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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000929-ME

B.S. APPELLANT

APPEAL FROM SIMPSON CIRCUIT COURT
v. HONORABLE G. SIDNOR BRODERSON, JUDGE
ACTION NO. 11-J-00040-003

CABINET FOR HEALTH & FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, S.G., MOTHER, AND B.S., A MINOR CHILD APPELLEES

AND

NO. 2016-CA-00930-ME

S.G. APPELLANT

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ACTION NO. 11-J-00040-003

CABINET FOR HEALTH & FAMILY SERVICES, COMMONWEALTH OF KENTUCKY, B.S., FATHER, AND B.S, A MINOR CHILD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON, JUDGES.

CLAYTON, JUDGE: The issue in these dependency, neglect, or abuse cases is whether the trial court erred when it denied the father's motion to place their child with a relative rather than non-relative foster parents. The Appellants, who are the parents, argue that the trial court failed to properly apply the statutory and regulatory preference given for relative placement. The Cabinet responds with various alternative arguments. Having thoroughly reviewed the proceedings below and the applicable law, we find that the trial court did not err when it considered placing the child with a relative and ultimately placed the child with a non-relative, foster family after conducting a best-interests-of-the-child determination.

BACKGROUND

On April 19, 2011, Appellants' child ("Child") was born. Child was shortly thereafter removed from the Appellants' home and placed in the Cabinet's custody. Child initially lived with foster parents and eventually came to live with a family member ("Family Member") of the Appellants, who became Child's custodian. Child resided with Family Member for approximately three years.

On December 11, 2014, Family Member filed a Dependency, Neglect, and Abuse ("DNA") Petition in Simpson Family Court. She averred in her petition that she was unable to provide care for Child, and Child's parents were exposing

Child to drugs and otherwise endangering Child due to unsafe conditions. A hearing was held on December 17, 2014. The trial court accepted Family Member's stipulation of dependency. It entered an "Order Temporary Removal Hearing" and an "Order Adjudication Hearing" that placed the child in the Cabinet's custody. Child was then placed with non-relative foster parents.

A dispositional report was created on January 9, 2015, by the Cabinet. The report noted that Child was doing well in his foster home. It also noted that Appellants had been served regarding the temporary removal hearing but did not appear at the hearing. Furthermore, the Cabinet had not been able to make contact with Appellants, but if and when contact was made, the Cabinet would work toward reunification between Appellants and Child.

A disposition hearing was then held on January 14, 2015. The Appellants did not appear at the hearing. An "Order Disposition Hearing" was entered on the same date, ordering that Child remain committed with CHFS. The Court found reasonable efforts were made to prevent Child's removal from home, and Appellants were unable to provide a safe and stable home for Child. Child was ordered to remain in the Cabinet's custody. The clerk's notation shows a copy of the order was sent to Appellants.

On May 4, 2015, an Order was entered scheduling a hearing on May 20, 2015. The Order scheduled a hearing regarding possible waiver of reasonable efforts. The clerk's notation states copies were mailed to Appellants.

At the May 20, 2015, hearing, Mother did not appear as she was in jail. A guardian ad litem was appointed for Mother. Father filed an affidavit of indigency and was appointed counsel. The hearing was reset for June 10, 2015. On that date, a social worker with the Cabinet testified briefly regarding its request to waive reasonable efforts. It was noted that the Father had sporadic visits with Child. The Court then granted the waiver of reasonable efforts. Its written order found that the parents engaged in a pattern of conduct due to their alcohol or drug abuse for a period of not less than 90 days that rendered them incapable of caring for Child. A few weeks later, the Cabinet filed a petition to terminate parental rights.

At a status conference in September of 2015, Father put forward some relatives he believed should be considered by the Cabinet for placement. The Cabinet indicated it was performing home evaluations on each of the relatives. As the Cabinet had changed the goal from reunification to adoption, the trial court stated that before it proceeded with termination of parental rights, it would set another status conference after the relatives' home evaluations were completed.

In January of 2016, Father filed a motion for relative placement. That motion was heard on April 22, 2016. At the hearing, the parties each presented substantial evidence, including testimony from: the social worker; the Mother; the relative with whom Appellants desired Child to be placed; and a mental health expert. At the hearing's conclusion, the trial court orally ruled as follows:

> Relative placement is, uh, favored, uh, under the law and under Chapter 620. Um, at least, um, certainly and specifically by statute at the temporary removal hearing. And relatives are to be considered at other stages thereafter, but there is no preference by statute either at the adjudication stage if the child is adjudicated to be dependent, neglected, or abused. I think the court is to consider qualified relatives with respect to preference given. Same thing at disposition. The court, um, I believe is to consider relatives for placement, but there is no preference given at that point. The court is to do what is in the best interests of the child. The court is to consider, I think, by statute, is required to consider the wishes of the parents at those stages.

