

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002071-ME

F. N.

APPELLANT

v.

APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 04-J-00720-002

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY
SERVICES AND B. N.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, HOWARD¹ AND LAMBERT, JUDGES.

HOWARD, JUDGE: This appeal is from an order of the Hardin Family Court, in a dependency action brought pursuant to KRS Chapter 620, granting joint custody of A. N., now nine years old, to F. N. and B. N., her natural mother and father, respectively, with primary residential custody awarded to B. N., the father. The appellant argues that the

¹ Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

Family Court lacked jurisdiction to enter such order and that the court's findings of fact were not supported by substantial evidence. Finding no error, we affirm.

The background of this case is as follows. On May 24, 2005, the Cabinet for Health and Family Services (hereinafter the Cabinet) filed a Petition in the Hardin Family Court, alleging that A. N., then seven years old, was a dependent, neglected or abused child and seeking an emergency order removing her from the custody of her mother, F. N. Specifically, the petition alleged that the Cabinet “has concerns of mother's state of mind regarding this child;” that she had “threatened the safety of the child;” and that she had “stabbed child in the back with a fork,” leaving marks. An order was entered that same date, granting emergency custody to the Cabinet.

A temporary removal hearing was held on June 2, 2005, at which time the family court awarded temporary custody to the cabinet and ordered a psychological evaluation of both F. N. and A. N.²

On July 6, 2005, the father, B. N., filed a motion seeking temporary custody of A. N. and on July 16, 2005, the court entered an order granting that motion. A. N. then went to live with her father in Alabama.

An adjudication hearing was held on October 12, 2005, at which time the family court found the allegations of the petition to be proven by a preponderance of the

² While we have the complete written record in this case, neither party designated the video record of the June 2, 2005, temporary removal hearing, the October 12, 2005, adjudication hearing, or the February 1, 2006, disposition hearing, for inclusion in the record on appeal. Therefore, those hearings are not included in our record. We are required to, and do, assume that the evidence at those hearings supported the actions taken by the family court. *Hamblin v. Johnson*, 254 S.W.2d 76 (Ky. 1953).

evidence and found A. N. to be dependent, “due to the mother's mental and emotional condition (state of mind) as regards [sic] to her child, [A. N.], therein.” The court did not specifically find A. N. to be abused or neglected. A disposition hearing was scheduled and psychological evaluations and counseling again ordered as to both the mother and the child.

On January 11, 2006, a psychological report was filed with regard to F. N., the mother. That report indicates that F. N. reported to the psychologist that she had a “history of severe physical abuse by her parents.” She reported that her mother “kicked my teeth in,”³ that her father physically abused her, and that her brother sexually abused her. She was removed from her home as a teenager, spent several months in a hospital, and was eventually placed in a home for abused children. F. N. also reported that she has a history of “choosing partners who become abusive,” and that both she and A. N. had been physically abused by her partners. She denied that she had ever abused A. N., and accused A. N. of “lies” for making such accusations. She told her counselor that she was in treatment, “because my daughter keeps lying on me and they think I'm depressed and need counseling.” She attended three counseling sessions, then quit. The report recommended that she have further treatment, but made no recommendation as to any possible reunification of F. N. and A. N.⁴

³ While this case was pending, on November 28, 2005, F. N. sought and obtained an emergency protective order against her mother, based on a new incident of physical assault.

⁴ A psychological report was also prepared on A. N., but was not filed with the court until February 13, 2006, after the disposition hearing in this case. This report diagnosed the child as suffering from an “adjustment disorder, with anxiety,” and recommended a “very short course of

On January 23, 2006, the Cabinet filed its dispositional report, recommending that A. N. remain with her father.

The disposition hearing was held on February 1, 2006, and the family court returned A. N. to her mother, conditioned on F. N. obtaining another psychological assessment for both her and A. N. and following through with all recommended counseling. The cabinet was directed to keep an open file to monitor her progress.

On May 25, 2006, F. N. filed a motion to suspend B. N.'s visitation with A. N., alleging that he had whipped A. N. with a belt. An order was entered June 7, 2006, temporarily suspending B. N.'s visitation.

On August 23, 2006, the Cabinet filed a motion, asking the family court “to hold a review for the juvenile, [A. N.], in regards to custody.” With that motion was filed an affidavit, signed by Lauren Wells, an employee of the cabinet, alleging that A. N. had reported to school personnel that her mother hit her with a belt and allowed her sister to do so, that her mother suffocated her with a pillow, called her “the 'B' word,” and threatened her if she reported any of this to the Cabinet. A letter was attached from a school employee reporting that after A. N. reported these things to the school personnel, she was found hiding under a table in the fetal position, begging, “don't tell my mommy.”

A hearing was held on August 30, 2006, at which time the social worker, Ms. Wells, testified that A. N. had told her essentially the same things she had told school

individual psychotherapy,” but indicated that she was doing well, living at that time with her father in Alabama.

officials, specifically that F. N. hit her with a belt and allowed A. N.'s sister to do so; that F. N. suffocated her with a pillow; that she called her “the 'B' word;” and that F. N. threatened that if A. N. reported any of this and the Cabinet came to the house, she would “hurt” her, or “never talk to you again.” A. N. begged her, “Please don't tell my mommy. I'm going to be in big trouble.” Ms. Wells also verified that school employees had reported witnessing F. N. yelling angrily at A. N. when picking her up from school, and that on the day she reported these things, A. N. was twice found under a table in the fetal position, begging, “don't tell my mommy.” Ms. Wells testified, from her observation, that A. N. was clearly frightened, even “terrified,” of her mother. She also noted that A. N. had twice previously been removed from her mother's home, due to “behaviors between the mother and child.”

