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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-001166-ME

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH & FAMILY
SERVICES APPELLANT

v.

APPEAL FROM ESTILL CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 17-CI-00137

FAIRLEY NEAL APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, GOODWINE, AND JONES, JUDGES.

JONES, JUDGE: The Cabinet for Health and Family Services (the Cabinet) appeals from a judgment of the Estill Circuit Court granting custody of E.P., a minor child, to her *de facto* custodian, Fairley Neal. Discerning no error or abuse of discretion, we affirm.

BACKGROUND

The events of this case began when Neal met S.P., the biological mother of E.P., at a trailer park where one of Neal's friends lived. S.P. had just given birth to E.P. and needed a place to stay. Neal offered to help. S.P. and E.P. began living with Neal on or about June 1, 2016. Neal, with help from his adult daughter and daughter-in-law, quickly assumed a primary role in caring for E.P. Neal fed, bathed, and changed E.P., and he provided food, diapers, and clothing for her. S.P., in comparison, provided little assistance in raising the child. Furthermore, S.P. left the home after two months, leaving E.P. in Neal's care. After leaving in August, S.P. returned to the area in October and lived with her boyfriend in a camper on Neal's property. S.P. occasionally visited E.P., but she did not reside with or actively parent the child. S.P. then left around Thanksgiving and did not return until late May 2017, when she came back to celebrate E.P.'s birthday. After several days, S.P. once again departed around June 1, 2017.

The Cabinet originally became involved with S.P. while she was pregnant with E.P., beginning around October 2015. The exact nature of the Cabinet's previous interactions with S.P. is not part of the record,[1] but testimony in this case indicates the Cabinet had an ongoing case with S.P. regarding her older

[1] Neither the termination proceeding nor the termination order forms part of the certified record on appeal. Our only knowledge of the earlier Cabinet activity and its consequent termination proceeding is derived from testimony in the final custody hearing in the case *sub judice*, which took place on April 9, 2019.

child, E.P.'s half-brother. The Cabinet became aware of Neal and his involvement with the family when he accompanied S.P. to family court in September or October 2016. Alerted to S.P.'s new residence, the Cabinet conducted a home visit at Neal's house that same week. The Cabinet found S.P. had given Neal a power of attorney for E.P.'s care and E.P. was behind on her immunizations. The Cabinet made an appointment to correct the oversight, and Neal agreed to take E.P. to the doctor. Neal asked the Cabinet's social worker what he would need to do to get custody. The social worker told Neal that a power of attorney was not sufficient, and he would need to consult an attorney. The social worker also informed Neal the Cabinet would be unable to place E.P. with him because he is not a relative.

Finally, in June 2017, the Cabinet arrived at Neal's home and removed E.P. from his care. According to Neal, the Cabinet did not inform him why E.P. was taken from him. Later, the Cabinet testified it removed E.P. at S.P.'s request, based on her allegation that E.P. was not in a safe environment. However, the Cabinet admitted in its later testimony that it did not see anything during its earlier home visits with Neal that caused concern. At some point during these proceedings, S.P.'s parental rights to E.P. and her half-brother were terminated. The Cabinet had previously placed E.P.'s half-brother with the Townsends, a foster family. When E.P. was subsequently removed from Neal's care, the Cabinet placed her with her half-brother at the Townsends.

Within a few weeks of E.P.'s removal in June 2017, Neal filed a petition for custody with the Estill Circuit Court. According to Neal's pleadings,[2] despite being served notice, counsel for the Cabinet did not respond to the petition and did not enter an appearance for the Cabinet at the hearing held on December 14, 2017. At the final hearing, held in February 2018, Neal orally moved the court for a judgment by default, based on the lack of response by any party to his petition. The Domestic Relations Commissioner (DRC) recommended granting the motion and the circuit court confirmed the recommendation. The Cabinet filed a notice of appeal from the decision, but it failed to timely file a brief before this Court. Accordingly, we dismissed the Cabinet's appeal.[3] The Cabinet subsequently moved the circuit court to alter, amend, or vacate the default judgment under CR 60.02. The circuit court, concerned about awarding custody based on a default judgment, granted the Cabinet's motion on January 8, 2019. The circuit court then set the matter for a final custody hearing before the DRC.

