IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 10, 2014 Session

IN RE KANE H.

Appeal from the Juvenile Court for Montgomery County
No. MCJVCTCV 11-4400 L. Raymond Grimes, Judge

No. M2014-00376-COA-R3-JV – Filed May 20, 2015

This appeal concerns a child custody dispute between a child's Mother and Grandparents. When the child was one year old, Mother signed an order transferring custody of the child to Grandparents. One year later, Mother petitioned to modify custody and have the child returned to her. Grandparents claimed that Mother was addicted to drugs and emotionally unstable. Following a hearing, the trial court determined that Mother presented a risk of substantial harm to the child if custody was returned to her. However, the court granted Mother visitation for the majority of each year. Grandparents appealed, claiming the trial court erred by granting more parenting time to Mother than to Grandparents. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which and ANDY D. BENNETT and RICHARD H. DINKINS, JJ. joined.

Stacy A. Turner, Clarksville, Tennessee, for the appellants, Jimmie H. and Ann H.

Jacqueline H., Big Rock, Tennessee, Pro Se.

MEMORANDUM OPINION[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

Jacqueline H.[2] ("Mother") bore Kane H. out of wedlock in August 2010. At Kane's birth, Mother was seventeen years old and in the custody of her adoptive parents, Jimmie and Ann H. ("Grandparents"). Mother is the biological granddaughter of Grandparents. Grandparents adopted Mother as their own child when she was a baby. Grandparents also adopted Mother's sister, Natasha, when she was very young.

After Kane's birth, he and Mother continued to live with Grandparents. Grandparents financially provided for Kane. In November 2011, Mother signed an agreed order granting custody of Kane to Grandparents. Mother signed the agreed order at the office of an attorney selected and paid for by Grandparents. At that time, Mother was eighteen years old and Kane was one. The Juvenile Court for Montgomery County entered the agreed order on November 28, 2011.

In October 2012, Mother attempted to move with Kane to a new home. Relying on the agreed order, Grandparents forced Kane's return with the assistance of law enforcement officers. On November 5, 2012, Mother filed a petition requesting that Kane be returned to her custody because she did not have notice of the content of the agreed order. Mother claimed she thought she was signing a power of attorney for Kane. Mother stated the proposed agreed order granting Grandparents custody was presented to her with a large stack of papers at the attorney's office and that the order was not explained to her. Grandmother testified that Mother knew she was signing an order to transfer custody of Kane. Grandmother stated that Mother transferred custody of Kane "so that [he] would be took [sic] care of."

While Mother's petition was pending, the trial court awarded her temporary parenting time. Initially, Mother visited Kane every other weekend. The court later granted Mother visitation every weekend. From February to April 2013, Mother testified that Kane lived with her full-time while Grandmother was in the hospital. Grandmother disputed that claim. From early August to late September 2013, Mother exercised

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[1] Tennessee Court of Appeals Rule 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse, or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2] In order to protect the anonymity of minor children, the Court, in its discretion, may elect to use initials for the children, their parents, and others. *K.B.J. v. T.J.*, 359 S.W.3d 608, 608 n.1 (Tenn. Ct. App. 2011).

visitation with Kane every weekend. Mother did not visit Kane from September 22 to October 25, 2013, because Grandparents said Kane was sick. Mother claimed she did not want to endanger the health of her new baby, who was born prematurely in September 2013.

The court conducted a final hearing on October 25 and 28, 2013. Mother testified that she would be able to care for Kane if she was granted full custody. She asserted she had the ability to financially support him and to provide him with a "well-maintained," stable home, in which the child would have his own room. However, Mother admitted she did not work and was reliant on her fiancé for financial support. She stated that she had $6,000 in cash saved to support herself and Kane until she could find full-time employment, but she later admitted this was false. She claimed to be Kane's primary caretaker during the time she and Kane lived with Grandparents, so returning Kane to her custody would be in his best interest.

Grandparents alleged that Mother was addicted to prescription drugs and had previously attempted suicide. Mother's twelve-year-old cousin, whom the trial court found to be "very credible," also testified she saw Mother abusing prescription drugs on one particular occasion in May 2012. Mother's sister testified that Mother had sent her text messages in September 2012 threatening suicide but could not produce the texts.

