

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001974-ME

ROBIN CALDWELL

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS III, JUDGE
ACTION NO. 17-CI-00389

DENISE BURDICK, TY DOOLEN,
AND WHITNEY DAVIS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND SMALLWOOD, JUDGES.

MAZE, JUDGE: Robin Caldwell (Robin) appeals the order of the Boyd Circuit Court adopting the Domestic Relations Commissioner (DRC)'s recommendation that appellee, Denise Burdick (Denise), receive custody of Robin's grandchildren. Robin argues the DRC erred by finding she did not qualify as a *de facto* custodian

and failing to consider the relevant statutory factors when awarding Denise sole custody. After careful review, we affirm.

Robin and Denise are the grandmothers of Jacob and Jaeli. Since 2007, Jacob and Jaeli have not received care from their parents, Whitney Davis (Whitney), Robin's daughter, and Ty Doolen (Ty), Denise's son. Rather, Robin was appointed guardian of the children in August 2007 and Denise was appointed co-guardian in 2012. From 2012 to 2017, Robin and Denise would share caregiving responsibilities.

In May 2017, Denise filed a motion for emergency custody, alleging Robin had grown too sick to continue caring for the children, could not provide financial care for the children, and had used Jacob's social security number to obtain debts in the child's name. That same day, the circuit court entered an *ex parte* order awarding Denise temporary custody and referring the matter to the DRC for an evidentiary hearing. Robin did not appear at the hearing, and the DRC submitted a report recommending Denise receive custody until further orders were issued by the circuit court. Because Robin subsequently alleged she did not receive notice of the emergency motion, the DRC held a supplemental hearing in August 2017. At the supplemental hearing, the DRC heard testimony from Robin; Robin's husband, James; Denise; and Whitney. Ty did not appear as he was in prison at the time and was not appointed a guardian *ad litem*. The DRC also

interviewed Jacob and Jaeli in the presence of counsel.

Robin testified that she and James were unemployed and their sole source of income was assistance from their parents and \$150 Denise gave them each month to pay rent. Regarding her and James's health, Robin explained that she suffered a stroke in December 2016, her seventh, and that James required two shots of insulin a day, down from seven. James testified that he had stopped working in 2011 because of his health. He also admitted to using Jacob's social security number to obtain cable and that an outstanding debt had been incurred in his name as a result. Denise testified that she had been providing Robin, James, and the children with financial support since James stopped working and neither he nor Robin had the means to meet all of the children's needs. Denise opined Jacob and Jaeli needed a more stable environment and had adjusted well to her home in Illinois. Whitney testified that she preferred Robin retain custody but conceded the children should reside wherever they are happy. During the DRC's interview with the children, Jaeli expressed a desire to stay in Kentucky with Robin, but Jacob, the older sibling, stated he and his sister should reside with Denise in Illinois.

The DRC then filed a Supplemental Report and Recommendation finding Whitney and Ty had waived their superior right to custody as parents and neither Denise nor Robin qualified as the children's *de facto* custodian under KRS¹

¹ Kentucky Revised Statutes.

403.270. However, the DRC found Denise had standing under KRS 403.800 as a “person acting as a parent” and it would be in Jacob and Jaeli’s best interests that she receive sole custody. The circuit court overruled Robin’s exceptions and confirmed by order the DRC’s Supplemental Report and Recommendations. This appeal follows.

On appeal, Robin argues the DRC erred by finding she did not qualify as a *de facto* custodian. Robin contends that as a *de facto* custodian she had a superior right to custody of Jacob and Jaeli. In the alternative, Robin contends the DRC’s Report and Recommendation did not contain specific findings of fact and failed to consider the relevant statutory factors. Finally, she argues procedural irregularities require reversal.

STANDARD OF REVIEW

A child custody determination requires a two-tiered analysis. *L.D. v. J.H.*, 350 S.W.3d 828, 829-30 (Ky. App. 2011). A trial court’s factual findings will not be disturbed unless clearly erroneous. *Id.* at 829. Findings of fact are not clearly erroneous when supported by substantial evidence. *Id.* at 830. An appellate court reviews legal issues *de novo*. *Id.* The findings of a domestic relations commissioner, to the extent that the trial court adopts them, shall be considered the findings of the court. *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003).

