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(Opinion rendered September 17, 2004, withdrawn)

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002270-MR

TRENTON CLAY HATFIELD — APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
ACTION NO. 99-CI-00587

ALAN WALTERS; ROSE WALTERS;
AMANDA WALTERS WOODS; JERRY HATFIELD;
KATIE HATFIELD; AND COMMONWEALTH
OF KENTUCKY, CABINET FOR FAMILIES
AND CHILDREN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

COMBS, CHIEF JUDGE: Trenton Hatfield appeals from a judgment of the Pulaski Circuit Court that awarded custody of his son, T.H., to the child's maternal grandparents, Alan and Rose Walters. Hatfield argues that the evidence that he allegedly abandoned T.H. fails to satisfy the "clear and convincing" standard

required by KRS[1] 625.090. After a careful review of the record, we believe that the proper evidentiary standard was met. Thus, we affirm.

Hatfield and Amanda Walters Woods were married in 1993. T.H. was born September 28, 1994. When the child was four months of age, Hatfield joined the military. He was initially stationed in Louisiana, where his wife and son later joined him. After the Hatfields separated in the summer of 1995, T.H. never again lived with his father, nor did he visit Hatfield's residence. The Louisiana decree dissolving the Hatfields' marriage neither mentioned T.H. nor made any provision for his support.

Amanda suffers from emotional and psychiatric disorders and has been unable to care for T.H. by herself. After she and her son returned to Kentucky in 1995, T.H. lived with the Amanda's parents, the Walterses. Hatfield had no contact with T.H. during the next year. He did not provide the Walterses with any financial support for T.H. He contends that he paid Amanda $100 each month to comply with an oral agreement. This evidence was disputed by the Walterses.

In October of 1996, Amanda moved close to her parents. Hoping that Amanda's mental health had improved and that she would be able to care for her son, the Walterses allowed T.H. to

[1] Kentucky Revised Statutes.

reside with his mother for several months. Nevertheless, the Walterses continued to be a frequent presence in T.H.'s life, providing both financial assistance and emotional sustenance to him.

In 1997, Amanda remarried and gave birth to a second child. T.H. returned to the Walterses' residence, where he more or less essentially remained until the fall of 2001. During this time, Dr. Glenn Blackburn, a pediatrician and T.H.'s primary physician since his birth, diagnosed T.H. as suffering from Attention Deficit Hyperactive Disorder (ADHD) and prescribed a regimen of drugs for the child. Dr. Blackburn also diagnosed T.H. with bi-polar disorder, the same mental disorder affecting his mother.

Upon petitioning the court, Jerry and Katie Hatfield, Trenton Hatfield's parents, were granted regular visitation with T.H. in 1999. The elder Hatfields are the custodians of another of Hatfield's children, an eleven-year-old son from a previous marriage. Tensions arose between the two sets of grandparents partly because T.H.'s paternal grandparents did not agree with Dr. Blackburn's medical diagnoses and treatment of T.H. They refused to give T.H. his medicine during their visitations with him. Their actions and the resulting conflict with the Walterses had significant physical and emotional consequences for T.H.

During the four-year period from 1997 to 2001, neither the Walterses nor T.H. received telephone calls or any other form of communication from Hatfield. Hatfield testified that he was not even aware that T.H. was living with the Walterses during those years. He saw his son at his parents' home only on the rare occasions when he was on leave from the military. In October 1999, after the Walterses applied for a state medical card for T.H., Hatfield was ordered to pay $100 per month for T.H.'s support. In January of 2001, Hatfield voluntarily increased that amount to $150 per month.

In August 2001, the Walterses petitioned the Pulaski District Court to be appointed as T.H.'s guardians in order to enroll him in school. On September 5, 2001, they were granted a limited guardianship of the child. Hatfield had recently been deployed to Kosovo. He moved to vacate that order and argued that his mother was better qualified to serve as T.H.'s guardian.

A legal battle between the sets of grandparents ensued. The Walterses, who had lost their own son as a result of an accident in June of 2001, testified that they were constantly harassed by Hatfield's parents and that they have became fearful for their own safety as well as that of T.H. T.H.'s *guardian ad litem* petitioned the court to place the child

in the custody of the Cabinet for Families and Children pending the outcome of the custody dispute.