The trial court then weighed the evidence both in favor of relative placement and in favor of continuing the foster care placement. It noted that a request for relative placement was not made until, at earliest, seven months after the disposition order. Additionally, according to Appellants' mental health expert, children in general have no memory of what occurs prior to age four. Thus, Child would have memories that were only created in the past year, and all of that time was spent with the foster family. The court further noted that Child is well cared for and thriving in his foster home. While Child's relative is a "fine, fine" person, and the trial court would have "no concerns whatsoever" about the relative's home, the court was more concerned about the risk of harm to Child by uprooting him from the only stable home about which he has any memory.

The trial court believed Child could overcome any problems transitioning into the relative's house, "but there's no reason for [Child] to go

through that." Child is "strongly attached" to his foster parents, and Appellants' expert testified that there is a risk of harm to Child if he were to have to change households. "Changing and uprooting [Child] at this point would pose a risk of harm to him according to [the mental health expert]." If the parents had wanted a relative placement, they should have requested it long before they did. Thus, the trial court denied the motion for relative placement.

Father then filed a Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate, arguing that the trial court failed to apply the proper preference for relative placement. Following lengthy argument, the trial court denied the motion on that ground, noting that it permitted the relative to be evaluated, it considered the relative for placement, and it ultimately determined what was in the best interests of Child. Appellants timely filed notices of appeal.

ISSUE

Mother's brief presents a summary, two-paragraph argument concerning whether the trial court erred by denying the Father's motion for relative placement.[1] Father's brief raises the same issue as Mother's brief, albeit in more

[1] Mother's brief contains no preservation statement demonstrating how she preserved the issue for appeal. CR 76.12(4)(c)(v). Mother readily admits that it was Father who made the motion for relative placement. Nowhere in her brief does she state she joined the motion, nor have we found a written request for the same in the instant record. The notice of appeal that Mother filed states she is appealing the order denying Father's motion for relative placement and for CR 59.05 relief. Mother, then, is attempting to appeal an order regarding another party's motion. We find it questionable that Mother's appeal is appropriately before us, though we do note that a previous panel of this Court has allowed the non-moving parent to appeal an order denying relative placement. *D.W. v. Cabinet for Health and Family Services, Commonwealth of Kentucky*, 2016 WL 4151837 (Ky. App. Aug. 5, 2016). The Cabinet has not raised any issue regarding Mother's standing, nor has the Cabinet requested any sanctions for Mother's appellate briefing errors. Additionally, the orders being appealed are styled "IN RE: IN THE INTEREST OF: (CHILD)", and Mother has an interest in Child. Accordingly, as Mother is only piggy-backing off of

depth. He also makes a one-sentence argument that his due process rights under the 14th Amendment to the United States Constitution were violated when the trial court changed the goal to adoption. For his due process claim, he incorporates by reference an argument made in his brief in *B.S. v. Cabinet for Health and Family Services*, 2016-CA-000961-ME, which appeal was before a separate panel of this Court. The opinion in that appeal was rendered on September 8, 2017, and is currently pending on motion for discretionary review in the Kentucky Supreme Court. *See* 2017-SC-000553-DE. We will not address an issue that was decided by another panel of this Court. Thus, we turn to the only issue before us: did the trial court err by denying the motion for relative placement?

ANALYSIS

Pursuant to 922 Kentucky Administrative Rules (KAR) 1:140, which governs adoption permanency services and foster care, the Cabinet is to select a placement according to the least restrictive appropriate placement available as required by Kentucky Revised Statutes (KRS) 620.090(2). KRS 620.090 provides in relevant part:

> (1) If, after completion of the temporary removal hearing, the court finds there are reasonable grounds to believe the child is dependent, neglected or abused, the court shall issue an order for temporary removal and shall grant temporary custody to the cabinet or other appropriate person or agency. Preference shall be given to available and qualified relatives of the child considering the wishes

Father's issue, and we hold below that the trial court committed no error in denying Father's motion, we will refrain from dismissing Mother or imposing sanctions against her for her failure to follow appellate briefing rules.

> of the parent or other person exercising custodial control or supervision, if known. The order shall state the specific reasons for removal and show that alternative less restrictive placements and services have been considered. The court may recommend a placement for the child.
>
> (2) In placing a child under an order of temporary custody, the cabinet or its designee shall use the least restrictive appropriate placement available. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known. The child may also be placed in a facility or program operated or approved by the cabinet, including a foster home, or any other appropriate available placement. . . .

Significantly, though there is a "preference" for relative placement, placement with relatives is not mandated by this statutory and regulatory scheme. *P.W. v. Cabinet for Health and Family Services*, 417 S.W.3d 758, 761 (Ky. App. 2013) (citing *Baker v. Webb*, 127 S.W.3d 622, 625 (Ky. 2004)). Instead, the best-interests-of-the-child standard is the lodestar upon which a trial court bases its decision. "There can be no question that the overriding legislative policy of the pertinent statutes and regulations is consideration of the best interests of children." *P.W.*, 417 S.W.3d at 761 (citing *Baker*, 127 S.W.3d at 626).

