

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2009 Session

IN RE: J.K.D. (DOB 11/26/94) and D.N.D. (DOB 6/26/01)

**Direct Appeal from the Circuit Court for Marion County
No. 17503 Buddy D. Perry, Judge**

No. M2008-02531-COA-R3-CV - Filed September 30, 2009

The juvenile court found Mother's minor children to be dependent and neglected and placed them in the physical custody of Appellee Francine Hicks. The circuit court affirmed the award of custody to Ms. Hicks. Mother appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and J. STEVEN STAFFORD, J., joined.

Lisa Z. Bowman, Chattanooga, Tennessee, for the Respondent/Appellant.

M. Keith Davis, Dunlap, Tennessee, for the Petitioner/Appellee.

MEMORANDUM OPINION¹

This appeal arises from an order of the Circuit Court for Marion County placing Appellant Mother's two minor children, J.K.D. (born 1994) and D.N.D. (born 2001), in the custody of intervening petitioner Francine Hicks (Ms. Hicks). This lawsuit was commenced in March 2007 by the children's maternal grandparents, Branka Vukshich (Ms. Vukshich) and Peter Vukshich (Mr. Vukshich, collectively, the Vukshichs), now residents of the State of Washington, who filed a petition in the Juvenile Court for Marion County alleging the children were dependent and neglected

¹ Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

and seeking custody of the children. When the matter was filed, J.K.D. was living with her father (“Father”) and D.N.D. was living with Ms. Hicks. The juvenile court heard the matter over three days and, in August 2007, found the children to be dependent and neglected. The juvenile court awarded legal custody of the children to the State of Tennessee, which was allowed to participate in the matter, and granted physical custody to Ms. Hicks. The Vukshichs filed a notice of appeal to the circuit court. In December 2007, the juvenile court entered an order stating that temporary custody would remain with the State pending adjudication of the matter in circuit court. While the matter was pending in circuit court, physical custody was vested with Ms. Hicks upon motion of the State. In December 2007, Mr. Vukshich filed a notice of nonsuit.

The circuit court heard the matter on August 7 and September 2, 2008. In October 2008, the circuit court entered an order finding the children to be dependent and neglected and awarding custody to Ms. Hicks, who again intervened in the matter. The court ordered the Department of Children’s Services (“DCS”) to establish a permanency plan regarding contact between the children and Mother and Father. Ms. Vukshich filed a motion to alter or amend the judgment, arguing that the court erred by awarding custody to Ms. Hicks, and asking the court to award legal custody to her and physical custody to Mother. Ms. Vukshich also asserted that DCS should not be permitted to be involved in the matter. The trial court denied the motion in January 2009. Mother filed a notice of appeal to this Court. We affirm.

Issue Presented

On appeal, Mother asserts the trial court erred in granting custody of the minor children to a non-related third party.

Standard of Review

We review the decisions of a trial court sitting without a jury *de novo* upon the record, with a presumption of correctness as to the trial court’s findings of fact, unless the evidence preponderates otherwise. *In Re: Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). Tenn. R. App. P. 13(d). No presumption of correctness attaches, however, to a trial court’s conclusions on issues of law. *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); Tenn. R. App. P. 13(d).

Under the United States and Tennessee Constitutions, parents have a fundamental liberty interest in the custody of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *In re Askew*, 993 S.W.2d 1, 3 (Tenn. 1999). A court may not deprive a natural parent of custody of their child in favor of a third party unless the court determines that the parent is unfit or that there is a danger of substantial harm to the child. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). As the natural parent has superior rights against third parties, a third party seeking custody carries the burden of proof. *In re Askew*, 993 S.W.2d at 4-5. The third party must show the danger of substantial harm or the unfitness of a parent by a “clear preponderance of convincing proof.” *Stubblefield v. State ex rel. Fjelstad*, 106 S.W.2d 558, 560 (Tenn.1937); *Henderson v. Mabry*, 838 S.W.2d 537, 540 (Tenn. Ct. App.1992). Accordingly, in order to prevail in a child custody action

in Tennessee, third parties must overcome a strong presumption in favor of the child's natural parents.

