

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001444-ME

T.M.

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 13-J-01419-005

T.C.G., MATERNAL GRANDMOTHER;
T.J.D.S., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLEES

AND

NO. 2019-CA-001445-ME

T.M.

APPELLANT

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DAWN M. GENTRY, JUDGE
ACTION NO. 13-J-01529-003

T.C.G., MATERNAL GRANDMOTHER;
R.N.S., A CHILD; AND CABINET FOR
HEALTH AND FAMILY SERVICES,
COMMONWEALTH OF KENTUCKY

APPELLEES

OPINION
REVERSING AND REMANDING

** **

BEFORE: CALDWELL, DIXON, AND L. THOMPSON, JUDGES.

DIXON, JUDGE: T.M. (“Mother”) appeals from an order of the Kenton Circuit Court, Family Division, granting permanent custody of her two minor children, ages 5 and 6 at the time of the hearing, to their maternal grandmother, T.C.G. (“Grandmother”). After careful review, we reverse and remand for additional findings.

PROCEDURAL BACKGROUND

In June 2018, Mother filed a dependency, neglect, and abuse (DNA) petition alleging that the children were being abused or neglected by their great-grandmother, who was given custody through a 2015 DNA action against Mother. The petition alleged that within a week of receiving temporary custody, the great-grandmother abandoned the children, leaving them with Grandmother. Great-grandmother admitted to dependency, and temporary custody of the children was given to Grandmother.

In May 2019, Mother moved the family court to return custody of her children. Grandmother promptly moved the family court to declare her a *de facto* custodian and for permanent custody. Mother sought to dismiss the motion for *de facto* custodian status, and Grandmother responded raising an alternative claim for

custody under KRS¹ 620.027. After a hearing, the family court granted Mother's motion to dismiss the *de facto* custody claim, finding that Grandmother did not qualify, but further held that Grandmother did have standing to proceed under KRS 620.027 and that it was in the best interest of the children for her to have permanent custody. This appeal followed.

Mother argues the family court erred, first by utilizing KRS 620.027 to grant Grandmother custody, and second in evaluating the best interest of the children. The Court will address each argument in turn and will introduce additional facts, as necessary.

STANDARD OF REVIEW

On appeal, the family court's factual findings are subject to the clearly erroneous standard of review. CR² 52.01; *see also L.D. v. J.H.*, 350 S.W.3d 828, 829 (Ky. App. 2011). Under this standard, an appellate court must give significant deference to the family court's findings and should not interfere unless the record is devoid of substantial evidence to support them. *D.G.R. v. Com., Cabinet for Health and Family Services*, 364 S.W.3d 106, 113 (Ky. 2012). The lower court's legal conclusions are reviewed *de novo*. *L.D.*, 350 S.W.3d at 830. If the family

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

court's findings and conclusions are unobjectionable, the Court will not disturb the family court's custody decision absent an abuse of discretion. *Id.*

PERMANENT CUSTODY CLAIM

Mother raises several issues regarding the family court's holding that Grandmother had standing under KRS 620.027 to assert a permanent custody claim.

KRS 620.027 provides:

The District Court has jurisdiction, concurrent with that of the Circuit Court, to determine matters of child custody and visitation in cases that come before the District Court where the need for a permanent placement and custody order is established as set forth in this chapter. The District Court, in making these determinations, shall utilize the provisions of KRS Chapter 403 relating to child custody and visitation. In any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interest of the child.

Mother asserts that the directive to utilize KRS Chapter 403 necessitates that a non-parent qualify as a *de facto* custodian to have standing. Otherwise, she argues Chapter 403 would be rendered meaningless. In this vein, Mother argues it was error for the court to award Grandmother custody after expressly determining she did not qualify as a *de facto* custodian, absent a finding that Mother was unfit, which was not made herein. Finally, Mother asserts that

even if KRS 620.027 does create standing which is independent of *de facto* custodian status, the statute is inapplicable in this case because Mother resides with Grandmother and the children.