Mother insisted that she had never had a drug problem. She produced a prescription for Lortab and Xanax and stated she would stop taking the drugs after her short-term prescriptions ended. Mother explained that the Lortab prescription was for pain after the birth of her second child and the Xanax prescription was for panic attacks. Mother further testified that she had submitted to a hair follicle drug test for the past seven months, and that the results were negative. Mother also noted that Grandmother took prescription Xanax and Grandfather took prescription Lortab. Grandmother admitted to those facts.

In arguing that a change of custody was in Kane's best interest, Mother pointed to what she described as Grandparents' pattern of "taking children" from their biological mothers. Mother's sister, Natasha, testified that in addition to Mother, Grandparents had also adopted Natasha and her oldest child, their biological great-grandchild. Grandmother denied that she and her husband were trying to "keep Kane from [Mother]," but asserted they merely wanted to ensure Kane's safety.

In its February 7, 2014 order, the trial court made the following findings of fact and conclusions of law:

> 1. The court has considered the testimony of the parties, as well as their witnesses and is persuaded by the testimony of [Mother's cousin], whom

the Court finds to be very credible. [Cousin] testified that [Mother] was abusing prescription medication.

2. Further [Grandmother] testified that [Mother] attempted suicide.

3. The above allegations give this Court concern and are the reasons that the Court is not going to transfer custody.

4. The Court does find that [Mother] continued to use prescription medication and finds by clear and convincing evidence that the child is at a substantial risk of harm if custody is returned to the Mother.

5. It is therefore in the best interest of the child that custody remains with [Grandparents].

6. The Court is concerned about Grandparents' history of adopting their biological grandchildren and great-grandchildren.

7. [Mother] is to have visitation with the minor child from Thursdays at 6:00 p.m. to Mondays at 8:00 a.m. each and every week.

8. [Mother] is to have visitation with the minor child every summer beginning the 1st day of June and ending on the 15th day of August, with the exception of one week in June and one week in July, which the child will spend with [Grandparents].

9. [Mother] is to enjoy every Christmas with the child from 6:00 p.m. on the 24th day of December to 12:00 p.m. on the 25th day of December.

10. [Mother] will enjoy every Thanksgiving break from the Wednesday before Thanksgiving at 6:00 p.m. to Sunday after Thanksgiving at 6:00 p.m.

11. [Mother] will enjoy every birthday with the child . . . .

12. If this order is violated in any way, the parties are not to call the police, but must file a contempt petition.

Grandparents timely appealed the trial court's February 7, 2014 Order.

II. ANALYSIS

Grandparents present one issue on appeal—whether the trial court erred by awarding Mother more days of unsupervised parenting time than days awarded to Grandparents after finding that Mother posed a substantial risk of harm to the child. Mother presents one issue for review as well—whether the trial court erred by maintaining custody with Grandparents and failing to properly weigh Mother's negative drug screens, Grandparents' health, and Grandparents' history of adopting children.

A. PRESUMPTION OF SUPERIOR RIGHTS

By applying the substantial risk of harm standard to determine whether Mother or Grandparents should have custody of Kane, the trial court implicitly concluded that Mother was entitled to a presumption of superior parental rights to Kane. The substantial risk of harm standard applies only if the parent enjoys a presumption of superior parental rights. *See In re Adoption of A.M.H.*, 215 S.W.3d 793, 812 (Tenn. 2007). In an initial custody proceeding between a parent and a non-parent, a parent generally enjoys a presumption of superior rights to their children. *Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002), *superseded by statute on other grounds as recognized by Armbrister v. Armbrister*, 414 S.W.3d 685, 693 (Tenn. 2013) (deriving this right from article I, section 8 of the Tennessee Constitution). However, "'absent extraordinary circumstances,' parents are not entitled to superior rights when seeking to *modify* a valid order placing custody with a non-parent," even if the order was a result of the parent's voluntary relinquishment of custody. *In re Adoption of A.M.H.*, 215 S.W.3d at 811 (quoting *Blair*, 77 S.W.3d at 143).

