RENDERED: DECEMBER 19, 2024
TO BE PUBLISHED

Supreme Court of Kentucky

2024-SC-0137-DGE

DEBBIE APPLEMAN; NICK APPLEMAN; AND RYAN ROBERTS — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2023-CA-0443
BRACKEN CIRCUIT COURT NO. 21-CI-00072

BRIANA GEBELL — APPELLEE

OPINION OF THE COURT BY JUSTICE NICKELL

AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

We granted discretionary review to determine whether the Court of Appeals properly reversed the Bracken Circuit Court's finding that Briana Gebell ("Mother") waived her superior right to custody of her minor child. Having carefully reviewed the record, law, and briefs, we affirm the decision of the Court of Appeals in part, reverse in part, and remand for additional proceedings.

FACTS AND PROCEDURAL HISTORY

The material facts are largely undisputed. Ryan Roberts ("Father") and Mother are the biological parents of A.G.R.[1] ("Child"), who was born in January

[1] We use initials to protect the privacy of this minor individual. *See* Kentucky Rules of Appellate Procedure (RAP) 31(B).

2016. In August 2016, the Cabinet for Health and Family Services filed a dependency, neglect, and abuse ("DNA") petition against Father and Mother in Bracken District Court. The Cabinet's allegations centered on Mother's mental health problems and pending criminal charges[2] as well as Father's substance abuse issues.

The district court placed Child in the temporary custody of Debbie and Nick Appleman. The Applemans are Father's paternal cousins, however, they raised him in place of his own parents.

Following an adjudication hearing in December 2016, the district court made a finding of dependency and ordered Child to remain in the Applemans' temporary custody. The Cabinet provided case plans to Father and Mother.

The district court eventually returned Child to Father's custody while Mother underwent in-patient treatment at a mental health facility. However, the Cabinet filed a second DNA petition against Father[3] in 2017 based on his abuse of alcohol. He stipulated to the abuse or neglect of Child, and the district court returned Child to the temporary custody of the Applemans as Mother continued to receive in-patient treatment.

Subsequently, upon the Cabinet's recommendation, the district court "reluctantly" returned Child to Father's custody. However, in 2018, the

[2] Mother was charged with burglary with a weapon (knife) and was found not guilty by reason of insanity.

[3] The second DNA petition was identified as trailer 002 to the original 2016 petition against both Father and Mother.

Cabinet filed a third DNA petition against Father[4] based on his arrest for aggravated DUI, wanton endangerment and related charges. Again, Father stipulated to abuse or neglect, and the district court placed Child in the temporary custody of the Applemans. On July 23, 2019, the district court entered a permanency order granting full custody of Child to the Applemans on the basis of "father's lack of compliance[,]" presumably referring to the court's prior DNA orders. The district court's order further permitted the "permanent custodians to control visitation between child's father, Ryan Roberts."

In June 2021, Mother filed a motion in the circuit court seeking to regain custody of Child, or, alternatively, to obtain visitation. The circuit court granted Mother supervised visitation every other weekend. In April 2022, Mother filed a motion for unsupervised visitation. The Applemans did not object to this request, and the circuit court granted Mother's motion.

On December 5, 2022, Mother filed a motion for sole custody of Child. The Applemans responded in opposition. Following a hearing, the circuit court denied Mother's request for sole custody upon a finding that "being absent and/or non-involved for the majority of the minor child's life thus far has waived her superior right to custody" and that the Applemans' continued custody was in the best interest of the child.

[4] The third DNA petition was identified as trailer 003 to the original 2016 petition.

The Court of Appeals reversed the circuit court and directed it to award custody to Mother upon a conclusion that the record did not support the finding of waiver.[5] We granted discretionary review.

LAW AND ANALYSIS

The Applemans argue that the permanency order in the DNA proceeding granted them equal standing to Mother in any subsequent custody dispute. Thus, they contend the circuit court properly denied Mother's petition for custody under the modification standard set forth in KRS[6] 403.340 without regard to her parental fitness or waiver of superior rights. We disagree.

The Applemans obtained permanent custody of Child under KRS 620.027 which authorizes a district court in a DNA proceeding

> 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.

Generally, a permanent custody order in a DNA proceeding will be tantamount to a "custody decree" such that the modification standard under KRS 403.340 will control when a natural parent seeks to regain custody from a third-party non-parent. *London v. Collins*, 242 S.W.3d 351, 356 (Ky. App.

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[5] The Applemans did not participate in the proceedings before the Court of Appeals.

[6] Kentucky Revised Statutes.

2007). However, if a permanency order does not comply with the requirements of KRS 403.270, then the trial court must treat a parent's subsequent attempt to regain custody "as if there had been no prior custody determination." *Id.* In the present matter, we cannot conclude the dictates of KRS 403.270(2) were followed in the prior DNA proceeding relative to Mother's superior right to custody.

KRS 403.270(2) provides that custody shall be determined "in accordance with the best interests of the child and equal consideration shall be given to each parent and to any *de facto* custodian." It is undisputed that the Applemans have not been declared Child's *de facto* custodians. Instead, as the Court of Appeals correctly recognized, the Applemans' legal status stems from KRS 403.800(13) which defines a "person acting as a parent" as:

> a person, other than a parent, who:
>
> > (a) Has physical custody of the child or has had physical custody for a period of six (6) consecutive months, including any temporary absence, within one (1) year immediately before the commencement of a child custody proceeding; and
> >
> > (b) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state[.]