After returning from Kosovo in December 2001, Hatfield filed a petition in the Pulaski Circuit Court seeking permanent custody of T.H. The Walterses also petitioned for custody and alleged that Hatfield was not a fit parent. A hearing was conducted in May 2002. Neither Amanda nor Hatfield's parents participated in or testified at the hearing.

The Walterses testified about the care that they had provided to T.H. over the years, noting that they had received only one telephone call from Hatfield during that entire time. During that conversation, which occurred during 1995 or 1996, Hatfield promised to send clothes for T.H. But he did not send clothes or ever call again. The Walterses also told the court about T.H.'s multiple health problems and the difficulties which resulted when the Hatfield grandparents withheld his medication.

Hatfield testified that he had been married three times and that he was currently residing with his 23-year-old fiancée in Fayetteville, North Carolina, near Fort Bragg. He said that he earned about $43,000 per year. Although his fiancée had not met T.H. prior to the custody hearing, Hatfield testified that they could provide a loving and stable home for T.H. However, he added that he had no plans to have his older son reside in his household since his parents had done a

wonderful job of raising that child. He had left his first son with his parents because he did not want to uproot him.

In its judgment of June 7, 2002, the trial court found that T.H.'s best interest would be most beneficially served by placement with the Walterses. The court concluded that they had established by clear and convincing evidence that Hatfield was "unfit or unsuited to the trust of exercising custody of [T.H.]" -- especially in light of the child's delicate medical situation.

The trial court omitted a recitation of any of the specific criteria listed in KRS 625.090(2) in support of its conclusion that Hatfield was unfit. Accordingly, this Court reversed the judgment. The matter was remanded to the Pulaski Circuit Court with directions that it make findings pursuant to the specific statutory criteria and that it determine anew whether to award custody of T.H. to Hatfield or to the Walterses.

On remand, the trial court initially awarded custody to Hatfield. Relying on the definition of *abandonment* in O.S. v. C.F., Ky.App., 655 S.W.2d 32, 34 (1983), as a "settled purpose to forego all parental duties and relinquish all parental claims of the child," the trial court reasoned as follows:

> The Court's [prior] finding that [Hatfield] was unfit arose simply from the fact that he had deferred the rearing of his child to other persons, while he pursued other activities. However honorable those other activities may have been, they were accorded by [Hatfield] a higher priority than tending to his child. He pursued his military career and allowed other people to raise his child. In doing to, he allowed his child to become acclimated in the home of Alan and Rose Walters, and dependent upon Alan and Rose Walters for his daily care and nurturing. [Hatfield's] decisions allowed his son to become rooted in its grandparents' home. His more recent decision to become active as a father has the result of uprooting his son from the relations he has established in his father's absence. It is in that sense alone that the Court found [Hatfield] to be "unfit" to rear his child.
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> . . .
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> [Hatfield] was uninvolved in the child's life for periods of more than 90 days on numerous occasions. His devotion to duty away from the home evinced an intention to forego parental duties and let others control his child's growth and development. He has maintained relatively little contact with his child throughout the child's life, seeing him ordinarily no more than three times a year for relatively short visits. He did not maintain frequent and regular contact with the child through letters or e-mail. Although he plainly abrogated his parental role for several years, his indifference did not forego "all" of his parental duties since he did continue through his work to support the child.

Following the new judgment, the Walterses and the child's *guardian ad litem* moved the trial court to alter, amend,

or vacate its judgment. Their motions were based on our recent decision in Kimbler v. Arms, Ky.App., 102 S.W.3d 517 (2003). In that case, this Court elaborated upon the definition of *abandonment* in the context of civil litigation to encompass willful behavior such as "withholding of parental care, presence, opportunity to display voluntary affection and neglect to lend support and maintenance." Id. at 522. *Abandonment* was also broadly defined to mean "failure to fulfill responsibility of care, training and guidance during the child's formative years." Id. at 522-523.