Analysis

Upon review of the record, it is clear to us that it is in the best interests of J.K.D. and D.N.D. to remain in Ms. Hick's custody. D.N.D. is a special needs child who has resided with Ms. Hicks almost continually since her birth following State action in 2001 when Mother, who either did not acknowledge or was not aware of her pregnancy gave birth to her into a toilet. It is also undisputed that J.K.D. was sexually molested on multiple occasions by the Vukshich's four adopted sons while living with Mother and Father at the Vukshich's home; that Father was physically, sexually and emotionally abusive; and that J.K.D. has spent substantial time with and bonded to Ms. Hicks. It is also undisputed that Mother, who has a 10th grade education and apparently suffers from learning disabilities, left Father in 2006 and resided with a boyfriend, leaving J.K.D. with Father, and that Mother and Father subsequently divorced in 2007. Father, who is not a party to this appeal, testified that he did not know whether he is the children's biological father.

In its October 2008 order, the trial court found that both Mother and Father are unfit to care for the children due to mental incapacity, immorality or depravity, and that they neglected or refused to provide medical and/or psychological care for the children. The court further found that "the children were under improper guardianship or control as to injure or endanger the morals or health of the children" while in their parents' and grandparents' care, and that D.N.D. remained in Ms. Hicks care after the juvenile court placed custody back with Mother and Father after the 2001 removal. The trial court found that D.N.D. is "a fragile child due to her physical condition," and that "[J.K.D.] is also a fragile child due to the abuse and neglect she has suffered both in the home with her father and in the home with her grandparents." The trial court stated, "[t]he failure of anyone to provide continuing counseling to [J.K.D.] is a further indication of the neglect and abuse of this child."

Upon review of the record, it is clear to us that returning to these children to Mother's custody would place them in a situation that most likely would result in substantial harm. We are not insensitive to the fact that Mother was abused and, to a great extent, controlled by Father until she left in 2006. However, it is also clear that, although she is employed and earns approximately \$800 per month, Mother is unable to care for herself and her children. Mother testified "the bank" handles her money, that Ms. Vukshich pays her bills out of a joint account that she has had for "not too long," and that she has never seen a bank statement. She further testified that she "believed" D.N.D. was born in 2000, and that she "thought" J.K.D. was 13 years of age. Mother testified that, although she had access to a vehicle after moving in with "Mark" in 2006, she did not attempt to drive to Ms. Hicks' home to visit the children, but that it was Ms. Hicks "responsibility to make sure that I can see my children." When asked whether she knew how far Ms. Hicks drove in order for Mother to visit with the children, Mother answered, "I don't know. That's her responsibility to make sure I see my children."

With respect to D.N.D.'s medical condition, Mother testified that she "supposedly has seizures, which no medical doctor has ever witnessed" and that, with respect to the operation of D.N.D.'s sleep monitor, "[i]t's a matter of pushing one or two buttons and sticking these things on her side." When asked whether Ms. Hicks had taken "good care" of the children, Mother replied, "Yeah," noting, "but that doesn't give her the right to take my children away from me." Mother further stated that she did not know how long D.N.D. had lived with Ms. Hicks.

Mother resided in Chattanooga at the time of the hearing of this matter and testified that she did not know how long she resided in Chattanooga because she is "not good with stuff like that." Mother testified that she had been fired from her former job as a result of a confrontation with a co-worker, and that before Ms. Vukshich began paying her bills her boyfriend's mother did. Mother testified that she disciplined J.K.D. by spanking her with a belt and testified, "[i]t's not illegal to spank your child by Tennessee law with a belt. If you don't believe me, go find it yourself and read it." When asked whether Father allowed J.K.D. to have a night light because she was afraid of the dark, whether J.K.D. was upset that Father would not allow her to wear jewelry, and whether J.K.D. ever spoke to her about being upset with Father, Mother testified, "I don't remember." When asked if she ever asked her parents to help her to "get out" of her living situation with Father, Mother testified, "No."

When asked what she did to assist J.K.D. after learning that she had been sexually molested, Mother replied, "[w]hat are you supposed to do?" and testified that she did not call DHS. She further testified that she "assumed" her mother would follow-up with counseling, but that she never attended a counseling session. When asked whether she would relocate to Washington to be close to her children if the court granted custody to the Vukshichs, Mother testified, "I haven't crossed that bridge yet. . . . When I cross that bridge, I'll let you know." She stated that she would not move to Washington unless she "absolutely [had] to."

The evidence in the record does not preponderate against the trial court's findings in this case. The evidence clearly establishes that to award Mother custody would present a danger of substantial harm to these children, and that it is in the children's best interest to remain in the custody of Ms. Hicks. Further, we note that, despite Mother's assertion that her parental rights are being terminated *de facto*, this is not a termination of parental rights case and the circuit court has ordered DCS to remain involved in this case to facilitate Mother's visitation with the children.

Holding

In light of the foregoing, the judgment of the circuit court is affirmed. Costs of this appeal are taxed to Mother and her surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE