RENDERED: MAY 2, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001850-ME

DELORES MARIE KNIGHT — APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 07-CI-00003

LINDA YOUNG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND THOMPSON, JUDGES.

COMBS, CHIEF JUDGE: Delores Marie Knight appeals from a judgment of the Lyon Circuit Court of July 25, 2007, finding her to be an unfit parent and awarding custody of her minor child, H.L.K., to the child's paternal grandmother, Linda Young. We affirm.

H.L.K. was born in Virginia on August 4, 2000, to Delores Marie and Jerry Knight.[1] Three years later, they divorced by decree of the Vigo Superior Court in Terre Haute, Indiana. Following an evidentiary hearing, the Indiana court declined to award

[1] Some of the witnesses at the evidentiary hearing referred to Ms. Knight as "Delores" others referred to her as "Marie." We shall refer to Ms. Knight as "Marie."

custody of the child to Marie and instead awarded her periods of visitation. The court found that Jerry was willing to facilitate a relationship between H.L.K. and her half-siblings (other children of Marie with whom Marie had maintained only minimal contact). The court also found that Jerry had a meaningful relationship with his own family that could be beneficial to H.L.K. Marie had little contact with her own family. The court considered evidence tending to suggest that Marie was mentally and emotionally unstable.

Jerry was awarded physical and legal custody of the child, and Marie was ordered to pay weekly child support. Following the divorce, Marie moved to Tiffin, Iowa. She did not regularly exercise her right to visitation nor did she pay child support as ordered by the court.

In 2004, Jerry moved with H.L.K. from Indiana to Kentucky. In November 2006, Jerry and H.L.K. moved in with Jerry's mother, Linda Young, at her home in Lyon County, Kentucky. On December 22, 2006, Jerry was killed in a motorcycle accident. Young moved immediately for an order of emergency, temporary custody of H.L.K. The Indiana court transferred jurisdiction to Kentucky, and, on January 9, 2007, Young filed a verified petition for permanent custody in the Lyon Circuit Court. In her petition, Young alleged that she was the fit and proper person to have custody of H.L.K. and that Marie was not capable of caring for the child. Marie filed a response to the petition and sought custody of the little girl.

An evidentiary hearing was held on July 17, 2007, at which the circuit court found that Marie was an unfit parent and awarded custody of the child to Young. Marie was granted limited, supervised visitation. No provisions were made for the payment of child support. This appeal followed.

Marie contends that the circuit court abused its discretion by awarding custody of H.L.K. to Young. She argues that she was entitled to custody under the provisions of Kentucky Revised Statutes (KRS) 405.020 and that the circuit court's finding that she was unfit was not supported by properly admitted, clear and convincing evidence. We shall address each contention.

First, Marie contends that the court erred by admitting the deposition testimony and counseling records of Mary Fran Davis, a licensed clinical social worker. We disagree.

On April 25, 2007, through counsel, Young filed in the record a report prepared by Davis. The report covered several sessions conducted in Davis's office and contained her professional evaluation of the relationship between Young and H.L.K. Also on that date, Young filed a notice indicating that Davis's deposition would be taken in Hopkinsville on May 2, 2007. Marie's counsel had been permitted by the court to withdraw in February 2007; substitute counsel was later permitted to withdraw in early April. Therefore, Young's certificate of service indicates that a copy of the notice to take Davis's deposition was mailed directly to Marie at her home in Iowa. The deposition was taken as scheduled on May 2, 2007. Marie did not attend – nor was she represented at – the deposition.

Marie's present counsel gave notice that he had assumed her representation on May, 4, 2007. After hiring her lawyer, Marie immediately filed a response to Young's previous motion to compel discovery responses and filed a motion for visitation. On May 8, she appeared in Lyon Circuit Court for a hearing. Marie did not raise any objection to the deposition that had been conducted as scheduled on May 2, 2007.

The record indicates that after Davis completed her evaluation of the relationship between H.L.K. and Young, Davis became H.L.K.'s treating therapist. On June 22, 2007, Young filed a notice of intent to rely on Davis's counseling records at the final hearing. On July 16, 2007, Marie filed a motion *in limine* to exclude from evidence Davis's deposition testimony and counseling records. Marie contended that since Davis's opinions had been derived from conversations that she had with H.L.K., H.L.K.'s statements to Davis were inadmissible hearsay. In response, Young argued that the records were admissible because the statements had been made for purposes of medical treatment. The motion *in limine* was not resolved prior to the hearing.

