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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000092-ME

S.M.B.

APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NOS. 15-CI-00006

N.L.B.

APPELLEE

AND

2017-CA-000093-ME

S.M.B.

APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NOS. 11-J-00066-001

N.L.B.

APPELLEE

AND

2017-CA-000094-ME

S.M.B.

APPELLANT

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NOS. 11-J-00067-001

v.

N.L.B.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

STUMBO, JUDGE: S.M.B.¹ (hereinafter referred to as Mother) appeals from orders of the Lewis Circuit Court which denied her custody of her three children.

Finding no error, we affirm.

Mother and N.L.B. (hereinafter referred to as Father) are the biological parents of three children (hereinafter referred to as Child 1, Child 2, and Child 3). In 2012, permanent custody of Child 1 and Child 2 was given to the paternal grandparents due to dependency, neglect, and abuse (DNA) actions brought in juvenile court. There was no appeal from those court orders. In 2015, the court granted Father custody of Child 3 due to a domestic violence incident. Also in 2015, Father petitioned for the dissolution of his marriage to Mother. The only issue for the court's consideration was the custody of Child 3. The court requested that the Cabinet for Health and Family Services conduct an investigation into the homes of Mother and Father and file a report as to its recommendation of

¹ This case involves minor children; therefore, we will not identify the parties by their names.

custody. After the investigation, the court would consider the custody issue upon motion of the parties.

In May of 2016, after all Cabinet reports had been submitted, Mother moved for custody of Child 3. She later moved for custody of Child 1 and Child 2. The paternal grandparents then joined the action and the juvenile cases were consolidated into the divorce and custody action for the purposes of determining custody of all three children.

On December 1, 2016, the trial court entered an order denying Mother's motions for custody. The court found that it would be in the best interests of the children for their current custody arrangements to continue. Child 1 and Child 2 remained in the custody of the grandparents and Child 3 remained in the custody of Father. Mother was granted regular visitation with all three children. This appeal followed.

Mother's only argument on appeal is that the trial court failed to find that she was an unfit parent; therefore, she should be granted custody of the children. Mother cites to the cases of *Davis v. Collinsworth*, 771 S.W.2d 329 (Ky. 1989), *McNames v. Corum*, 683 S.W.2d 246 (Ky. 1985), and *Chandler v. Chandler*, 535 S.W.2d 71 (Ky. 1975), in support of her position. These cases hold that before a parent can lose custody of his or her children to a third-party, there must be a finding that the parent is unfit.

The trial court based its custody decision on Kentucky Revised Statute (KRS) 403.270 and the best interests of the children. This was proper. Mother had

previously been found unfit when Child 1 and Child 2 were placed in the permanent custody of the grandparents due to the juvenile DNA actions. Father was granted custody of Child 3 by the court. The issue of unfitness set forth in the cases cited by Mother does not apply as to Child 3 because it was a parent, not a third-party, who was granted custody.

Even though Mother's only argument revolved around her fitness to parent, we will still examine the best interests of the children issue as it was the reason set forth by the trial court when it overruled Mother's motion for custody.

KRS 403.270 states:

(1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, "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. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

(b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.822, and 405.020.

(2) 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. 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 custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

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

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

(i) 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.

In the case at hand, although not expressly stated by the trial court, the grandparents are the de facto custodians of Child 1 and Child 2. They meet all the

requirements set forth in KRS 403.270(1) and were declared permanent custodians by the court in the DNA actions. The court found that the grandparents were necessary parties and ordered them joined into the case. No appeal was made from the juvenile actions and Mother makes no argument that the grandparents were improperly joined.

The trial court held a hearing during which multiple people testified. Evidence was also entered which showed that the Cabinet had no concerns with placing the children with either parent. The court ultimately decided that the best interests of the children required that the children remain with their current custodians. The court found that the children were doing well in their current environment and that the children have resided most of their lives with their current custodians. The court also did not want to uproot the children from their lives in Lewis County, Kentucky, in order to move them to Nicholasville, Kentucky, where Mother currently resides.

Kentucky Rules of Civil Procedure (CR) 52.01 directs that “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” A judgment “supported by substantial evidence” is not “clearly erroneous.” *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). Substantial evidence is defined as “evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable

men.” *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

In reviewing the trial court’s decision, we must determine whether it abused its discretion by awarding custody of the children to [the parent at issue]. An abuse of discretion occurs when a trial court enters a decision that is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We will not substitute our own findings of fact unless those of the trial court are “clearly erroneous.” *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Further, with regard to custody matters, “the test is not whether we would have decided differently, but whether the findings of the trial judge were clearly erroneous or he abused his discretion.” *Eviston v. Eviston*, 507 S.W.2d 153, 153 (Ky. 1974); *see also Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982).

Miller v. Harris, 320 S.W.3d 138, 141 (Ky. App. 2010).

In the case at hand, it is clear that the trial court considered the evidence presented and found that the best interests of the children required custody to remain with Father and the grandparents. The findings made by the court were based on substantial evidence and were not clearly erroneous. The court did not abuse its discretion when it overruled Mother’s motion for custody.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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