In *Mullins v. Picklesimer*, 317 S.W.3d 569, 574-75 (Ky. 2010), we held that a non-parent who qualifies as a person acting as parent has standing to seek custody under KRS 403.822. However, unlike *de facto* custodian status, a person acting as a parent does not gain equal standing to a biological parent. *Id.* at 578; *see also Morton v. Tipton*, 569 S.W.3d 388, 397 (Ky. 2019) ("[T]he

superior rights of a parent are not bestowed on a non-parent custodian, regardless of the custodian's relationship to the child or the length of their custodial relationship."). We further explained:

> When a non-parent does not meet the statutory standard of de facto custodian in KRS 403.270, the non-parent pursuing custody must prove either of the following two exceptions to a parent's superior right or entitlement to custody: (1) that the parent is shown by clear and convincing evidence to be an unfit custodian, or (2) that the parent has waived his or her superior right to custody by clear and convincing evidence.

Id. In a custody dispute between a non-parent and a parent, a court can only determine custody in accordance with the child's best interest *after* these threshold requirements have been satisfied. *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003).

Because the district court did not make any specific findings in the DNA proceeding relative to Mother's unfitness, waiver of her superior rights, or consent to permanent placement, the permanency order in favor of the Applemans did not qualify as a custody decree under KRS Chapter 403 or otherwise confer equal standing with Mother. *London*, 242 S.W.3d at 356. Thus, the Court of Appeals properly determined that the Applemans were required to demonstrate waiver or unfitness to defeat Mother's superior right to custody.

However, this conclusion does not necessarily entitle Mother to immediate custody. The Court of Appeals directed the circuit court to award custody to Mother because the evidence did not support a finding of waiver and that it was precluded from remanding for additional proceedings on the issue of

Mother's fitness pursuant to *Vinson v. Sorrell*, 136 S.W.3d 465 (Ky. 2004). Under the present circumstances, however, we conclude additional proceedings are required.

Vinson involved a custody dispute between maternal grandparents and the biological father. *Id.* at 466. The grandparents sought custody based upon an allegation that the father had waived his superior right to custody and was otherwise unfit. *Id.* The trial court awarded custody to the grandparents on a finding of waiver but did not make any findings as to the father's unfitness. *Id.* at 466-67. The Court of Appeals reversed on the waiver issue and directed the trial court to award custody to the father. *Id.* at 467. On discretionary review, we affirmed the Court of Appeals and refused to remand for additional findings on the father's unfitness explaining:

> As the trial court did not find [the father] to be unfit, we may assume that there was insufficient evidence of unfitness or that the [grandparents] abandoned the claim. In either event, whether [the father] was unfit was not preserved for appellate review. As such, there is no basis to remand the question of unfitness to the trial court.

Id. at 471.

We perceive the present appeal to be distinguishable from *Vinson* because the circuit court below applied the inappropriate modification standard from the outset.[7] Thus, the circuit court did not squarely confront

[7] Because *Vinson* is distinguishable from the present matter, we need not revisit its continuing validity here. We further reject Mother's contention as to the Appleman's failure to preserve the issues of waiver and unfitness.

waiver and unfitness as threshold issues under the correct legal standard established by our precedents in *Mullins* and *Asente*.

In *Moore v. Moore*, 626 S.W.3d 535, 540 (Ky. 2021), we recently held it is error for an appellate court, in a custody matter, to focus on "whether the trial court's findings of fact were supported by substantial evidence while not considering whether those factual findings were sufficient" under the applicable legal standard. Here, the circuit court's finding of waiver was clearly insufficient as a matter of law because it did not address the voluntariness of Mother's separation from Child. *See Asente*, 110 S.W.3d at 358.

Similarly, the lack of any findings as to Mother's fitness resulted from the circuit court's application of the incorrect standard as opposed to abandonment of the issue or a lack of substantial evidence in the record. Such failure to make appropriate findings under the proper standard forecloses meaningful appellate review and requires remand for additional proceedings. *Moore*, 626 S.W.3d at 540.

CONCLUSION

For the foregoing reasons, we affirm the Court of Appeals' determination that the Applemans were required to demonstrate Mother's unfitness or waiver because the prior permanency order did not constitute a "custody decree" for failure to comply with KRS 403.270. However, we reverse the Court of Appeals' holding that Mother was entitled to immediate custody. Therefore, we affirm in part, reverse in part, and remand to the trial court for further proceedings with

directions to apply the appropriate legal standard in determining entitlement to custody.

All sitting. VanMeter, C.J.; Conley, and Lambert, JJ., concur. Keller, J., dissents by separate opinion in which Bisig and Thompson, JJ., join.

KELLER, J., DISSENTING: Having reviewed the circuit court's order and judgment in this matter, I hold that the circuit court sufficiently articulated factors to support Mother's waiver of her superior right to custody and would, therefore, reverse the Court of Appeals and reinstate the circuit court's judgment and order.

Bisig and Thompson, JJ., join.

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