ANALYSIS

1. The DRC's Finding That Robin Did Not Qualify as a *De Facto* Custodian Was Not Clearly Erroneous.

A “‘*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[.]” KRS 403.270(1)(a). Once a court determines a person qualifies as a *de facto* custodian, the court shall give that person the same standing in custody matters that is given to parents. KRS 403.270(1)(b).

Robin contends she should have qualified as a *de facto* custodian because the children resided with her from 2007 to 2012 and James testified that Denise did not provide any financial assistance during this time. However, Denise testified that Robin had not been able to meet the children’s needs since 2011. As fact-finder, the DRC “had sole discretion to determine the quality, character, and substance of the evidence[.]” *Ball v. Tatum*, 373 S.W.3d 458, 465 (Ky. App. 2012). Even if Robin would have qualified as a *de facto* custodian from 2007 to 2012, this Court has previously held that *de facto* custodianship, once established, does not necessarily persist and give an abiding right to be declared *de facto* custodian in future custody matters. *Sullivan v. Tucker*, 29 S.W.3d 805, 807 (Ky.

App. 2000). “[D]e facto custodianship is a matter that must be addressed anew whenever the status is asserted.” *Id.* at 808. Thus, the DRC’s finding that Robin was not a *de facto* custodian was not clearly erroneous, and the circuit court was not required to give her the same standing as a parent.

2. The Circuit Court’s Award of Sole Custody to Denise Was Based on the Relevant Statutory Factors and Supported by Substantial Evidence.

A non-parent who qualifies as a “person acting as a parent” under KRS 403.800 may obtain custody of a child if they prove by clear and convincing evidence that the parents are either (1) unfit custodians; or (2) have waived their superior right to custody. *Mullins v. Picklesimer*, 317 S.W.3d 569, 578 (Ky. 2010). Robin does not challenge Denise’s standing as a person acting as a parent nor the finding that Jacob and Jaeli’s parents waived their superior right to custody. Once the person acting as a parent has proven waiver, custody should be awarded based on the best interests of the child. *Boone v. Ballinger*, 228 S.W.3d 1, 13 (Ky. App. 2007). Factors relevant to a best interests determination include the child’s wishes regarding their custodian; the child’s interaction with any person significantly affecting their best interests; the child’s adjustment and continuing proximity to their home, school, and community; and the physical health of all individuals involved. KRS 403.270(2).

Although Robin alleges the DRC’s Supplemental Report and Recommendation did not provide sufficient findings of fact, a trial court’s findings

of fact do not have to “specifically mention each and every piece of evidence or argument of counsel to pass muster.” *Truman v. Lillard*, 404 S.W.3d 863, 867 (Ky. App. 2012). Findings of fact are sufficient when they permit an appellate court to determine the evidence and facts the trial court relied on in reaching its decision. *Patmon v. Hobbs*, 495 S.W.3d 722, 728 (Ky. App. 2016). After carefully reviewing the DRC’s report and relevant testimony, it is clear the circuit court’s award of sole custody to Denise was based on the relevant statutory factors and supported by substantial evidence.

3. The Procedural Errors Alleged by Robin Do Not Warrant Reversal.

Robin argues the *ex parte* order the circuit court entered in Denise’s favor violated KRS 620.060 and led to an “unfair” decision by the DRC. However, she does not allege the DRC was biased against her or that any of its findings were not supported by testimony from the supplemental evidentiary hearing. Robin also argues the circuit court erred by failing to appoint a guardian *ad litem* for Ty. She does not direct this Court to any authority giving her standing to raise such an argument on behalf of a different party. Robin also does not allege a guardian *ad litem* could have produced evidence contravening the DRC’s finding that Ty waived his superior right to custody. Even if a procedural error did occur in this case and was preserved for appellate review, we discern no grounds upon which Robin was prejudiced.

CONCLUSION

Based on the foregoing, the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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