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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001811-ME

ANNETTE BOSTON APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 14-CI-00146

DEBRA TRUSTY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Annette Boston, an intervening petitioner, in this custody matter, appeals from both the September 3, 2015 findings of fact, conclusions of law, and final custody order of the Caldwell Circuit Court and also its November 10, 2015 order denying her motion for additional findings of fact and an amended

judgment. Having carefully considered the record and the legal arguments of the parties, we affirm.

BACKGROUND

This matter is a custody dispute between the maternal grandmother, Debra Trusty, and the maternal aunt, Annette Boston. Both parties are seeking custody of the five children of Karol Boston who died of cancer on August 16, 2014. The children are D.C. (D.O.B. 2/22/01), B.C. (D.O.B. 3/15/02), A.M. (D.O.B. 6/15/04), M.M. (D.O.B. 11/10/05), and S.F. (D.O.B. 3/15/08).[1] Reggie Cavanaugh is the biological father of D.C. and B.C.; Demetrius Steppe is the biological father of A.M.; Ronald Ivory[2] is the biological father of M.M.; and, James Fairrow is the biological father of S.F.

A petition for custody of the children was filed on August 22, 2014, by Debra and her husband, Rocky Trusty. Rocky is the step-grandfather of the children. After the filing of the petition, the respective biological fathers of the children were served notice of the pending action through certified mail or a warning order attorney. Six months later, on March 2, 2015, Annette filed a motion to intervene in the custody action. The trial court granted the motion, and on April 17, 2015, she filed a petition for custody of the children. Debra challenged Annette's standing to make a custody claim. In addition, Annette made

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[1] Throughout the record, the children's names are spelled differently and the children's birth dates are listed differently. While acknowledging the discrepancies, the names and birth dates will be consistent in this opinion and based on the trial court order. We have chosen not to identify the children by their complete names.

[2] Originally, listed as Ronald Jackson.

a motion for visitation, and the parties agreed that she would have visitation with the children every-other-weekend.

A bench trial was held on July 2, 2015. At the beginning of the trial, Annette made a motion for the trial court judge to interview the children and renewed this motion at the conclusion of the hearing. The trial court denied the motion. However, Annette did not make a motion for a psychological evaluation of the children or the appointment of a guardian *ad litem* ("GAL"). This issue was raised for the first time on appeal.

At the trial, Debra, Rocky, Annette, and Judy Foster, the mother of James Fairrow, testified. In addition, two fathers, Ronald Ivory and James Fairrow testified by phone. During Debra's testimony she maintained that during Karol's illness, both the children and Karol resided with her so that she could care for them. According to Debra, the children have lived in the Trusty home continuously since October 2012. Nonetheless, Annette maintains that after Karol's death, the children lived with her. Debra disputes this assertion and Annette did not provide any evidence to support the claim. During the trial, Annette discussed the apartment she currently resides in and its appropriateness for the children and acknowledged the children's visitation. Nonetheless, she did not establish that the children lived with her.

The fathers are not pursuing custody of the children. In fact, the fathers do not have a relationship with the children nor do they provide financial support. Reggie Cavanaugh, Demetrius Steppe, and James Fairrow each filed an

“entry of appearance” prior to the trial. Ronald Ivory was served through a warning order attorney but under the name “Jackson.” He testified telephonically at the hearing and acknowledge that he was waiving his custodial rights. Additionally, Ronald and James, who also testified by telephone, indicated that they would prefer Annette be given custody of the children.

The trial court found by clear and convincing evidence that all the biological fathers knowingly, intelligently, and voluntarily waived the superior rights to custody as the biological fathers of the respective child or children. The trial court then found by clear and convincing evidence that Debra and Rocky had been the primary caregivers and provided financial support for the five children and that the children have lived with them in excess of one year. Therefore, the trial court determined that Debra and Rocky are *de facto* custodians as to any claims for custody made by the fathers.

The trial court then addressed the relevant factors in Kentucky Revised Statues (KRS) 403.270(2) to evaluate the custody dispute between the parties, and after doing so, determined that it was in the best interest of the children for Debra and Rocky to be the sole custodians of the children.