Extraordinary circumstances exist when "the order transferring custody from the natural parent is accomplished by fraud or without notice to the parent"; "the order . . . is invalid on its face"; or "the natural parent cedes only temporary and informal custody to the non-parents." *Id.* In those circumstances, parents continue to enjoy a presumption of superior rights. *Id.* Only a parent's "'voluntary transfer of custody to a non-parent, *with knowledge of the consequences of that* transfer,' [ ] will defeat a parent's claim to superior rights of custody." *Id.* (quoting *Blair*, 77 S.W.3d at 147).

When parents enter an order transferring custody without knowledge of the consequences, the presumption of superior parental rights still applies. *Id.* at 811-12. For example, in *In re Adoption of A.M.H.*, 215 S.W.3d 793 (Tenn. 2007), the parents voluntarily transferred custody of their young daughter to a foster couple while "they tried to regain financial stability." *Id.* at 797. The evidence in that case showed that the parents transferred custody as a "temporary measure to provide health insurance for [their daughter] with the full intent that custody would be returned." *Id.* at 812. Therefore, our Supreme Court concluded that the parents did not understand the consequences of the custody transfer and were entitled to a presumption of superior parental rights. *Id.*

In this case, the November 2011 agreed order transferred custody of Kane from Mother to Grandparents. In its entirety, the order stated:

> **AGREED ORDER**
>
> Based on the signatures of the parties below:
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that custody of the minor child, Kane [H.] is awarded to Jimmy and Ann [H.].

Mother seeks to modify that order. Consequently, she is not entitled to a presumption of superior rights unless the order was accomplished either "without notice" or by fraud, the order was invalid on its face, or the order was temporary. *See id*.

Mother claims that she had no notice of the agreed order. Specifically, she asserts she did not understand the consequences of the agreed order. Mother testified that, when she signed the order, she thought she was signing a power of attorney for Kane. At the time, Mother was eighteen years old and a high school dropout. She was presented with the document by her adoptive parents, who admitted they thought Mother was unstable. Mother said she did not read the agreed order, nor did the attorney explain the order to her. Mother also did not discuss the order with independent counsel. With respect to her understanding of the order, she testified as follows:

> Q [Grandparents' attorney]: That [order] [i]s pretty clear and simple, isn't it?
>
> A [Mother]: Yes, it is. But when it's pushed together with a bunch of paperwork and they're saying, "Sign here, here, here, and here," I didn't really pay attention to it.
>
> Q: What other paperwork is it you said you signed that day?
>
> A: I signed a power of attorney, um, and a bunch of other things.
>
> Q: So it is your testimony as we sit here today that you say that you didn't know that you signed a custody order?
>
> A: Yes.

Despite Grandparents' admission that Mother was unstable, Grandmother insisted Mother understood the agreed order. Grandmother testified that the attorney explained

the agreed order to Mother and that Mother understood the consequences of the agreed order. She further stated that Mother signed the custody order "[s]o that Kane would be took [sic] care of," and that she and her husband were not "trying to keep Kane from [Mother]."

Mother's testimony and the circumstances surrounding the agreed order lead us to conclude, as did the trial court, that Mother did not appreciate the consequences of entering into the agreed order. Usually, "'the existence of the normal family relationship between a parent and adult child, standing alone, does not give rise to an inference or presumption that either one exercises any dominion or control over the other.'" *Basham v. Duffer*, 238 S.W.3d 304, 310 (Tenn. Ct. App. 2007) (quoting *Iacometti v. Frassinelli*, 494 S.W.2d 496, 499 (Tenn. Ct. App. 1973)). However, in this case, Grandparents, Mother's adoptive parents, were in a position of trust when they presented her with a custody order. Mother reasonably trusted Grandparents to protect her parental rights to Kane and to act in her best interest. Mother testified that she only agreed to sign a power of attorney so that she would not lose custody of Kane to Kane's father. Grandparents were also in a position of control. They selected and paid for the attorney who drafted the agreed order. The language of the agreed order alone would not have alerted Mother to the consequences of the custody transfer. Moreover, Mother did not have independent counsel to advise her of the consequences. Accordingly, we conclude that the trial court appropriately applied a presumption of superior parental rights in favor of Mother.