During the evidentiary hearing, Marie objected to the admission of Davis's deposition testimony on relevancy grounds. The trial court agreed that the testimony was not relevant to a determination regarding Marie's fitness. However, it ruled that the deposition was admissible because of the limited purpose set forth at Kentucky Rule of Evidence (KRE) 803(4), which provides an exception to the hearsay rule for "statements for purposes of medical treatment or diagnosis."

On appeal, Marie contends that Davis's deposition testimony should not have been admitted into evidence since the deposition was taken without proper notice. She alleges that Young knew that at the time that she served the notice of deposition on April 26, 2007, it was highly unlikely that Marie would be able either to appear or to retain counsel to appear on her behalf. Under these circumstances, she argues that the trial court erred by permitting Young's use of the deposition testimony against her.

We are not persuaded that this argument has been properly preserved for our review. Regardless of the preservation problem, however, we have examined her argument. We disagree. Kentucky Rule of Civil Procedure (CR) 30.02(1) provides that "a party desiring to take the deposition of any person upon oral examination shall give

reasonable notice in writing to every other party to the action." CR 32.01 provides for the use of depositions at trial. The rule authorizes the use of "any part or all of a deposition, so far as admissible under the rules of evidence . . . against any party who was present or represented at the taking of the deposition or *who had reasonable notice thereof*. . . ." Marie received reasonable notice that Davis's deposition was to be taken in this matter. There is no evidence to support Marie's contention that Young deliberately scheduled Davis's deposition in a manner calculated to exclude Marie from participating.

Although Marie refers to the provisions of CR 30.02(2)(b) in support of her argument, these provisions apply only where a party demonstrates that he was served with notice according to the provisions of CR 30.02(2)(a).

> (a) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.
> (b) If a party shows that when he was served with notice under subparagraph (a) of this paragraph (2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

The provisions of CR 30.02(2)(b) become pertinent only when a plaintiff anticipates the examination of a witness who is about to go out of the state **and** will be unavailable for examination unless his deposition is taken before the expiration of the 30-day period following the service of the summons upon the defendant. Under these special circumstances, counsel is not required to obtain leave of court as normally required when the plaintiff seeks to take a deposition prior to the expiration of the thirty (30) days

following service of the summons. Since Young did not seek to take Davis's deposition until long after the expiration of the thirty-day period following service of the summons, leave of court was not required. Thus, the cited provisions are not applicable to the facts before us.

In a separate argument, Marie contends that Davis's deposition and counseling records should have been excluded because the opinions and statements contained in them were based on hearsay testimony elicited from the child. It is apparent from the argument that Marie objects only to H.L.K's negative portrayal of her as a mother. However, Davis candidly admitted (both in her deposition testimony and in her written assessment) that she had not met with Marie and that she did not feel comfortable making a professional judgment with respect to the relationship between H.L.K. and Marie. It is also clear that the trial court admitted the deposition testimony for its limited purpose concerning medical treatment and that it did not utilize the deposition in reaching a conclusion with respect to Marie's fitness as a parent. We find no error.

Next, Marie argues that the court erred by admitting the testimony of several witnesses who had no information regarding her relationship with H.L.K. While Marie does not identify these witnesses, she challenges the court's admission of their testimony tending to show that she: has had serious difficulty with her finances; has had a run-in with law enforcement officials and others with respect to her attempts to procure prescription medication; has suffered through profound emotional crises; and has experienced (at best) tumultuous relationships with her prior-born children.

We are not persuaded that this argument has been properly preserved for our review. Nevertheless, we have undertaken a careful review of the entirety of the trial court's record in this matter. We conclude that the court did not err by admitting the

challenged testimony. In this proceeding, the trial court was charged with deciding whether Marie was "suited to the trust" of raising her young daughter. The evidence came from a variety of witnesses – including Marie herself.

Without exception, the evidence focused on factors relevant to the court's determination with respect to the custody of H.L.K. The evidence pertaining to Marie was overwhelmingly and disturbingly negative. In reviewing the court's thorough findings of fact, we are persuaded that it carefully assessed the testimony and considered the evidence material to its conclusion. We find no error.