The Court cannot find, and Mother has not cited, where in the record she made these arguments to the lower court, and as such, she has not preserved them for review by this Court. “[A]n appellant preserves for appellate review only those issues fairly brought to the attention of the trial court.” *Elery v. Commonwealth*, 368 S.W.3d 78, 97 (Ky. 2012). Accordingly, we will not address these claims beyond stating that Mother’s interpretation of the interplay between the two statutes is not supported by a plain reading of KRS 620.027 or by case law interpreting it. *See L.D.*, 350 S.W.3d 828.

BEST INTEREST EVALUATION

Mother’s second argument is that reversal is required because the family court’s best interest evaluation was flawed. Specifically, Mother asserts the family court erred by: (1) failing to apply the best interest factors set out in KRS 403.270(2); (2) rendering a series of conclusory statements instead of findings; and (3) erroneously finding that Mother was unable to provide for the financial stability of the children despite her uncontroverted testimony that she earns \$2,600 a month through her employment. We agree that the family court’s findings are insufficient.

KRS 403.270(2), in pertinent part, states:

The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. Subject to KRS 403.315, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare. The court shall consider all relevant factors including:

- (a) The wishes of the child's parent or parents, and any de facto custodian, as to his or her custody;
- (b) The wishes of the child as to his or her custodian, with due consideration given to the influence a parent or de facto custodian may have over the child's wishes;
- (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests;
- (d) The motivation of the adults participating in the custody proceeding;
- (e) The child's adjustment and continuing proximity to his or her home, school, and community;
- (f) The mental and physical health of all individuals involved;

(g) A finding by the court that domestic violence and abuse, as defined in KRS 403.720, has been committed by one (1) of the parties against a child of the parties or against another party. The court shall determine the extent to which the domestic violence and abuse has affected the child and the child's relationship to each party, with due consideration given to efforts made by a party toward the completion of any domestic violence treatment, counseling, or program;

(h) The extent to which the child has been cared for, nurtured, and supported by any de facto custodian;

(i) The intent of the parent or parents in placing the child with a de facto custodian;

(j) The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school; and

(k) The likelihood a party will allow the child frequent, meaningful, and continuing contact with the other parent or de facto custodian

In a custody action, the family court “shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate

judgment” CR 52.01. The court’s factual findings should do more than address the matter in a cursory manner. *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011).

Herein, the family court’s order does not reference the KRS 403.270(2) factors and contains just six cursory findings regarding the children’s best interest. Specifically, the family court found: (1) the minor children were living with another grandmother prior to Appellee being given custody; (2) Mother has a history of substance abuse but began testing negative in February 2019; (3) Mother is unable to provide financial stability for the children; (4) Mother opposes Grandmother having permanent custody; (5) the children are well bonded and stable with Grandmother, having adjusted to her home; and (6) it is in the children’s best interest to remain with Grandmother. In addition to the perfunctory nature of these findings, the order does not address the presumption for joint custody or why the court chose to deviate therefrom.

Custody determinations have a significant impact upon a family. The determination shapes where the child will reside and who will have the authority to make decisions regarding the child’s care, upbringing, and control. An award of sole custody deprives the non-custodians of the legal right to be included in decision-making for that child. Further, once ordered, custody can only be modified under limited circumstances. KRS 403.340. In making a custody

determination, the court's order should demonstrate a thoughtful consideration of the evidence as it pertains to the relevant statutory standards. The order herein fails to meet this burden. Accordingly, this matter shall be remanded for additional findings.

Because we have found the family court's findings to be insufficient, we need not address Mother's contention the finding that she was unable to financially support the children is erroneous.

CONCLUSION

For the foregoing reasons, the judgment of the Kenton Circuit Court, Family Division, is REVERSED and REMANDED for additional proceedings. On remand, the family court shall consider the best interest factors set out in KRS 403.270(2), make specific findings of fact, and demonstrate due consideration of the presumption favoring joint custody before reaching the ultimate legal conclusion as to the custody arrangement that is in the children's best interest.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE T.C.G.:

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