In its final order of August 26, 2003, the trial court concluded that the "clear and convincing evidence show[ed] that [Hatfield] had abandoned [T.H.] for multiple periods in excess of 90 days since birth." Because the Walterses had acted as the "primary caregivers and nurturers" of T.H., the trial court awarded them custody of their grandson while granting Hatfield reasonable visitation on holidays and at other times. This appeal followed the denial of Hatfield's motion to alter, amend, or vacate the judgment.

The sole issue presented by this appeal is whether the trial court properly determined as a matter of law that Hatfield abandoned T.H. Hatfield claims that the weight of the evidence does not satisfy the standard of clear and convincing evidence required by KRS 625.090. He argues that the facts establish

that he has always provided financial support for T.H.; that he has "made efforts to visit his son when permitted by the military"; and that his "military commitment and sacrifice have been the main reasons behind his periodic absence from [T.H.'s] life." (Appellant's brief, p. 6.) Although he was physically absent from T.H., Hatfield urges that the evidence does not support the conclusion that he intended to "forego 'all' of his parental duties since he provided significant voluntary support for [T.H.]." (Id. at p. 9.)

After a careful review of the record, we are satisfied that the trial court did not err in concluding that the Walterses met their burden of proving by clear and convincing evidence that Hatfield abandoned T.H. as contemplated by KRS 625.090(2)(a). Because the Walterses did not seek to be treated as T.H.'s *de facto* custodians, they were required to prove by clear and convincing evidence either that Hatfield was unfit or that he has waived the right to custody by his conduct. Vinson v. Sorrell, Ky., 136 S.W.3d 465, 467 (2004). The concept of proof by clear and convincing evidence:

> relates more than anything else to an attitude or approach to weighing the evidence, rather than to a legal formula that can be precisely defined in words.

Id., at 468.

> Clear and convincing proof does not necessarily mean uncontradicted proof. It

> is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.

Rowland v. Holt, 253 Ky. 718, 726, 70 S.W.2d 5, 9 (1934).

The trial court recited the following incidents or conduct in concluding that Hatfield abandoned T.H.: Hatfield's failure to attempt to have any relationship with T.H.; his failure to bear any significant responsibility for his child (other than a minimal amount of financial support) during the seven years between his divorce from T.H.'s mother and the custody hearing; his failure ever to contact the Walterses or to inquire about T.H.'s well-being or needs; his failure to confer with T.H.'s pediatrician (prior to the custody dispute) about his child's significant medical problems; his failure to initiate any personal contact with T.H. or to send him letters, cards, or gifts on birthdays or at Christmas; and his pattern of permanently delegating responsibility for his children to others.

The evidence reveals that Hatfield's failure to maintain a relationship or to have any personal contact with his son is not attributable to the actions of the Walterses or of his former wife, Amanda. Hatfield does not contend that the Walterses discouraged or thwarted his attempt to contact T.H. There is no evidence that the Walterses attempted to undermine

Hatfield's parental relationship or that they created any obstacle to his access to his son. On the contrary, the evidence discloses that the Walterses have pictures of Hatfield in their home and that they have told T.H. about his father. The Walterses always transported T.H. to and from his visits with Hatfield's parents.

Hatfield's explanation for ignoring T.H. is that he was serving his country in the military. Hatfield's assignment kept him physically out of the country for eight months of T.H.'s life; however, he was stationed in the eastern part of the United States for many other months. He failed to visit with his child while he was stateside, arranging to see him on approximately three occasions. He gave no accounting as to why he did not call or write to his little boy. He did not communicate with his child's caregivers, nor did he demonstrate interest in his son during his critically important formative years. Kimbler, supra, at 522-523.

Hatfield argues persuasively and sympathetically that he is being penalized by a callous court system for the logical and necessary consequences of serving his country. Such is not the case. Many thousands of parents in military service manage to keep in touch intimately and frequently with their families. Distance and inconvenience are not impediments for them to communicate with loved ones, to exchange photos, to reiterate

messages of love and affection. Cell phones and the internet have become a blessing of modern technology for absent parents. However, there is a vast distinction between absence and indifference.