B. CUSTODY OF KANE

In a child custody dispute between a parent with superior rights and a non-parent, we apply a unique standard of review. *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001). We first presume the trial court's factual findings, including its determination regarding a child's best interest, to be correct, unless the evidence preponderates otherwise. *See, e.g.*, Tenn. R. App. P. 13(d); *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007) ("[W]here the best interests of the child lie [is a] factual question[]."); *id.* Determinations of witness credibility are given great weight, and they will not be overturned without clear and convincing evidence to the contrary. *In re Adoption of A.M.H.*, 215 S.W.3d at 809. We then determine whether the facts, as found by the trial court, "clearly and convincingly establish that a child will be exposed to a risk of substantial harm if he or she is placed in a [ ] parent's custody." *Ray*, 83 S.W.3d at 733.

Because of Mother's superior parental rights to Kane, she can be deprived of custody only "'upon a showing of substantial harm to the child.'" *In re Adoption of A.M.H.*, 215 S.W.3d at 812 (quoting *In re Askew*, 993 S.W.2d 1, 4 (Tenn. 1999)). In this case, Grandparents have the burden of showing by clear and convincing evidence that Kane will be exposed to substantial harm if placed in Mother's custody. *See, e.g.*, *In re B.C.W.*, No. M2007-00168-COA-R3-JV, 2008 WL 450616, at *3 (Tenn. Ct. App. Feb. 19, 2008). "Substantial harm" means two things: (1) there must be "a real hazard or

danger [to the child] that is not minor, trivial, or insignificant"; and (2) "the harm must be more than a theoretical possibility . . . it must be sufficiently probable to prompt a reasonable person to believe that the harm will occur more likely than not." *In re R.D.H.*, No. M2006-00837-COA-R3-JV, 2007 WL 2403352, at *11 (Tenn. Ct. App. Aug. 22, 2007).

The evidence does not preponderate against the trial court's factual findings regarding Mother's drug use and suicide attempt. Mother is still taking two types of prescription medication, though she maintains that they are for specific, temporary medical conditions. Although she denies a history of substance abuse, two other witnesses claimed Mother had previously abused drugs. Mother also disputes her sister's and Grandmother's claims that she previously attempted suicide, but the trial court obviously found the other witnesses' testimony on this point credible. Mother has failed to present a sufficient basis to overturn the court's credibility determinations. Therefore, we conclude that the facts found by the trial court clearly and convincingly establish that Kane would be exposed to a risk of substantial harm if Mother was granted custody, as opposed to visitation.

C. VISITATION WITH KANE

Grandparents argue that the trial court erred by granting Mother, whom the court determined to present a substantial risk of harm to Kane, more days of parenting time per year than Grandparents. They claim a trial court cannot grant a parent who is a substantial risk of harm visitation that amounts to a majority of the year.

"[T]he details of custody and visitation with children are peculiarly within the broad discretion of the trial judge." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *Suttles v. Suttles*, 748 S.W.2d 427, 249 (Tenn. 1988)). An appellate court will not interfere with discretionary decisions except upon a showing of abuse of that discretion. *See, e.g.*, *Armbrister*, 414 S.W.3d at 693. A trial court abuses its discretion only if it: (1) applies an incorrect legal standard; (2) reaches an illogical conclusion; (3) bases its decision on a clearly erroneous assessment of evidence; or (4) employs reasoning that causes an injustice to the complaining party. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Kline v. Eyrich*, 69 S.W.3d 197, 203-04 (Tenn. 2002); *Eldridge*, 42 S.W.3d at 85.

Three statutes place limits on a trial court's authority to set a visitation schedule: Tennessee Code Annotated §§ 36-6-112 (2010), -301 (2010), and -106 (2013). Tennessee Code Annotated § 36-6-112 states that a court "shall not place a child in the *custody* of a parent who presents a substantial risk of harm to that child." Tenn. Code Ann. § 36-6-112(c) (emphasis added). However, that section does not prohibit *visitation* with such a parent. Here, the court did not place Kane in Mother's custody, so the prohibition found in Tennessee Code Annotated § 36-6-112(c) is not implicated.

