to Mother approximately six weeks later with Grandparents being awarded visitation rights.

Over the following two and one-half years, the parties returned to court nearly two dozen times, primarily regarding issues with visitation. Mother was jailed on at least one occasion for contempt based on her continued refusal to comply with the trial court's visitation orders. After having been set and continued several times, a final hearing was ultimately scheduled for July 24, 2017. Approximately two weeks before the final hearing, Mother moved to set aside the

[3] Mother subsequently retained counsel who represented her throughout the remainder of the proceedings.

2014 default judgment, asserting for the first time its entry had been premature and raising a challenge to Grandparents' entitlement to *de facto* custodian status.

The trial court heard testimony at the final hearing from eleven witnesses including the parties, family members, neighbors, social workers and a police officer. At the conclusion of the hearing, the trial court verbally announced its rulings which found Grandparents had proven they were *de facto* custodians and had standing to seek custody, awarded custody to Mother, and granted visitation to Grandparents in accordance with its standard visitation schedule for non-custodial parents. A written order consistent with the verbal pronouncements was entered on August 28, 2017. That order also expressly reaffirmed the October 27, 2014, default judgment, finding no just reason existed to overturn it. Mother moved to alter, amend, or vacate, arguing denial of *de facto* custodian status and vacating the default judgment would be more appropriate outcomes given the evidence presented at the final hearing and prevailing law. On October 2, 2017, the trial court entered its amended findings of fact, conclusions of law, and custody decree, which included additional factual findings related to the time periods supporting its decision to award Grandparents *de facto* custodian status; deleted discussion of the appropriateness of the 2014 default judgment; and holding Mother's motion to set aside the default judgment was moot based on the trial court's current findings. All other aspects of the judgment remained the same. This appeal followed.

Mother raises three allegations of error in seeking reversal. First, she asserts the trial court's grant of *de facto* custodian status to Grandparents was contrary to the evidence adduced at the final hearing. Next, she argues the amended findings of fact, conclusions of law, and custody decree, should be vacated as she believes it contained insufficient factual findings. Finally, Mother contends Grandparents lacked standing to bring the custody action at the time it was filed. We disagree and affirm.

Initially, in contravention of CR[4] 76.12(4)(c)(v), Mother does not state how any of the arguments presented were preserved in the trial court.

> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard

[4] Kentucky Rules of Civil Procedure.

> of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). Although noncompliance with CR 76.12 is not automatically fatal, we would be well within our discretion to strike the briefs or dismiss the appeals for failure to comply. *Elwell*. While we have chosen not to impose such a harsh sanction, we caution counsel such latitude may not be extended in the future.

Mother first asserts the trial court erred in its grant of *de facto* custodian status to Grandparents as being unsupported by the evidence adduced at the final hearing. Pursuant to KRS 403.270(1)(a), a *de facto* custodian is "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[.]" Mother argues Grandparents failed to meet their burden of proof that the child resided with them for the requisite time and the trial court erred in finding otherwise. She believes the testimony adduced by Grandparents was not credible

and was clearly contradicted by her own witnesses. Mother asserts reversal is plainly warranted. We disagree.

It is well-settled that an appellate court may set aside a lower court's factual findings

> only if those findings are clearly erroneous. And, the dispositive question that we must answer, therefore, is whether the trial court's findings of fact are clearly erroneous, i.e., whether or not those findings are supported by substantial evidence. "[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.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted). *See also* CR 52.01, *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986). We review the trial court's application of the law to those facts *de novo*. *Lindley v. Paducah Bank & Trust*, 114 S.W.3d 259, 263 (Ky. App. 2002).

The record before us contains conflicting evidence regarding who had been the child's primary caregiver and financial supporter, with each side asserting

the child had resided with them for the lion's share of her life. It appears the trial court, being tasked with determining the weight and credibility of the evidence presented, found Mother's testimony and evidence unconvincing. Based on this assessment, the trial court concluded Grandparents satisfied the requirements of being named *de facto* custodians. Clearly, Mother disagrees with the trial court's decision, but a mere disagreement with the assessment of the evidence and the weight given thereto constitutes an insufficient basis upon which to reverse. Mother's vehement argument that her position was supported by substantial evidence is likewise insufficient for us to substitute our judgment for that of the trial court.