Indeed, the cases interpreting the preference for relative placement do not view the "preference" as creating a *de facto* placement for children in relatives' homes. The cases imply that the "preference" permits relatives, in addition to any

foster care parent or other such placement that the Cabinet deems is in the best interests of the child, to be considered by the trial court for placement.

For example, the Kentucky Supreme Court in *Baker* used the "preference" to permit a relative to intervene in an adoption proceeding. Notably, the Court did not require the circuit court to allow the relative to adopt the child. The Court interpreted the statutory and regulatory "preference" (the Court also referred to it as a "priority") for relatives of a child as "vest[ing the relatives] with a sufficient, cognizable legal interest in the adoption proceeding[.]" 127 S.W.3d at 625. "Although the statute and regulations *do not mandate* that the Cabinet choose a relative placement over other options, they at the very least, require that the Cabinet consider relatives in its determination of proper placement." *Id*. (emphasis added).

The Court concluded that under the applicable law the relatives should be evaluated by the Cabinet so the Cabinet can "make an informed recommendation to the circuit court as to the best placement option for the child." *Id*. at 626 (footnote omitted). Then, in the adoption context, "[t]he circuit court should accept the Cabinet's recommendation for placement unless it finds that recommendation to be arbitrary or unreasonable." *Id*. (citing *Commonwealth, Dept. of Child Welfare v. Jarboe*, 464 S.W.2d 287, 290 (Ky. 1971)).

Applying *Baker* to a fact pattern similar to the instant case, where a trial court denied a motion for placement with relatives, a panel of this Court found no error because the trial court considered placement with the relatives but

ultimately used the best-interests-of-the-child standard to place the child with non-relatives:

> There can be no question that the overriding legislative policy of the pertinent statutes and regulations is consideration of the best interests of children. *See Baker*, 127 S.W.3d at 626. P.W. made a conscious decision to place her children with strangers rather than family at the inception of the proceedings in 2011. By the time the Cabinet's goal changed to adoption in late 2012, those strangers had become family.
>
> In fact, as the family court pointed out, the foster parents were the only parents A.R.P had ever known.
>
> We must agree with the family court that while relative placement is certainly preferred, at some point the best interests of the children outweigh that factor. Such is especially true in this case given the tender age of A.R.P. and A.L.P. To remove them from the only home that essentially either had known and place them with the [relatives], with whom they had had little contact, was simply not in their best interest.
>
> Accordingly, we believe that the family court's decision to deny placement with the [relatives] was proper.

P.W., 417 S.W.3d at 761 (paragraph breaks added for readability).

Thus, case law indicates a trial court must consider the "preference" for relative placement by allowing the relatives to intervene and be evaluated by the Cabinet for potential placement. Beyond that, the trial court's placement decision must be guided by the best interests of the child.

Under this established jurisprudence for relative placement, we conduct an appellate review of the trial court's order denying relative placement for clear error. *Cf. L.D. v. J.H.*, 350 S.W.3d 828, 829-30 (Ky. App. 2011) (citing CR 52.01). We give "due regard" to the trial court's judgment of witness credibility, CR 52.01, and we review whether the court's findings are supported by substantial evidence, *B.C. v. B.T.*, 182 S.W.3d 213, 219 (Ky. App. 2005). If the factual findings are correct and the correct law was applied, "a family court's ultimate decision regarding custody will not be disturbed, absent an abuse of discretion." *Id*.

Here, the trial court applied the correct law. To apply the "preference" for relative placement, the trial court needed to allow the relatives to be evaluated by the Cabinet for placement, and it needed to consider those relatives that were qualified for placement. The trial court did so here. It continued the hearing multiple times so the evaluations could be completed. It permitted the qualified relative to testify at the hearing. And the trial court also considered that the parents wanted Child to be placed with the relative. Though the trial court stated it was applying no preference for relative placement, its actions were otherwise. Thus, we find no clear error or abuse of discretion in how the trial court interpreted and applied the preference for relative placement.

Furthermore, we find no clear error or abuse of discretion in the trial court's best-interests-of-the-child analysis. The Father argues that the trial court both misapplied facts and relied upon facts not in evidence in making its best-

interests-of-the-child determination. We discern no such error. The trial court's facts regarding the child's attachment to his foster family had a factual basis. Fact finders are permitted to draw reasonable inferences from the evidence; they are not, however, permitted to perform "mere guesswork" based on inadequate information, conjecture, or speculation. *See, e.g., Toler v. Süd-Chemie, Inc.*, 458 S.W.3d 276, 287 (Ky. 2014). Here, Father's own expert testified about how children form attachments to foster parents, especially children that are the same age as Child. The expert also testified that removing Child from the foster home may harm Child. Furthermore, the Cabinet's evaluations demonstrated that Child was doing well in his foster placement, and changing Child's placement to a relative would potentially harm Child.

As the trial court applied the correct law and based its best-interests-of-the-child determination on evidence of substance, we hold that the trial court committed no clear error, nor did it abuse its discretion when it denied the motion for relative placement. Accordingly, we AFFIRM the order denying relative placement.

ALL CONCUR.

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