In the court’s Conclusion of Law, it addressed the issue of standing. The court reasoned that this custody contest was between two sets of nonparents, and the best interest test was applicable. Since the three fathers entered appearances of consent and waiver, and the fourth father, Ronald Ivory, made an oral waiver under oath in favor of Annette, the trial court concluded, based on the

legal concept of waiver, that she had standing to seek custody in this case. Notwithstanding the decision that Annette had standing, the trial court ordered that Debra and Rocky be granted sole custody of the five children. Further, the trial court declined to interview the children under the trial court's discretion as authorized in KRS 403.290(1).

Annette then made a motion for additional findings of fact and an amended judgment, which the trial court denied on November 10, 2015. She now appeals from the original judgment and the denial of the motion for additional findings.

STANDARD OF REVIEW

Under Kentucky Rules of Civil Procedure (CR) 52.01, a court's findings of fact shall not be set aside unless clearly erroneous. However, the trial court's determination that Annette had standing was a conclusion of law, and accordingly, our review of this conclusion is *de novo*. *Carpenter-Moore v. Carpenter*, 323 S.W.3d 11, 14 (Ky. App. 2010)(citing *Brewick v. Brewick*, 121 S.W.3d 524, 526 (Ky. App. 2003)). Further, "[u]nder this standard, we afford no deference to the trial court's application of the law to the facts found." *Laterza v. Commonwealth*, 244 W.3d 754, 756 (Ky. App. 2008).

ANALYSIS

Although not argued in the appeal, the first issue we address is the issue of Annette's standing to intervene in this custody action. We consider the issue of standing *de novo*. Apparently, the trial court concluded that the biological

fathers waived their parental rights in favor of the intervenor, and in doing so conferred standing on Annette to seek custody. We disagree.

At the bench trial, Debra contested Annette's standing to seek custody of the children. We are aware that in *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), the Kentucky Supreme Court clarified that lack of subject-matter jurisdiction and lack of standing are not synonymous. Further, the Supreme Court held that lack of standing may be waived if not raised before the trial court. *Id*. Nevertheless, in the case at bar, Debra raised standing, and consequently, the issue of standing is implicated.

Natural parents have a superior right to the care, custody, and control of their children as well as the constitutionally protected right to raise their children. Nonetheless, in the case at bar, the natural mother is deceased and the biological fathers, who have never been actively involved in parenting these children or supported them financially, waived their superior right to custody of these five children. *Brumfield v. Stinson*, 368 S.W.3d 116, 118 (Ky. App. 2012). Hence, the custody dispute is between nonparents, one of which has the status of *de facto* custodian.

A *de facto* custodian is a person shown by clear and convincing evidence to have been both the primary caregiver and the financial supporter of a child for an extended period of time. KRS 403.270(1). When the caregiver qualifies as a *de facto* custodian, he or she will have the same standing as a biological parent in a custody proceeding. *Id*. So, Debra and Rocky are *de facto*

custodians with the same standing as a parent. Further, the fathers' waiver of custody relates to the maternal grandmother not the intervenor, Annette. The fathers suggesting that they prefer Annette as the children's custodian is merely a preference and not a designation of standing for Annette.

In order for Annette, who is not a *de facto* custodian, to pursue custody as a nonparent, she must prove either of the following two exceptions: (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. *Moore v. Asente*, 110 S.W.3d 336, 359 (Ky. 2003); *Mullins v. Picklesimer*, 317 S.W.3d 569, 577 (Ky. 2010). In essence, Annette is not seeking custody against the fathers but rather against the *de facto* custodians, Debra and Rocky.

The trial court reasoned that the custody dispute was between two nonparents, and hence, the fathers' waiver provided standing to Annette. We differ in two respects. First, Debra and Rocky have been found to be *de facto* custodians, and thus, have the same standing as a parent. Second, the fathers' rather vague indication of preference for Annette is not sufficient to provide a waiver on their part that gives her standing.