Next, Marie argues that the trial court erred in its application of the provisions of Kentucky Revised Statutes (KRS) 405.020. She contends that the law entitled her to custody. We disagree.

KRS 405.020(1) provides, in relevant part, as follows:

> The father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18). If either of the parents dies, **the survivor, if suited to the trust**, shall have the custody, nurture, and education of the children who are under the age of eighteen (18).

(Emphasis added.)

Our courts have recognized that a parent's being "suited to the trust" under KRS 405.020(1) is synonymous with the parent's being "fit." *See Rice v. Hatfield,* 638 S.W.2d 712 (Ky.App. 1982). Since a child's parents have a fundamental right to raise a child, the unfitness of a parent must be proven by clear and convincing evidence. *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). In order to defeat a parent's superior right to custody, the non-parent must prove that the parent has engaged in conduct akin to the kind of behavior that could result in the state's action to terminate parental rights. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

The type of evidence necessary to show parental unfitness has been described as follows:

> (1)[E]vidence of inflicting or allowing to be inflicted physical injury, emotional harm or sexual abuse; (2) moral delinquency; (3) abandonment; (4) emotional or mental illness; and (5) failure, for reasons other than poverty alone, to provide essential care for the children.

Davis v. Collinsworth, 771 S.W.2d 329, 330 (Ky. 1989). The Supreme Court of Kentucky has also held that the trial court must take into consideration the surviving parent's "moral fitness and habits, surroundings, age, financial ability, interest and affection for the child, and any circumstances which would be prejudicial to the best interest of the child, including the breaking up of her present relations. . . ." *Sumner v. Roark*, 836 S.W.2d 434 (Ky. App. 1992), *quoting Rallihan v. Motschmann,* 200 S.W. 358, 361-362 (Ky. 1918).

Marie contends that Young was required to prove each and every element identified by *Davis* as relevant to a determination of parental "unfitness." Since the court did not find that Marie had abandoned H.L.K., she argues that she is automatically entitled to custody. We disagree.

The provisions of KRS 625.090 authorize a circuit court to involuntarily terminate all parental rights when it finds by clear and convincing evidence that a child has been adjudged or found to be abused or neglected and that termination would be in the best interest of the child. Additionally, the court must find by clear and convincing evidence the existence of *one or more* of the following grounds:

> (a) That the parent has abandoned the child for a period of not less than ninety (90) days;
>
> (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury;

(c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm;

(d) That the parent has been convicted of a felony that involved the infliction of serious physical injury to any child;

(e) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child;

(f) That the parent has caused or allowed the child to be sexually abused or exploited;

(g) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child;

* * * * *

KRS 625.090(2).

The statutory provisions involving a court's **involuntary termination** of all parental rights do not require proof of each and every element that might indicate a parent's unfitness. Therefore, in a case involving a court's determination of fitness for physical **custody**, we cannot conclude that a court's scrutiny or analysis of the statutory factors must exceed that which is required for involuntary termination of parental rights. We conclude that the trial court did not err by determining that Marie was unfit to exercise physical custody of H.L.K. even though it did not find that Marie had abandoned the child.

Finally, Marie contends that the trial court erred by basing its findings on factors that she regards as peripheral to her immediate relationship with H.L.K; *i.e.*, her past pattern of conduct with her other children from other relationships. Again, we disagree.

The Supreme Court of Kentucky noted decades ago that in weighing the fitness of a parent, the trial court must consider "any circumstances which would be prejudicial to the best interest of the child." *Rallihan v. Motschmann,* 200 S.W. 358, 361-362 (Ky. 1918). That venerable holding has been reiterated and reinforced in numerous cases over the years. Our review of the trial court's findings, conclusions, and judgment indicates that the court carefully considered a variety of factors relevant to a determination of whether Marie was the fit and proper person to exercise custody of H.L.K. The evidence clearly and convincingly demonstrated that Marie was not suited to the task and the trust. The trial court did not err by determining that Marie is not fit to provide the necessary level of care and protection required by a young child and that there is no reasonable expectation that she will become a suitable custodian.

The judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

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