> A family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Bailey v. Bailey, 231 S.W.3d 793, 796 (Ky. App. 2007). "Thus, in reviewing the decision of the family court, the test is not whether the appellate court would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion." *Coffman v. Rankin*, 260 S.W.3d 767, 770 (Ky. 2008) (quoting *B.C. v. B.T.*, 182 S.W.3d 213, 219-20 (Ky. App. 2005)).

We have reviewed the record and conclude the trial court's decision was supported by substantial evidence. We also conclude the trial court appropriately interpreted and utilized the applicable statutory factors in reaching its decision. Because the trial court received and relied on substantial evidence of probative value to support its decision, we are without authority to alter that determination. We discern no abuse of discretion on the trial court's determination Grandparents were qualified as *de facto* custodians.

Next, Mother argues the amended findings of fact, conclusions of law, and custody decree contained insufficient factual findings and should therefore be vacated and remanded for the trial court to make additional and more complete findings. Citing *Keifer v. Keifer*, 354 S.W.3d 123 (Ky. 2011), Mother contends the trial court failed to "engage in at least a good faith effort at fact-finding" and did little more than state the requirements of the statute had been complied with. She asserts the trial court's failure to set forth the specific dates and times the child resided with Grandparents underlying its determination to grant *de facto* custodian status is fatal to that ultimate determination. We disagree with Mother's assessment of the trial court's judgment.

Contrary to Mother's contention, in its amended findings of fact, conclusions of law, and custody decree, the trial court did make specific findings regarding the requisite time period. After concluding Grandparents had produced

clear and convincing evidence they had been primary caregivers and financial supporters of the child, the trial court stated:

> [d]uring a period from August 2012 until at least March 2013 but most probably until March 2014, a period of more than 6 months, [Grandparents] were the persons who saw to the (1) day to day care of the child at issue (2) were the primary caregivers of the child at issue and (3) were the primary financial supporters of the child at issue by providing shelter, food, and other necessities of life for the child.

After reviewing the entirety of the trial court's judgment, including the specific finding set forth above, we hold the trial court did, in fact, engage in a good faith effort at fact-finding and its judgment is not the type of "bare-bone, conclusory order . . . setting forth nothing but the final outcome" as condemned by *Keifer*. *Id.* at 126. Mother's challenge is without merit.

Finally, Mother contends Grandparents lacked standing to bring the custody action at the time it was filed. She asserts Grandparents did not qualify as a "person acting as a parent" which is defined in KRS 403.800(13) as

> a person, other than a parent, who:
>
> (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and
>
> (b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state[.]

Mother argues Grandparents had not cared for the child for the requisite six months preceding the filing of the custody petition and had not been granted any legal right to custody of the child, thus depriving them of standing to bring the action. Mother's challenge falls wide of the mark.

Grandparents asserted in their verified petition and presented evidence at the final hearing that they had physical custody of the child and had been the primary caregivers and financial supporters of her for significantly longer than the requisite six-month period preceding the filing of the petition. The trial court twice found in favor of Grandparents on this factual issue. Thus, there can be no genuine argument Grandparents did not satisfy the requirements of KRS 403.800(13)(a).

Further, Mother's contention Grandparents had not previously been granted a legal right to custody of the child, thereby disqualifying them as a "person acting as a parent," is based on an incomplete reading of the statutory provisions and is therefore misplaced. While Mother seizes on the first phrase of KRS 403.800(13)(b), she fails to acknowledge the alternative method of qualification set forth in the remainder of the provision. A reading of the plain language of the statute reveals a person claiming a right to custody is on equal footing as one who has previously been awarded custody. Here, Grandparents averred they were entitled to custody of the child based on: their status as *de facto* custodians; Mother and Father's waiver of their superior rights to custody; and,

citing *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), Mother and Father's intent to co-parent the child with them. Clearly, Grandparents asserted a "right to legal custody under the law of this state" sufficient to satisfy KRS 403.800(13)(b). Grandparents had standing to bring the custody action and Mother's contentions to the contrary are unavailing.

For the foregoing reasons, and having discerned no error in the proceedings, the judgment of the Leslie Circuit Court, Family Division, is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brendon D. Miller
Jackson, Kentucky

BRIEF FOR APPELLEES:

Johnathan Fugate
Hyden, Kentucky