The final custody hearing took place before the DRC on April 9, 2019. Neal and the Cabinet's employees testified regarding the sequence of events outlined above. The fact witnesses uniformly testified about the loving

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[2] The record contains very few details regarding the events leading up to the final custody hearing. We have derived portions of the procedural timeline in this paragraph based on Neal's response to the Cabinet's Kentucky Rule of Civil Procedure (CR) 60.02 motion, which is found on pages 5 through 7 of the record on appeal.

[3] *Cabinet for Health and Family Services, Commonwealth of Kentucky v. Neal*, No. 2018-CA-000474-ME (Ky. App. Nov. 28, 2018).

relationship between E.P. and Neal, and how very attached E.P. is to him. Marissa Townsend, E.P.'s foster mother and a witness for the Cabinet, testified how the Townsends wanted to adopt E.P., as they had adopted her brother. Nonetheless, she admitted E.P. loves Neal and his family, and she further admitted that it would help E.P. if Neal had custody of her. Marissa's mother-in-law, Charlene Townsend, went one step further and testified on Neal's behalf, asserting E.P. has a strong bond with Neal and he is the best person to have custody of her.

During the hearing, the Cabinet's position appeared to be that Neal has "a good heart," but E.P. has developmental issues and the Townsends were better able to meet E.P.'s needs. The Cabinet was also concerned because Neal had three misdemeanor convictions relating to drug possession stemming from an incident in 2013. Neal admitted to the convictions, but attested he successfully completed probation and had not been in trouble since that time. The Cabinet also moved for a directed verdict based on Neal's testimony that he had intended to return E.P. to her mother once she achieved stability in her personal circumstances. By stating his intent to return E.P. to her mother, the Cabinet argued Neal had waived any superior right to custody as a *de facto* custodian.

In his findings of fact and conclusions of law, the DRC specifically found "Neal was the sole caregiver and financial provider for [E.P.] from, at least, August of 2016 to June of 2017." The DRC went on to find how Neal and the

child had a loving bond, as described by the witnesses in the case. The DRC found E.P. had overcome some of her developmental issues in care of the Townsends, but the Townsends themselves believed it would help E.P. to be with Neal. In his conclusions of law, the DRC found Neal was the primary caregiver for over six months when E.P. was under three years of age, and thus he qualified as a *de facto* custodian under KRS[4] 403.270. Furthermore, because Neal filed his petition for custody shortly after the Cabinet placed E.P. with the Townsends, the Townsends themselves did not qualify as *de facto* custodians. Finally, the DRC acknowledged Neal's criminal convictions but considered them relatively insignificant, noting they were misdemeanors handled in district court resulting in a "365-day sentence conditionally discharged for 2 years."

After analyzing the facts, the DRC's report concluded Neal did not waive his superior right to custody as a *de facto* custodian and recommended granting custody of E.P. to him. The DRC also encouraged the parties to establish a visitation schedule between E.P., the Townsends, and her half-brother. The record reflects no objections were filed to the DRC's report. The circuit court confirmed and adopted the recommendations of the DRC in an order dated June 27, 2019. This appeal by the Cabinet followed.

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[4] Kentucky Revised Statutes.

ANALYSIS

We must first address significant issues regarding preservation of the Cabinet's arguments. CR 76.12(4)(c)(v) requires an appellant to provide "at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." The purpose of the preservation statement "is not so much to ensure that opposing counsel can find the point at which the argument is preserved, it is 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." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). The Cabinet failed to provide any preservation statements in its brief, and several of its briefed arguments do not appear to have been submitted to the DRC or the circuit court.

Even more significant, however, is that the Cabinet failed to submit any objections or exceptions to the DRC's recommended report. CR 53.05(2) provides:

> Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

Similar language may also be found in FCRPP[5] 4(4). The Kentucky Supreme Court has held written objections to a commissioner's report are necessary if a party intends to preserve claims of error. "In general, a party who desires to object to a report must do so as provided in CR [53.05(2)] or be precluded from questioning on appeal the action of the circuit court in confirming the commissioner's report." *Eiland v. Ferrell*, 937 S.W.2d 713, 716 (Ky. 1997) (citation omitted).[6] The Supreme Court explained that allowing appellate review of the order without requiring parties to apprise the circuit court of any disagreements "would invite all the mischief associated with appellate review of unpreserved error." *Id*. Accordingly, the Cabinet's claims on appeal are not preserved for our review, and we affirm on that basis.[7]

Even though the Cabinet's failure to object to the report is dispositive, we will briefly address the Cabinet's underlying arguments. The Cabinet first argues the application of KRS 403.270 to this matter was erroneous because the Cabinet is not a parent. We disagree. KRS 403.270(1)(a) is clear:

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[5] Family Court Rules of Procedure and Practice.