Although Annette is the children's aunt, no evidence was provided that she served in a parental role. For the fathers to waive custody in favor of Annette, she must demonstrate that she had been raising the children. *See Mullins*, 317 S.W.3d at 579. Here, the children visited Annette, but Debra and Rocky

always remained as the parties who acted as parents. Since the children were with Debra and Rocky and supported by them, they were adjudged *de facto* custodians with the same standing as a parent. The fathers cannot waive custody to someone who is not serving as a parent. *See* KRS 403.800(13).

Moreover, the fourth father, Ronald Ivory, never formally entered an "entry of appearance" form; however, he testified telephonically at the bench trial, waived his parental rights, and indicated his preference for Annette to be named the custodian. However, none of the fathers' preferences for Annette constitutes a waiver providing her standing as either a *de facto* custodian or a person acting as a parent.

The dispute is not between Annette and the fathers. Rather, it is between Annette and the maternal grandparents. And Debra and Rocky have not waived custody. Further, their designation as *de facto* custodians requires that Annette establish either that they are unfit or have waived custody since they have the same status as a parent. *See Moore v. Asente* and *Mullins v. Picklesimer*, *supra.* In essence, for her to have standing she must demonstrate either unfitness or waiver against the rights of *de facto* custodians.

"Standing" is a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy. *Delahanty v. Commonwealth ex rel. Maze*, 295 S.W.3d 136, 140-141 (Ky. App. 2009). The trial court in the conclusions of law, citing *Williams v. Phelps*, 961 S.W.2d 40, 43 (Ky. App. 1998), and *Miller v. Harris*, 320 S.W.3d 138, 141 (Ky. App. 2010), opined

that *de facto* status is not involved in a custody dispute between nonparents. However, KRS 403.270(1)(b) says that "[o]nce 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." Therefore, *de facto* status is implicated and the case becomes one between a *de facto* custodian with the same status as a parent and a nonparent. Consequently, Annette must show that the maternal grandparents have waived custody to her in order to have standing.

"The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky. 1995). "Because this is a right with both constitutional and statutory underpinnings, proof of waiver must be clear and convincing. As such, while no formal or written waiver is required, statements and supporting circumstances must be equivalent to an express waiver to meet the burden of proof." *Vinson v. Sorrell*, 136 S.W.3d 465, 469 (Ky. 2004). It is indisputable that the maternal grandparents did not waive their right to custody. Thus, Annette has not established waiver on their part or attempted to establish that they are unfit. Consequently, we conclude that she does not have standing to seek custody of these five children.

Although we have decided that Annette did not have standing against Debra and Rocky to seek custody, we concur with the trial court's ultimate decision that the best interest of the children are served by designating Debra and

Rocky as sole custodians. As authorized by KRS 405.020(3), when a person, found to be a *de facto* custodian under KRS 403.270, petitions for legal custody of a child, the court shall grant legal custody to the person if the court determines that the person meets the definition of *de facto* custodian and that the best interest of the child are served by awarding custody to the *de facto* custodian. Such is the case herein. The trial court made a thorough and thoughtful evaluation of the situation and properly awarded sole custody of the five children to Debra and Rocky.

Our determination that Annette did not have standing to seek custody in this matter renders moot her arguments on appeal regarding the trial court's failure to interview the children and/or appoint a GAL. Nonetheless, we concur with the judge's finding that it was not the children's best interest to be interviewed, particularly, in light of the trauma of losing their mother. Further, the assertion that a GAL should have been appointed or a psychological assessment made was not requested during the trial, and hence, not preserved for our review.

Finally, the trial court has discretion to decide whether the children should be interviewed in such matters. As instructed by KRS 403.290(1), whether it is necessary to interview the child is determined by the trial court. *Addison v. Addison*, 463 S.W.3d 755, 763 (Ky. 2015). Moreover, the information needed to decide custody was available without the children's testimony, and the trial court ascertained that they did not need to become a part of the dispute between their grandmother and aunt.

CONCLUSION

Even though we have determined that Annette lacked standing to seek custody against the maternal grandparents, we affirm the decision. Indeed, this Court will not disturb the court's findings of fact unless they are clearly erroneous. In this case, the trial court did not err in its finding that the best interests of the five children were served by Debra and Rocky being named as their sole custodians. Thus, the judgment of the Caldwell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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