Both F. N. and B. N. testified, as did other witnesses for both sides. The court was asked by counsel for F. N. to interview A. N., but declined to do so. Both Ms. Wells and the Guardian ad Litem, appointed by the court to represent A. N.'s interests, recommended that custody be transferred to the father.⁵

Following the hearing, the Family Court orally amended the custody to joint custody between B. N. and F. N., with the father, B. N., as primary custodian. A written order to this effect was entered September 5, 2006. This order also provided that all parties were to cooperate with the Cabinet; that the mother and child were to continue in

⁵ The Guardian ad Litem has also joined in the brief filed by the Cabinet in this Court, asking that the order of the family court be affirmed.

counseling, with the father to follow the counselor's recommendations; and that there was to be no corporal punishment of the child. This order was inadvertently given the wrong case number,⁶ so an amended order was entered on October 2, 2006, containing the same substantive provisions. F. N. brings this appeal from both of these orders.

F. N. raises two issues on this appeal, that the Hardin Family Court lacked subject matter jurisdiction to enter its custody order and that the evidence at the September 6, 2006, hearing was insufficient to support the findings of fact made by the family court.

It is clear that the family court did have subject matter jurisdiction over this matter. KRS 23A.100(1) provides,

As a division of Circuit Court with general jurisdiction pursuant to Section 112(6) of the Constitution of Kentucky, a family court division of Circuit Court shall retain jurisdiction in the following cases:

- (a) Dissolution of marriage;
- (b) Child custody; . . .

Furthermore, this dependency action was brought pursuant to KRS Chapter 620. KRS 620.027 specifically provides that either the district court or the circuit court (including family court) “has jurisdiction . . .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”

⁶ It was given the number of a previous dependency case involving A. N. and these same parties.

KRS 620.140(1) further provides that,

In determining the disposition of all cases brought on behalf of dependent, neglected, or abused children, the juvenile session of the District Court [or now the family court in counties where those courts have been established], in the best interest of the child, shall have, but shall not be limited to, the following dispositional alternatives: . . .

(c) Removal of the child to the custody of an adult relative, . . .

Neither does this jurisdiction end when a disposition order is entered. KRS 620.150 allows the court to make further orders regarding visitation. Similarly, KRS 620.230 and 620.240 require the Cabinet to file case permanency plans and case progress reports with the court hearing a dependency action, and authorize that court to oversee such reports. Included among the subsequent actions a court is authorized to take, where appropriate, is a change of placement or custody. KRS 620.240(8) and (9). In fact, F. N. acknowledged the continuing jurisdiction of the family court over this case, after the entry of the disposition order, by filing her May 25, 2006, motion to suspend B. N.'s visitation.

It appears that what F. N. really intends to argue is not that the family court lacked jurisdiction, but that the motion to review the custody arrangement failed to comply with KRS 403.340, which sets certain substantive and procedural requirements for the modification of a “custody decree.” However, it is clear that the disposition order of February 1, 2006, was not a “custody decree,” as that term is used in KRS 403.340. The order made no reference to KRS 403.270(2), or any of the factors enumerated therein, which must be considered for a determination of custody under that section. It

was not a permanency order, pursuant to KRS 620.027.⁷ Rather, we believe that order was simply what it said it was; a disposition order in a dependency case, subject to review and modification by the court entering it at any time, as might be appropriate.

F. N. also argues that the findings of fact made by the family court were clearly erroneous, in that they were not supported by substantial evidence, as required by CR 52.01. That rule does indeed state, in relevant part,

Findings 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.

We agree with the appellant that implicit in this statement is the opposite assertion, that if findings of fact are clearly erroneous, they should be set aside on appeal. Findings of fact are “clearly erroneous” if they are not supported by substantial evidence. *Black Motor Co. v. Greene*, 385 S.W.2d 954 (Ky. 1964); *D. H. Overmyer Warehouse Co. v. Smith*, 451 S.W.2d 668 (Ky. 1970).

In fact, the written disposition order in this case contains no specific findings of fact. The family court orally made two findings following the August 30, 2006, hearing: that A. N.'s “best interests” were served by awarding primary residential custody to her father and that remaining with her mother “could seriously endanger [A.N.'s] mental, emotional and psychological well-being.” We have reviewed the video record of the September 5, 2006, hearing and are persuaded that the evidence at that

⁷ We believe that in order to be a “custody decree,” for purposes of KRS 403.340, a custody order must be based on the criteria set out in KRS 403.270(2). A permanency order issued pursuant to KRS 620.027 may be such a “custody decree,” if it is based on those criteria. It is doubtful that a disposition order would often rise to that level.

hearing, specifically the testimony of the social worker, Lauren Wells, as set out above, clearly constituted “substantial evidence” to support those findings. If F. N.'s complaint is that the court failed to make more specific findings of fact, or failed to make those findings in writing, that issue should have been raised in the trial court by a Rule 52.02 motion, and was not. It therefore cannot be reviewed by this Court, pursuant to CR 52.04. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982); *Crain v. Dean*, 741 S.W.2d 655 (Ky. 1987).

The September 6, 2006, and October 2, 2006, custody orders of the Hardin Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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