Tennessee Code Annotated § 36-6-301 permits visitation to be "supervised or prohibited" upon a finding that visitation is "likely to endanger the child's physical or emotional health," or that the parent has "physically or emotionally abused the child." Tenn. Code Ann. § 36-6-301. Grandparents presented no evidence of any physical or emotional abuse by Mother, nor did they present evidence suggesting Mother is likely to endanger Kane's health. Even Grandmother, who was most critical of Mother's parenting, did not claim that Mother ever abused or endangered Kane's physical or emotional health. The trial court made no findings regarding abuse by Mother. Therefore, the court did not err by granting Mother unsupervised, regular visitation with Kane.

The trial court must also consider the child's safety and any risk of substantial harm posed by a parent in its best-interest analysis under Tennessee Code Annotated § 36-6-106. *See, e.g.*, *Burden v. Burden*, 250 S.W.3d 899, 908 (Tenn. Ct. App. 2007) ("By statute as well as case law, the welfare and best interests of the child are the paramount concern in custody, visitation, and residential placement determinations, and the goal of any such decision is to place the child in an environment that will best serve his or her needs."); *In re B.C.W.*, No. M2007-00168-COA-R3-CV, 2008 WL 450616, at *3 (Tenn. Ct. App. Feb. 19, 2008). In *Omohundro v. Arnsdorff*, No. E2005-00315-COA-R3-CV, 2005 WL 2372758 (Tenn. Ct. App. Sept. 27, 2005), the court ordered regular weekend visitation for a mother who had physically abused her daughter several years earlier. *Arnsdorff*, 2005 WL 2372758, at *4, *9. Relying on expert and lay testimony, the court concluded that the likelihood of present-day abuse was low and determined unsupervised visitation was in the child's best interest. *Id.* at *9.

The record in this case demonstrates that visitation with Mother is in Kane's best interest. Mother's testimony showed that she loves Kane and is working on improving her emotional and financial stability so she can care for him full-time. Mother explained that she has a well-maintained home where Kane would have his own bedroom and the company of one half-sibling and one step-sibling. Mother also testified that she was able to financially support Kane. Although Mother relied heavily on her fiancé for financial support, we have not previously held that arrangement against parents. *See In re R.D.H.*, 2007 WL 2403352, at *13 (recognizing that the mother's husband provided the family's only income). In addition, the trial court also noted its concern about the Grandparents' pattern of adopting their biological grandchildren and great-grandchildren.

In this case, the court found Mother presented a substantial risk of harm to Kane only if "*custody* was returned to her." (emphasis added). Importantly, the trial court did not conclude that Mother presented a substantial risk of harm to Kane if she were granted visitation. *See* Tenn. Code Ann. § 36-6-301 (requiring a court to order visitation "after making an award of custody . . . unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.")

We find nothing inconsistent in the trial court's determination that Mother is capable of adequately caring for Kane for significant periods of time but that she is not yet capable of having custody of Kane. The court's decision to grant Mother "significant parenting time," rather than full custody, allows Mother and Kane to maintain their relationship and Grandparents to continue to act as stable decision-makers. This arrangement enables Kane to smoothly transition into Mother's custody.[3] Therefore, we conclude the court's visitation order was not an abuse of discretion. *See Edwards v. Edwards*, 501 S.W.2d 283, 291 (Tenn. Ct. App. 1973).

III. CONCLUSION

For the foregoing reasons, we affirm the juvenile court's judgment.

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W. NEAL McBRAYER, JUDGE

[3] In light of Mother's superior parental rights, if she subsequently petitions for custody of Kane, custody must be returned to her unless Grandparents demonstrate by clear and convincing evidence that Mother presents a substantial risk of harm to Kane if he were returned to her custody. *In re Adoption of A.M.H.*, 215 S.W.3d at 813 (holding that, "given the lack of evidence of a threat of substantial harm" to the child, physical custody of the child "must be returned to the parents"); *Ray*, 83 S.W.3d at 732. Only if the court determines that Mother presents a substantial risk of harm would it engage in a best interest analysis. *In re Adoption of Female Child*, 896 S.W.2d 546, 548 (Tenn. 1995).