[6] *Eiland* discusses CR 53.06(2), the rule which formerly considered these aspects of a commissioner's report. These rules were amended and renumbered by Order 2010-09, effective Jan. 1, 2011. *Eiland*'s analysis applies to the renumbered rule.

[7] The appellee argued different grounds for affirming, but "it is well-settled that an appellate court may affirm a lower court for any reason supported by the record." *McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n.19 (Ky. 2009) (citation omitted).

> "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.

The statute requires the circuit court to consider the involvement of the Cabinet only in calculating the time required for a party to meet the definition of a *de facto* custodian. The statute does not require the circuit court to consider the Cabinet's role in any other capacity, and we will not superimpose such a requirement.

Next, the Cabinet argues the circuit court did not have subject matter jurisdiction to issue its order, an argument it did not make to the DRC or the circuit court. Nonetheless, if this were truly a matter of subject matter jurisdiction, we would be obligated to consider the question, because subject matter jurisdiction cannot be acquired by waiver. *Jackson v. Commonwealth*, 363 S.W.3d 11, 16-17 (Ky. 2012). The Cabinet argues the earlier termination decree in this case amounted to a final custody order in favor of the Cabinet, and Neal filed no affidavits to modify custody within two years, pursuant to KRS 403.340(2). As a result, the Cabinet argues the circuit court did not acquire subject matter jurisdiction, citing *Petrey v. Cain*, 987 S.W.2d 786 (Ky. 1999). However, the Cabinet fails to note that *Petrey* is no longer controlling law on this issue, as it was overruled in *Masters v. Masters*, 415 S.W.3d 621, 624 (Ky. 2013). Pursuant to

Masters, any argument regarding the failure to submit affidavits was waived when the Cabinet failed to raise the issue below. *Id*. at 625; *see also Commonwealth v. Steadman*, 411 S.W.3d 717, 721-23 (Ky. 2013) (discussing the difference between subject matter jurisdiction and particular case jurisdiction).

In its third argument, the Cabinet argues the circuit court should have found Neal waived his superior right to custody as a *de facto* custodian by stating he had intended to return E.P. to her mother. This was the main thrust of the Cabinet's argument before the DRC during the hearing. The DRC's findings of fact, to the extent that the circuit court adopts them, are entitled to great deference; accordingly, we apply a clearly erroneous standard of review. CR 52.01; *Keith v. Keith*, 556 S.W.3d 10, 14 (Ky. App. 2018). Where the record contains substantial evidence to support the circuit court's findings, we will not disturb them on appeal. *Keith*, 556 S.W.3d at 14.

In his report, the DRC acknowledged that "[w]aiver requires proof of a knowing and voluntary surrender or relinquishment of a known right[,]" and that waiver could be implied by conduct, provided the actions taken were unequivocal evincing an intent to waive. The DRC was correct in this assessment. *See Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003). The DRC concluded that Neal's conduct did not show unequivocal desire to waive his right to custody, specifically

pointing out that Neal inquired about getting custody when he spoke to the Cabinet employee in October 2016. The record supports the DRC's findings.

Finally, the Cabinet argues it was error for the circuit court to grant custody to Neal because it was not in E.P.'s best interests. However, the evidence within the record uniformly indicated Neal acted as a loving parent who cares about the child. The Cabinet's position appeared to be grounded in the belief that the Townsends would be better suited, but the DRC determined this was not enough to take custody from a fit *de facto* custodian. Again, we will not set aside findings in a custody case unless they are clearly erroneous. CR 52.01; *Baize v. Peak*, 524 S.W.3d 30, 31-32 (Ky. App. 2017).

In short, even if we were to consider this matter on the merits, the DRC's findings of fact and conclusions of law, adopted by the circuit court *in toto*, were supported by substantial evidence in the record. We discern no clear error.

CONCLUSION

For the reasons stated herein, the judgment of the Estill Circuit Court is affirmed.

ALL CONCUR.

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