K.R.S. 625.090(2) and pertinent case law require us to look beyond the reason for Hatfield's non-involvement with his son and to focus instead on its impact on this child. Abandonment has been equated with unfitness as a matter of law – with regrettable semantic innuendoes. Unfitness to the lay mind connotes neglect or abuse -– perhaps even violent or criminal conduct. However, for purposes of a custody decision, the legal definition of *unfitness* has evolved into what child psychologists have taught us to recognize as the harm resulting from the withholding of intangible emotional contacts from a child that are critically necessary to normal development. One is legally deemed to have abandoned a child by absenting himself for prolonged periods and refraining from interacting by demonstrating love and affection. Such a parent is deemed to be unfit – or at least to have waived his superior right to custody. Vinson, supra, at 468.

We are persuaded that the trial court was correct in determining that the extreme degree of detachment and lack of involvement exhibited by Hatfield toward his son constitutes abandonment as a matter of law. Hatfield consistently ignored

his son for seven years. He did provide some financial support during those years. But that sporadic support is only one of the many factors to be considered. See, Vinson supra, at 470. Thus, we find no abuse of discretion in the trial court's award of custody to the only two people who have consistently provided stability, attachment, care, and emotional constancy in T.H.'s life.

This is a sad and difficult case. From the earliest days of his life, T.H. has been the subject of legal wrangling. Hatfield obviously cares for his son as he has pursued his custody action vigorously. We emphasize that this is a custody case rather than an action to terminate parental rights. Therefore, Hatfield will have the right and opportunity to establish a relationship with T.H. through visitation.

We affirm the judgment of the Pulaski Circuit Court.

GUIDUGLI, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS WITH SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING OPINION: While I concur in the result reached by the majority, I believe that the prior panel's opinion unduly narrowed the issue to be considered by the trial court upon remand. In Vinson v. Sorrell, 136 S.W.3d 465 (Ky., 2004), the Kentucky Supreme Court recently explained that when a non-parent does not meet the statutory standard of de facto custodian, 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. at 468.

Under the first exception, a parent's abandonment of a child may prove unfitness. "Abandonment" must be shown under the standards set out in KRS 625.090(2)(a), relating to termination of parental rights. Lacking the guidance of Vinson v. Sorrell, the prior panel of this Court focused on the first exception. Since that decision is now law of the case, the trial court and the majority confine their inquiry to that issue.

The problem with the approach taken by the prior panel is that it equates abandonment for purposes of custody with abandonment for purposes of termination of parental rights. In its June 19, 2003, order the trial court expressed some frustration with this standard, stating, "[i]f the law is such that even a career criminal's incarceration cannot be found to constitute abandonment, it is inconceivable that the mere benign indifference to fatherhood shown by a career soldier could be deemed to be 'abandonment'." Thus, the trial court initially concluded that it could not find that Hatfield had abandoned T.H. despite his nearly total lack of involvement in the child's life for several years.

Upon reconsideration, however, the trial court found that Hatfield's conduct constituted an abandonment of T.H. I am concerned about that lack of specificity of that finding and the court's contradictory finding in its earlier order. Nevertheless, I agree with the majority that the trial court's application of KRS 625.090(2)(a) to the facts of this case was not clearly erroneous.

Moreover, under the second exception, a parent may waive his or her superior right to custody through an intentional and voluntary relinquishment of that right. Vinson v. Sorrell, *supra* at 469, *citing* Greathouse v. Shreve, 891 S.W.2d 387 (Ky. 1995). In determining whether a parent has waived his or her right to custody, a court may consider the length of time the child has been away from the parent, circumstances of separation, age of the child when care was assumed by the non-parent, time elapsed before the parent sought to claim the child, and frequency and nature of contact, if any, between the parent and the child during the non-parent's custody. Id. at 470, *citing* Shifflett v. Shifflett, 891 S.W.2d 392, 397 (Ky., 1995) (*Spain, J., concurring*). The trial court's findings clearly justify the conclusion that Hatfield waived his superior right to custody of T.H. As the trial court and the majority correctly note, Hatfield pursued his military career for seven years and knowingly allowed T.H. to be raised by non-parents, including the

Walterses. Therefore, I would hold that Hatfield has waived his superior right to custody, and consequently the trial court did not abuse its discretion by awarding custody of T.H. to the Walterses.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEES:
Tommie L. Weatherly London, Kentucky	Charles J. McEnroe Somerset, Kentucky